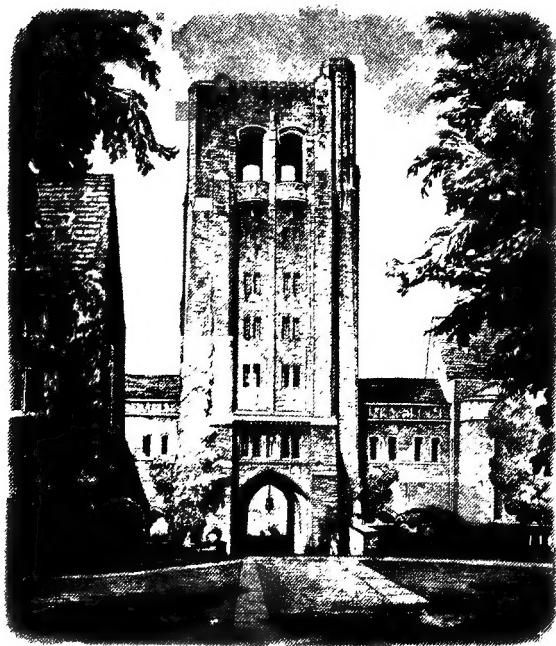






Cornell Law School Library

Marshall Equity Collection

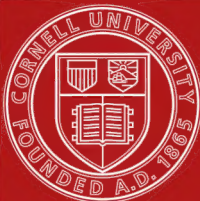
Gift of

E. J. Marshall, L. L. B. 1894

CORNELL UNIVERSITY LIBRARY



3 1924 084 259 997



Cornell University Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

THE
PRACTICE
OF THE
CHANCERY DIVISION
OF THE
High Court of Justice
(INCLUDING THE WINDING-UP OF COMPANIES),
AND ON
APPEAL TO HER MAJESTY'S COURT OF APPEAL
AND
The House of Lords.

BY
FRANK EVANS, ESQ.,
OF LINCOLN'S-INN, BARRISTER-AT-LAW.

LONDON:
HORACE COX,
"THE LAW TIMES" OFFICE, 10, WELLINGTON-STREET,
STRAND, W.C.

—
1881.

LONDON :

PRINTED BY HORACE COX, 10, WELLINGTON-STREET, STRAND, W.C.



DEDICATED BY PERMISSION
TO
THE RIGHT HONOURABLE
SIR WILLIAM BALIOL BRETT, KNT.,
LORD JUSTICE
OF
HER MAJESTY'S COURT OF APPEAL.

PREFACE.

No one who has been required to assist in carrying out the old practice in conjunction with the new can have failed to experience considerable difficulty in putting his hand promptly upon the several Acts and Orders illustrated and explained by decided cases which are scattered without much order over the pages of the ordinary text-book. It occurred to the designer of this work that to apply to practice the arrangement of Crump's Law of Marine Insurance would conduce to simplicity and facility of reference. It is felt that this attempt is more or less an experiment: it is hoped that it may be a successful experiment, and that it may be a step in the direction of codification.

F. O. CRUMP.

A. H. POYSER.

FRANK EVANS.

PREFACE TO PART I.

IN this volume the statutes, rules, and orders are generally set out *verbatim*. Where alterations have been necessitated, as in the case of statutes, &c., passed before the Supreme Court of Judicature Acts, the words which are not actually part of the original enactment or rule have been inclosed in square brackets, thus [the Act]. The decisions are brought down, in the Addenda, as far as they are reported or noted up to and including Saturday, the 19th February, 1881.

The Author expresses his acknowledgment for the kind assistance rendered to him by HENRY FELLOWS (who has revised the proofs on certain points), EDWARD EGREMONT SUTTON, LEWIS BOYD SEBASTIAN, and EDWARD ARTHUR SCRATCHLEY, Esquires, all of Lincoln's Inn, Barristers-at-Law.

FRANK EVANS.

21, Old-square, Lincoln's Inn,
24th Feb., 1881.

TABLE OF TITLES.

ABSTRACT OF TITLE, *page* 1
ABUSE OF PROCESS, 2
ACCOUNT, 3
ACKNOWLEDGMENTS, 15
ACTION, 16
ADDING TO JUDGMENT [see JUDGMENT]
ADMINISTRATION ACTION, 18
ADMINISTRATION ON SUMMONS, 37
ADMINISTRATION UNDER SIR GEORGE TURNER'S ACT, 41
ADMINISTRATOR [see ADMINISTRATION ACTION; PARTIES; TRUSTEES]
ADMISSIONS, 45
AMENDMENT, 45
ANSWER [see DISCOVERY]
APPEAL, 46
APPEARANCE, 81
APPOINTMENT OF TRUSTEES [see TRUSTEES]
APPORTIONMENT OF FUND, 88
ARBITRATION, 88
ARGUMENT, 101
ARREST, 101
ASSESSORS [see TRIAL]
ASSIGNMENT OF DEBTS AND CHUSES IN ACTION, 108
ATTACHMENT, WRIT OF [see EXECUTION, XX.]; OF DEBTS [see EXECUTION, XVIII.]
BILL OF EXCHANGE, 109
BILL OF SALE, 109
BOUNDARIES, 112
BURIAL ACTS [see CHARITIES]
CANCELLATION, &c., OF INSTRUMENTS, 113
CAUSE OF ACTION [see WRIT OF SUMMONS]
CENTRAL OFFICE, 114
CERTIORARI, 119
CESTUI QUE TRUST [see PARTIES, TRUSTEES]
CESTUI QUE VIE, PRODUCTION OF, 124
CHAMBERS, 126

- CHARGE, 144
- CHARGING ORDER [see COSTS; EXECUTION]
- CHARGING STOCK, 144
- CHARITIES, 146
- CHOSE IN ACTION [see ASSIGNMENT OF DEBT]
- COMMITTAL [see ARREST; EXECUTION]
- COMPANIES, 170
- COMPROMISE, 191
- CONDITIONS OF SALE [see PROPERTY]
- CONFIRMATION OF SALES, &c., 193
- CONSOLIDATION, 195
- CONTEMPT OF COURT [see ARREST]
- CONVEYANCING COUNSEL, 196
- COPIES, 198
- COPYHOLD ACTS, 200
- COSTS, 202
- COUNTER-CLAIM [see PLEADING]
- COUNTY COURTS, 253
- COUNTY DEBENTURES ACT, 256
- CUSTODY OF INFANTS [see INFANTS]
- DECLARATION OF RIGHT, 256
- DECLARATION OF TITLE, 257
- DECREE [see JUDGMENT]
- DEEDS, 265
- DEFENCE ACTS, 266
- DISCONTINUANCE AND WITHDRAWAL, 270
- DISCOVERY, 271
- DISENTAILING DEED [see PROTECTOR OF SETTLEMENT]
- DISMISSING ACTION, 290
- DISTRICT REGISTRIES, 290
- DISTRINGAS, ON STOCK [see CHARGING ORDER]; NUPER VICE-COMITEM [see EXECUTION]
- DIVISIONAL COURTS, 296
- DOCUMENTS [see ADMISSIONS; DISCOVERY; EVIDENCE]
- ECCLESIASTICAL ESTATES, 297
- ELEGIT [see EXECUTION]
- ENROLMENT OF DEEDS [see CENTRAL OFFICE; CHARITIES]
- EQUITABLE RULES, 299
- EQUITY TO SETTLEMENT [see MARRIED WOMEN]
- EVIDENCE, 302
- EXECUTION, 337
- EXECUTOR, 373
- EXHIBIT [see EVIDENCE]
- EX PARTE APPLICATION, 373
- EXPERIMENT [see PROPERTY]
- EXPERT, 374
- EXTENSION OF TIME [see TIME]
- FEES, 374

- FIERI FACIAS, ORDINARY, AND DE BONIS ECCLESIASTICIS [see EXECUTION]
- FIRM [see APPEARANCE; DISCOVERY; WRIT OF SUMMONS]
- FOLIO, 389
- FORECLOSURE, 390
- FOREIGN LAW, 400
- FOREIGN SOVEREIGN [see PARTIES]
- FORMER PRACTICE, 404
- FORMS, 405
- FURTHER CONSIDERATION, 406
- GARNISHEE [see EXECUTION]
- GOODS, 411
- GRAMMAR SCHOOL [see CHARITIES]
- GUARDIAN [see INFANTS; LUNATICS; PARTIES; SETTLED ESTATE; TRUSTEES]
- HOUSE OF LORDS [see APPEAL]
- IMPRISONMENT [see ARREST; EXECUTION]
- IMPROVEMENT OF LAND, 413
- INCLOSURE ACT, 416
- INFANTS, 417
- INJUNCTION, 431
- INQUIRIES, 438
- INSPECTION [see DISCOVERY]
- INTERLOCUTORY PROCEEDINGS, 440
- INTERPLEADER, 441
- INTERPRETATION, 445
- INTERROGATORIES [see DISCOVERY]
- INVESTMENT, 447
- IRREGULARITY, 447
- ISSUES, 448
- JUDGMENT, 448
- JUDICIAL OPINION [see TRUSTEES]
- JURISDICTION, 489
- JURY [see TRIAL]
- KEEPER OF RECORDS [see JURISDICTION, IV.]
- LANCASTER PALATINE COURT, 496
- LAND [see RECOVERY OF LAND]
- LANDS CLAUSES ACT, 497
- LAND TAX REDEMPTION ACT, 517
- LAND TRANSFER ACT, 1875, 519
- LAW AND EQUITY [see EQUITABLE RULES]
- LEASES, 526
- LEAVE TO ATTEND PROCEEDINGS [see JUDGMENT, XVI.]
- LEAVE TO DEFEND, IN LAND ACTIONS [see APPEARANCE, IX.];
WHERE WRIT SPECIALLY INDORSED [see JUDGMENT, III.]
- LEGACY DUTY ACT, 527
- LETTERS PATENT [see JURISDICTION; PATENTS]
- LIBERTY TO APPLY [see JUDGMENT, XVII.]

-
- LIEN, 528
 LIFE ASSURANCE COMPANY, 529
 LIS PENDENS, 529
 LOCAL LOANS ACT, 530
 LORD MAYOR'S COURT [see MAYOR'S COURT]
 LORD ST. LEONARD'S ACT [see CONFIRMATION OF SALES, &c., II.,
 TRUSTEES]
 LUNATICS, 530
 MAINTENANCE [see INFANTS; LUNATICS; MARRIED WOMEN]
 MANAGEMENT OF PROPERTY [see INFANTS; PROPERTY; TRUSTEES]
 MANDAMUS, 532
 MARRIAGE, OF PARTIES [see PARTIES]; OF GUARDIAN [see INFANTS,
 II., 5]; OF INFANTS [see INFANTS, II., V.]; SETTLEMENTS [see
 INFANTS, II.; VI., 7]
 MARRIED WOMEN, 534
 MASTER [see CENTRAL OFFICE]
 MAYOR'S COURT, 538
 MEMBER OF PARLIAMENT [see ARREST, III.]
 MERCHANT SHIPPING ACTS, 540
 MESNE PROFITS [see RECOVERY OF LAND]
 METROPOLITAN BOARD OF WORKS LOANS, 541
 MILITARY FORCES LOCALISATION, 542
 MINERALS [see CONFIRMATION OF SALES; INFANTS, VI., 6; SETTLED
 ESTATES]
 MONEY [see JUDGMENT; PAYMENT INTO AND OUT OF COURT; WRIT OF
 SUMMONS]
 MORTGAGE, 543
 MORTGAGE DEBENTURE ACTS, 543
 MOTION, 545
 MULTIPLICITY [see EQUITABLE RULES]
 MUNICIPAL CORPORATIONS ACT [see CHARITIES]
 NATIONAL DEBT ACT, 553
 NE EXEAT REGNO [see ARREST, II., 2]
 NEW TRIAL, 555
 NEW TRUSTEES [see TRUSTEES]
 NEXT FRIEND [see PARTIES; COSTS]
 NONSUIT [see JUDGMENT; NEW TRIAL]
 NOTICES, 562
 OATHS [see EVIDENCE]
 OFFICE COPIES [see COPIES; EVIDENCE]
 OFFICES [see CENTRAL OFFICE; SITTINGS; TIME]
 ORDERS, 562
 PALATINE COURT [see JURISDICTION: JUDGMENT, XXV.]
 PARLIAMENTARY BILL, 563
 PARLIAMENTARY DEPOSITS [see COMPANIES, XI.; PAYMENT INTO AND
 OUT OF COURT]
 PARTICULARS, OF PLEADING [see PLEADING]; OF SALE [see PROPERTY]
 PARTIES, 563

- PARTITION, 604
- PARTNERS, 618
- PASSING JUDGMENT OR ORDER [see JUDGMENT, XV.]
- PATENTS, 623
- PAUPERS [see LUNATICS; PARTIES]
- PAYMENT INTO AND OUT OF COURT, 625
- PENDING PROCEEDINGS [see JURISDICTION]
- PERPETUATING TESTIMONY [see EVIDENCE]
- PETITION, 671
- PETITION OF RIGHT, 677
- PLEADING, 684
- POLICIES OF ASSURANCE, 723
- PORTIONS, 723
- POSSESSION, WRIT OF [see EXECUTION, XXII.]; PLEADING POSSESSION
[see RECOVERY OF LAND]
- PRESERVATION OF PROPERTY [see PROPERTY]
- PRINTING, 724
- PRIVATE HEARING, 725
- PROCEEDS OF CHARGED PROPERTY, 725
- PRODUCTION, OF CESTUI QUE VIE [see CESTUI QUE VIE]; OF
DOCUMENTS [see DISCOVERY; EVIDENCE]
- PROHIBITION, 726
- PROPERTY, 728
- PROPERTY LAW AMENDMENT ACT [see INFANTS; LUNATICS; MARRIED
WOMEN]
- PROSECUTION OF DIRECTORS [see WINDING-UP]
- PROTECTOR OF SETTLEMENT, 744
- QUESTIONS, OF FACT [see TRIAL; REFEREES]; OF LAW [see INTER-
PLEADER; SPECIAL CASE; TRIAL]
- RAILWAY COMPANIES [see COMPANIES; LANDS CLAUSES ACT; WIND-
ING-UP]
- REAL ESTATE, 745
- RECEIVER, 746
- RECOVERY OF LAND, 755
- RECTIFICATION OF INSTRUMENTS [see CANCELLATION, &C., OF INSTRU-
MENTS]
- REDEMPTION, 760
- REDUCTION OF CAPITAL [see COMPANIES, VIII.]
- REFEREES, 766
- REGISTRIES [see DISTRICT REGISTRIES]
- REHEARING, 774
- REMOVAL OF ACTION [see CERTIORARI; TRANSFER]
- RENEWAL OF LEASE, 774
- REPLY [see PLEADING, X.; XII.]
- RESTRAINING ORDER, 775
- REVIEWING TAXATION [see APPEAL, IV.]
- SALE [see PROPERTY, VII., VIII.]
- SAMPLES [see DISCOVERY, VI.]

- SCANDAL [see CHAMBERS; XX.; DISCOVERY, II.; EVIDENCE, III., 10;
PLEADING]
- SEARCH, 777
- SEQUESTRATION [see EXECUTION]
- SETTLED ESTATES, 777
- SETTLEMENT, OF PROPERTY [see INFANTS; MARRIED WOMEN]; OF
DEEDS [see DEEDS]; OF ISSUE [see ISSUES]
- SET-OFF [see PLEADING, VII.]
- SEVERANCE, 804
- SHARES, CHARGING ORDER [see CHARGING STOCK; EXECUTION, XIX.];
RESTRAINING DEALINGS [see RESTRAINING ORDER]
- SHIP [see MERCHANT SHIPPING ACTS]
- SHORT CAUSE, 805
- SHORTHAND NOTES [see COSTS, III., 2; APPEAL]
- SHOW CAUSE [see MOTION, VII.]
- SITTINGS, 806
- SOLICITORS, 807
- SPECIAL CASE, 829
- SPECIAL JURY [see TRIAL]
- SPECIFIC PERFORMANCE, 833
- STAYING PROCEEDINGS, 844
- STOCK [see CHARGING STOCK; EXECUTION, XIX.; RESTRAINING ORDER;
TRUSTEES]
- STOP ORDER, 851
- SUBPENA [see EVIDENCE, II., 5 (e)]
- SUMMONS [see CHAMBERS; WRIT OF SUMMONS]
- TAXATION OF COSTS [see COSTS, IV., V.]
- TERMS [see TIME, II.]
- TEST ACTION [see CONSOLIDATION]
- THIRD PARTY NOTICES [see PLEADING, XVI.]
- TIME, 854
- TRADE MARKS, 856
- TRANSFER, 864
- TRIAL, 875
- TRUSTEES, 893
- UNCLAIMED STOCK [see NATIONAL DEBT ACT]
- UNSOUND MIND, PERSONS OF [see LUNATICS, II.; PARTIES; WRIT OF
SUMMONS; APPEARANCE; JUDGMENT]
- VACANT POSSESSION [see RECOVERY OF LAND, III.]
- VACATIONS, 943
- VENDITIONI EXPONAS [see EXECUTION, XV., 1]
- VENDOR AND PURCHASER, 944
- VENUE [see TRIAL, VIII.]
- VERDICT [see TRIAL, XI.; NEW TRIAL]
- VESTING ORDER [see TRUSTEES, IV.]
- WANT OF PROSECUTION [see DISMISSING ACTION; JUDGMENT, II., 2 (a)
(c), and 4; DISCOVERY; COSTS, I., 1 (g)]
- WARD [see INFANTS, II.]

WINDING-UP, 947

WITHDRAWAL [see DISCONTINUANCE AND WITHDRAWAL]

WITNESS [see EVIDENCE; TRIAL]

WRIT, OF ASSISTANCE [see EXECUTION, XXIII.]; OF ATTACHMENT [see EXECUTION, XX.]; OF CERTIORARI [see CERTIORARI]; DE CONTUMACE CAPIENDO [see JUDGMENT, XXV., 1 (c)]; OF DELIVERY [see EXECUTION, XXIV.]; OF DISTRINGAS NUPER VICE COMITEM [see EXECUTION, XV., 1]; OF ELEGIT [see EXECUTION, XIV.]; OF FIERI FACIAS [see EXECUTION, XIII.]; OF FIERI FACIAS DE BONIS ECCLESIASTICIS [see EXECUTION, XV., 3]; OF INQUIRY [see INQUIRIES, II.]; OF MANDAMUS [see MANDAMUS]; OF NE EXEAT REGNO [see ARREST, II., 2]; OF POSSESSION [see EXECUTION, XXII.]; OF PROHIBITION [see PROHIBITION]; OF SEQUESTRARI FACIAS DE BONIS ECCLESIASTICIS [see EXECUTION, XV., 3]; OF SEQUESTRATION [see EXECUTION, XVII.]; OF SUBPENA [see EVIDENCE; SOLICITORS, IV.]; OF SUMMONS [see WRIT OF SUMMONS]; OF VENDITIONI EXPONAS [see EXECUTION, XV., 1].

WRIT OF SUMMONS, 997

TABLE OF CASES.

A.

- Abbott, *ex parte*, (Add.) 350, (Add.) 351
 Abud v. Riches, 363
 Accident and Marine Insurance Company v. Macarty, 205
 Adair, *re*, 786
 Adair v. Young, 66
 Adams's Settled Estates, *re*, 800
 Adams, *re*, 515, 920
 Agar v. Fairfax, 607, 617
 Agar-Ellis, *re*, 420, 424
 Aird, *re*, 24, 851
 Aitken v. Dunbar, 458, 467
 Aldborough v. Burton, 204
 Alexandra Palace Company, *Re*, (Add.) 273
 Alhusen v. Labouchere, 273, 275, 277, 278
 Alison's Trusts, *re*, 421, 496
 Allan v. United Kingdom Telegraph Company, 481
 Allen, *re*, 816, 935, 940
 Allen v. Bone, 815
 — v. Duke of Hamilton, 319
 — v. Kennet, 756
 Ambroise v. Evelyn, 459, 704
 Amenny v. Nawab of Bengal, 461
 Amos v. Chadwick, 195, 196
 Amptill, The, 747
 Anderson v. British Columbia, Bank of, 272, 273, 279, 284
 Anderson v. Pellier, 560
 — v. Welsby, 67
 Andrews, *re*, 786
 — v. Stewart, 461
 Angell v. Baddeley, 442
 Angelo, *re*, 905, 915
 Anglo-French Co-operative Society, 108
 Anglo-Italian Bank v. Davies, 353, 460
 — v. Wells, 462
 Anglo-Virginian Freehold Land Company, *re*, 957
 Anonymous, (Add.) 813
 Anstey v. North and South Woolwich Subway Company, 279
 Anthony v. Halstead, 556
 Archer v. Dowsing, 661
 Arkwright v. Newbold, 207
 Armitage v. Elworthy, 24, 378
 — v. Fitzwilliam, 277
 Armston, *re*, 942
 Armstrong, *re*, 919
 Arnold, *re*, 740, 836
 Arrowsmith, *re*, 906, 917, 923
 Artisans' and Labourers' Dwellings Improvement Act, *re*, 515
 Artistic Colour Printing Company, *re*, 850, 959
 Ashley v. Taylor, 275, 547, 548, 595, 596, 600
 Ashmead's Trusts, *re*, 553, 554
 Ashton v. Shorrocks, (Add.) 103, (Add.) 551
 Ashworth v. Outram, 55, 369
 Askew v. Woodhead, 507, 516
 Aslatt v. Mayor of Southampton, (Add.) 433
 Asquith v. Molineaux, 876
 Associated Home Company v. Whichcord, 717
 Association of Land Financiers, *re*, 961, 970
 Astley v. Micklethwait, (Add.) 33
 Aston v. Hurwitz, 1001
 — v. Meredith, 801
 Atherley v. Harvey, 273
 Atkins' Estate, *re*, 503, 595
 Atkins v. Palmer, 312
 — v. Taylor, 456, 483, 693, 700
 Atkinson v. Ellison, 100, 101
 Attenborough v. London and Saint Katherine's Dock Company, 443, 717
 Attorney, *re*, 812
 Attorney-General v. Constable, 432
 — v. Council of Birmingham, 437; 591, 593, 691
 — v. Dean of Manchester, (Add.) 154
 — v. Great Eastern Railway Company, 59
 — v. London and North-Western Railway Company, 549
 — v. Metropolitan District Railway Company, 325
 — v. Moass, 447, 696
 — v. Shrewsbury Bridge Company, 694
 — v. Swansea Improvement Company, 66
 — v. Tomline, 192
 — v. Waring, (Add.) 426
 Attwood v. Chichester, 483, 584, 585
 — v. Miller, 707
 Augustinus v. Nerinckx, 693

Austin v. Amhurst, 502

— v. Jackson, 622

Ayles v. Cox, 913, 924, 926, 930

Aynsley v. Glover, 433

B.

Bache, *re*, 920

Back v. Hay, 878, 885

Backhouse v. Charlton, 391

Bacon v. Bacon, 285

— v. Turner, 1010

Badcock, *re*, 906, 908, 926

Bagnall v. Carlton, 285, 359

Bagot v. Easton, 695, 708, 711, 1102

Baile v. Baile, 823, 824

Bailey v. Birchall, 823

Bailie's Trusts, *re*, 59

Baines v. Bromley, (Add.) 209

Baker v. Oakes, 208

— v. Wait, 870

— v. Wood, (Add.) 433

Ball v. Kemp-Welch, 617, 618

Ballard v. Shutt, 844

Balmforth v. Pledge, 558

Banco de Portugal, *ex parte*, 65, 774

Banco de Portugal v. Waddell, (Add.) 76

Banister, *re*, 197, 738

Bank of Montreal v. Cameron, 460

Bank of Whitehaven v. Thompson, 1013

Banker's case, *The*, 678

Banque Franco-Egyptienne v. Lutscher, 306, 308

Barber, *ex parte*, 622

Barber, *re*, 941

Barber v. Mackrell, 15, 26

Barker, *re*, 23, 920

Barker v. Cox, 835

— v. Hemming, (Add.) 232, (Add.) 445

— v. Peile, 898

Barnes v. Addy, 827

Barnicott v. Harris, 275, 705

Barraclough v. Greenough, 332

Barrett v. Hammond, 364, 366

Barrick v. Buba, 308

Barrows, *re*, 863, 864

Bartholomew, *re*, 941

Bartholomew v. Freeman, 734

Bartlett, *re*, (Add.) 743

Bartlett v. Rees, 391

— v. Roche, 694, 695

Barton v. Barton, 611

— v. Titchmarsh, (Add.) 53

Basnett v. Morgan, 910, 931

Batchelor v. Middleton, 762

Bates v. Eley, 13

Bath v. Bell, 899

Bath's case, 191

Battersby, *re*, 926, 939

Batty, *re*, 504

Baughan, *ex parte*, 939

Baum, *re*, 68

Baxter, *re*, 915, 925

Bayly, *ex parte*, *re* Hart, 392, (Add.) 435, (Add.) 440

Beal v. Pilling, 275, 277

Beall v. Smith, 363, 531, 577, 599

Beaney v. Elliott, 325, 400, (Add.) 5

Besant, *re*, 425

Beaty v. Curson, 935, 941

Beaucher v. London and Chatham Railway Company, 559

Beaufort, Duke of, v. Crawshaw, 308

Beaumont's Mortgage Trusts, *re*, 194

Beckett v. Attwood, 896

Beckingham v. Owen, 461, 463

Beddow v. Beddow, 94, 432, 433, 437, 492, 532, 746

Bedwell v. Wood, 90

Befford, *re*, 939

Begg v. Cooper, 460

Beioley v. Carter, 780, 795, 803

Bell, *re*, 23, 34, 35, 408

Bell v. North Staffordshire Railway Company, 51, 95

— v. Turner, 736

— v. Wilkinson, 723

Bellerby v. Smith, 621

Belmonte v. Aynard, 205

— v. Gutschow, (Add.) 205

Belton, *Ex parte*, 828

Benbow v. Low, 693, 713, (Add.) 274

Bendyshe, *re*, 793

Benecke v. Frost

Bennett v. Lord Bury, 195

— v. Moore, 6, 23, 466

Benyon v. Godden, 237

Berdan v. Birmingham Small Arms Company, 59, 60

— v. Greenwood, 703

Beresford v. Geddes, 447

Bergholt, *re*, 923

Berkeley, Earl of, *re*, 505

— v. Standard Discount Company, 276

Berridge v. Roberts, 461

Berrie v. Howitt, 823, 824

Berry v. Exchange Trading Company, 553

— v. Mullan, 192

Bethell v. Casson, 288, 758

Bethlem Hospital, *re*, 514

Beynon v. Godden, 719

Bicknell, *re*, 798

Bignold, *re*, 919, 921

Bigsby v. Dickenson, 63, 64, (Add.) 323

Birch, *re*, 942

— v. Cropper, 922

Birchall, *re*, (Add.) 192

— v. Pugin, 823, 826

Bird, *re*, 940

— v. Harris, 815, (Add.) 136

Birkett, *re*, 941

Birmingham Estates Company v. Smith, 708

Birmingham, Mayor of, v. Allen, 772

Bishop Monk's Horfield Trust, *re*, (Add.) 502, (Add.) 514

Bissicks v. Bath Colliery Company, 348

Blackborough v. Ravenhill, 749

- Blackburn Union v. Brooks, 324, 325
 Blackford v. Davies, 7
 Blackmore v. Edwards, 698
 — v. Smith, 598
 Blackwood, *re*, 674
 Blades, *ex parte*, 810
 Blain, *ex parte*, 589
 Blakely Ordnance Company, 359
 Blanchard, *re*, 921, 924, 925
 Bland v. Daniell, 36
 Blann v. Bell, 33
 Blenkorn v. Penrose, (Add.) 691, 698
 Blewitt, *re*, 744
 Blewitt v. Dowling, 434, 865
 Bligh, *re*, 531
 — v. O'Connell, 531
 Blomfield, *re*, 504
 Bloye, *re*, 941
 Blyth, *re*, 513
 — and Young, *re*, 60, 946
 — v. Green, 588
 Boddy v. Kent, 601
 — v. Wall, 704
 Boden's Trust, *re*, 912
 Bolkhov, Vaughan, and Company
 v. Young, 278
 Bolton, *re*, 794, 940
 — v. Bolton, 274, 314
 — v. London School Board, 435,
 436
 Bolton Benefit Loan Society, *re*, 990
 Bonelli's Electric Telegraph, 940
 Bonnewell v. Jenkins, 887
 Bonser v. Bradshaw, 824
 Booth v. Briscoe, 556, 567
 Bordier v. Burrell, 886
 Bottomley v. Ambler, 97
 Bouch v. Sevenoaks Railway Company,
 357
 Bourbaud v. Bourbaud, 436
 Bourke, *re*, 923
 Bourton v. Williams, 396
 Bovill v. Hitchcock, 885
 Bowen, *re*, 828
 Bower v. Hartley, 717
 Bowes v. Marquis of Bute, 617
 Bowey v. Bell, 208
 Bowra v. Wright, 931
 Boyce, *re*, 918, 923
 Boycott, *re*, 922
 Boyd's Trusts, *re*, 868
 Boyes v. Cook, 693, 806
 Boynton v. Boynton, 596
 Boyse, *re*, (Add.) 28, (Add.) 489
 Box, *re*, 901
 Brackenbury, *re*, 922, 930
 Brader v. Kerby, 907
 Bradford Tramways Company, *re*, 665
 Bradley v. Munton, 930
 Bradshaw, *ex parte*, 914, 915, 987
 Braginton v. Yates, 877, 879
 Brain, *re*, 678, 682
 Brandon, *re*, 531
 — v. Brandon, 506
 Brandreth's Trade Mark, *re*, 208, 864
 Branwhite's case, 462
 Bray v. Curran, 192
 Brealy, *re*, 793
 Brent, *re*, 500, 937
 Brentnall, *re*, 922
 Breton v. Mockett, 693, 806
 Brewer, *re*, 503
 Brewood Railway Company, *re*, (Add.)
 185
 Brewster v. Durrand, 560
 Bridson v. Smith, 465
 Bright v. Marner, 711
 — v. Tyndall, 833
 British Alliance Corporation, *re*, 206,
 722
 — Dynamite Company v. Krebs,
 65, 78, 600, 602
 — Guardian Life, &c., Company,
 re, 985
 — Farmers' Company, *re*, 65
 — Imperial Company, *re*, 979
 Corporation, *re*, 1010
 Bristol and North Somerset Railway
 Company, *re*, 188
 — School, *re*, 515
 Bristow v. Booth, 913
 Broadwood, *re*, 802, 934
 Brocklebank v. East London Railway
 Company, 754
 — v. King's Lynn Steam-
 ship Company, 205, 206
 Broder v. Saillard, 772
 Brompton Waterworks, *ex parte*, 662
 Brook, *re*, 769, 864
 — v. Brook, 922
 — v. Hertford, 605
 — v. Wigg, 323, 826
 Brooke v. Lord Mostyn, 192, 193
 Broughton, *re*, 795
 Brown, *re*, 285
 — and Sibly, *re*, 945
 — v. Collis, 10
 — v. De Tastet, 7
 — v. Rye, (Add.) 209
 — v. Sewell, (Add.) 220, (Add.) 225
 — v. Shaw, 551
 — v. Trotman, 825
 Browning v. Sabin, 363
 Bryant, *re*, 934, 939
 — v. Bull, 353, 747, 749
 Brydges v. Fisher, 308
 Buchanan v. Taylor, 275
 Buckeridge v. Whalley, 13
 Buckinghamshire Railway, *re*, 500
 Buckley, *re*, 932
 — v. Cooke, 322
 Budd v. Davidson, (Add.) 323
 Budding v. Murdock, 697, 699
 Buenos Ayres Gas Company v. Wilde,
 438 (Add.), 102
 Buist v. Bridge (Add.) 363
 Bulkeley v. Earl of Eglinton, 922
 Bull v. Jones, 677
 Bullen v. King, 90
 Bulley v. Bulley, 583, 823, 824
 Bullock v. Corrie, 279, 285
 Bunbury, *re*, 798
 Bunnett v. Bunnett, 903
 Burdick v. Garriek, 573

- Burdin, *re*, 780, 803
 Burgoine v. Taylor, 483
 Burke v. Rooney, 51, 290, 697, 856
 Burley, *re*, 798, 800
 Burnand v. Rodocanachi, 678
 Burnell v. Burnell, 6, 23, 608
 Burridge v. Bellew, 816
 Burrowes, Lynn, and Sexton, *re*, 839, 945, 946
 Burrows v. Burrows, 368
 Burt, *re*, 926
 Burton, *re*, 920
 Buse v. Roper, 56, 444, 491
 — v. Rosser, 54
 Butchart v. Dresser, 602
 Bute, *re*, 908, 912
 Butler v. Butler, 5, 711, 718, 896, 897
 Bustros v. Bustros, 1013
 — v. White, 284, 288
 Byrd v. Nunn, 55, 691, 702
- C.
- Caddick, *re*, 789
 Cakemore v. Causeway, &c., Company, *re*, 956
 Caldwell v. Pagham Harbour Reclamation Company, 698, 1006
 Callendar v. Hawkins, 712
 Calvert, *ex parte*, 822
 Cambrian Railways Company, *re*, 187, 190, 747
 Camden Charities, *re*, (Add.) 147
 Campbell, *re*, 922, 923, (Add.) 21
 — v. Attorney-General, 306, 317, 335, 337
 Campbell v. Earl of Dalhousie, 335
 — v. Holyland, 391, 392, 399, 550, 552
 Canadian Oil Works Corporation v. Hay, 697, 856
 Cannon v. Johnson, 617
 Cannot v. Morgan, 866
 Cappelens v. Brown, 464
 Cardell v. Hawke, 21
 Cargill v. Bower, 691, 695, 698, 699, 1002
 Carlisle, Corporation of, v. Wilson, 4
 Carlyon v. Truscott, 780
 Carnarvonshire Slate Company, *re*, 957
 Carpenter, *re*, 905, 907, 926
 Carpmael v. Proffitt, 514
 Carr, *re*, 783
 Carter v. Leeds Daily News Company, 276
 — v. Salmon, (Add.) 435, (Add.) 440
 — v. Stubbs, 856, (Add) 290
 — v. Wake, 391
 Cartsburn, The, 718, 719
 Cartwright, *re*, 546, 815
 — v. Pulteney, 605
 Carver v. Pinto Leite, 274
 Cary v. Hills, (Add.) 20
 Casey v. Arnott, 1010
 Cashin v. Craddock, 282, 287, 699
- Cassiopeia, the, 1006, 1007, 1009
 Castelli v. Groom, 308
 Castro v. Murray, 2, 3
 Cates, *re*, 941
 Catlin v. King, 721
 Catling v. English, &c., Company, 1010
 Catlow v. Catlow, 823, 825
 Cattell v. Simons, 822
 Cavander, *re*, (Add.) 62
 Cave v. Cave, 495, 812, 813
 Cavendish v. —, 97
 Cawthorne, *re*, 941
 Cazneau, *re*, 939
 Central African Trading Company v. Grove, 708, 717
 Chamberlain, *ex parte*, 509
 — *re*, 794
 — v. Barnwell, (Add.) 67
 — v. Chamberlain, 1
 Chambers v. Green,
 Chapman v. Mason, 26, 867
 — v. Real Property Trust, 867
 Chatterton v. Cave, 561
 — v. Watney, (Add.) 357
 Chawner, *re*, 901
 Cheese v. Lovejoy, 891
 Cheshire, *re*, 298
 Chesterfield Colliery Company v. Black, 279, 698
 Chichester v. Donegal, 765
 Chilcott, *re*, 798
 Child v. Stenning, 582, 695, 887
 Chilton v. Corporation of London, 465
 Chorlton v. Dickie, 455, 459, 598, 697
 Christie v. Cameron, 586
 — v. Noble, 91
 — v. Ovington, 910
 Christ's College, Brecknock, v. Martin, 98, 806, 855
 Christ's Hospital, *ex parte*, 161, 514
 Churchward v. The Queen, 678
 Churton v. Douglas, 619
 City and County Investment Company, *re*, 986
 City of Glasgow Bank, *re*, 973
 City of Manchester, The, (Add.) 54, (Add.) 59
 Claridge v. Mackenzie, 447
 Clark, *re*, 535
 — v. Callow, 690, 702
 — v. Girdwood, 827
 — v. Molyneux, 560
 Clarke v. Cookson, 879, 880, 885, 889, 890
 Clay, *re*, 921
 Clay v. Tetley, (Add.) 59
 Claypole, Rector of, *ex parte*, 502, 802
 Clegg v. Edmundson, 284
 — v. Rowland, 44
 Clements v. Norris, 865
 Clergy Orphan Corporation, *re*, 901
 Cleveland, Duchess of, *re*, 783
 Clissold, *re*, 922
 Clitheroe, *re*, 802
 Clough, *re*, 789
 Clow v. Harper, 15, 90

- Clowes v. Hilliard, 592, (Add.) 21
 Clutton, *re*, 922
 — v. Lee, 529
 Coal Economising Gas Company, 64
 Coathupe v. Lewis, *re*, (Add.) 61
 Cobbett v. Field, 2, 3
 Cochrane v. Fearon, 205
 Cockburn v. Edwards, (Add.) 827
 — v. Peel, 801
 Cockell v. Fugh, 916
 Cockle v. Joyce, 483
 Coddington v. The Jacksonville, Pen-
 sacola, and Mobile Railway Company,
 466, 734
 Cohen v. Bulkeley, 196
 — v. Hale, 358
 Cole v. Beale, 204
 Colebourne v. Colebourne, 434, 747
 Coleman's Trusts, *re*, 532
 Coleman and Jarrom, *re*, 945
 Coles v. Benbow, 915, 916, 918
 Collett v. Collett, 780
 — v. Dickinson, 585, 712
 — v. Goode, 698, 701
 Collingwood, *re*, 905, 913
 Collins' Charity, *re*, 500
 Collins v. Vestry of Paddington, (Add.)
 58, (Add.) 60
 — v. Welsh, 208
 Collinson, *re*, 926
 Colquhoun, *re*, 816
 Colson, *re*, 936
 Colyer, *re*, 922
 Combs v. Brooks, 920, 925
 Comedy Opera Company v. Carte,
 (Add.) 104
 Commercial Discount Company, *re*, 961
 Commissioners of Sewers v. Gellatley,
 583
 — v. Glasse,
 274
 Conacher v. Conacher, 944, (Add.) 130,
 (Add.) 549
 Conington v. Gilliat, 886
 Conquest's case, 994
 Constantine, The, 68
 Conybeare, *re*, 922
 — v. Farrier, 333
 — v. Lewis, 57, (Add.) 270
 Conyer's Grammar School, 924
 Cook v. Bolton, 601
 — v. Day, 550, 1013
 — v. Enchmarch, 756
 — v. Gill, 727
 Cooke's Contract, *re*, 945, 946
 Cooke v. Collingridge, 7
 Cookney v. Anderson, 619
 Cooper, *re*, 682, 925
 — and Allen's Contract, *re*, 945
 — v. Cooper, 66
 — v. Ince Hall Colliery Company,
 730, 731
 — v. Macdonald, 917, 919
 — v. Whittingham, (Add.) 208,
 (Add.) 433
 Cope, *re*, 901
 Corbishley's Trusts, *re*, 660
 Cornish v. Guest, 618
 Corporation of London, *ex parte*, 673
 Corpus Christi College, *ex parte*, 512
 Costa Rica, Republic of, v. Strousberg,
 355 (Add.), 356
 Cotterill, *re*, 918
 Courtenay v. Courtenay, 898
 Covington, *re*, 941
 Cowan, *re*, 357
 Cox v. Barker, 582, 696
 — v. Cox, 618
 — v. Hopwood, 92
 — v. Watson, 399
 Coyle v. Cuming, 700, 705
 Crabtree, *re*, 797, 930
 Cracknall v. Janson, 62, 329
 Craig v. Phillips, 60
 Cramer, *re*, 914
 Crane, *re*, 515
 — v. Jullion, 1013
 Crawford v. Hornsea Steam Brick, &c.,
 Company, 63
 Credit Foncier Company, *re*, 178
 — Company, *re*, 284
 Creech St. Michael, Vicar of, *ex parte*,
 515
 Creen v. Wright, 208, 561
 Cresswell v. Bateman, 596
 — v. Parker, 1011
 Croker, *re*, 501, 802
 Crom v. Samuels, 855
 Crookes v. Whitworth, 607
 Cross, *re*, 800
 Cross's Charity, *re*, 783
 Crossley v. City of Glasgow Life Assur-
 ance Company, 569
 Croughton, *re*, 658, 661
 Crowe, *re*, 910, 913, 916, 917, 921, 925
 Crowe v. Barnicott, 708
 Crowe v. Russell, 25, 393, 845
 Croxton v. May, 661
 Cruikshank v. Floating Swimming
 Baths Company, 89, 772
 Crump v. Baker, 7
 — v. Cavendish, 463
 Cull, *re*, 941
 Cuming, *re*, 905, 918, 932
 Cummins v. Fletcher, 761, 833
 — v. Heron, 58
 Cundee, *re*, 795
 Cunningham and Bradley's Contract,
 re, 945
 Currie, *re*, 923
 Curtis, *re*, 922
 Curtois, *re*, 938
 Curwen's Settlement, *re*, 502, 515
 Cusden v. Clapham, 325, 444, 551
 Cust v. Middleton, 782

 D.
 D'Adhemar v. Bertrand, 922
 Dale, *ex parte*, (Add.) 486, 924
 — *re*, (Add.) 57
 Dalgleish, *re*, 909, 913, 921
 Dallas v. Glynn, 363
 Dallinger v. St. Albyn, 699

- Darcy v. Whittaker, 595, 600
 Daubney v. Shuttleworth, 469, 548, 549, 551, 552, 854
 Dann v. Simmins, (Add.) 63, 470, 560
 Davenant's Charity, *re*, 500
 Davenport v. Rylands, 437
 Davey v. Millar, 907
 — v. Railway Passengers Assurance Company (Add.), 92
 David Lloyd and Co., *re*, 392
 Davidson v. Cooper, 578
 — v. Leslie, 817
 Davies, *ex parte*, 930
 — *re*, 906, 919
 — v. Barrett, 548
 — v. Felix, 484, 558
 — v. Garland, 1006
 — v. Jenkins, 585
 — v. Lowndes, 307, 308
 — v. MacHenry, 121
 — v. Marshall, 434
 — v. Whitehead, 574
 — v. Williams, 282, 758
 Davis, *re*, 906, 919
 — v. Ashwin, 396
 — v. Chanter, 919
 — v. Davis, 192, 193, 475, 868
 — v. Flagstaff Silver, &c., Company, 539, 726, 871
 — v. Godbehere, 558
 — v. Spence, 460
 Davy v. Garrett, 55, 694, 695
 Dawes v. Thornton, 717
 Dawkins v. Lord Penrhyn, 721
 — v. Prince Edward of Saxe-Weimar, 2, 3
 — v. Simonetti, (Add.) 433
 Dawson v. Bank of Whitehaven, 761
 — v. Shepherd, (Add.) 235
 Day v. Brownrigg, 432, 721
 — v. Whittaker, 8
 Dean v. Lethbridge, 817
 — v. Wilson, 737
 Dear v. Swarder, 707
 De Brito v. Hillel, 13, 316
 De Cordova v. De Cordova, 31
 De Hart v. Stevenson, 567, 592
 De la Grange v. McAndrew, 207
 De la Warr, Earl, *re*, 901
 De la Warr v. Sackville, 77, 774
 Delmar v. Freemantle, 546, 548
 Delves v. Delves, 743
 Dempster v. Purnell, 693
 Dence v. Mason, (Add.) 57, 63, 598
 Dendy, *re*, 794
 Dennis, *re*, 901
 Dennis v. Seymour, 463
 Dent v. Sovereign Life Assurance Company, 884, 886, 889
 Derby Municipal Estates, *re*, 501
 De Tabley, *re*, 794
 Devon and Somerset Railway Company, *re*, 187
 Devoy v. Devoy, 914
 Dewar v. Maitland, 906
 Diamond Fuel Company, *re*, 205, 953
 Dickenson v. Dodds, 67
 Dickinson, *re*, 922
 Dicks v. Brooks, 64, 707
 Dickson, *re*, 918, 921, 942
 Dickson's case, 53, 982
 Dickson v. Harrison, 52, 58, 60
 Dillon v. Cunningham, 367
 Dinning v. Henderson, 735
 Disney v. Longbourne, 275, 276
 Ditton, *ex parte*, *re* Woods, 392, 432
 Dix v. Groom, 455
 Dixon, *re*, 41, 916
 Dixon's Trust, *re*, 531
 Dixon v. Evans, 191
 Dodds v. Shepherd, 56, 444
 Dodkin v. Brunt, 920
 Dollman v. Jones, 59, 557
 Dolphin v. Layton, 357
 Donald v. Bather, 570
 Donaldson v. Donaldson, 802
 Donisthorpe, *re*, 920, 923
 Dorning, *re*, 785
 Doss v. Secretary of State for India, 678
 Douglas v. London and North-Western Railway Company, 507
 Dowdeswell v. Dowdeswell, 20, 887
 Dowling, *re*, 500
 Dowling v. Dowling, 257
 Doyle v. Douglas, 196
 — v. Kaufman, 856, 1005
 Drake, *ex parte*, 373
 Drake v. Trefusis, 501, 502, 802
 Draper, *re*, 924, 928
 Drinkwater v. Radcliffe, 608, 609
 Drover v. Beyer, 106, 107
 Duchess of Westminster Silver Lead Ore Company, *re*, 57, 67, (Add.) 232
 Duckett v. Gover, 592, 593, 594
 — v. Williams, 308
 Dugdale, *re*, 858
 Dummer's Will, *re*, 802
 Duncan, *re*, 149
 Dunn v. Pearson, 558
 Dunraven Coal and Iron Mining Company, *re*, 65
 Dunraven's Estates, *re*, 514
 Dunster, *re*, 937
 Dupuy v. Welsford, 575
 Dymond v. Croft, 395, 397, 451, 454, 549, 1013
 Dynevor Duffryn Collieries Company, *re*, 503, 595
 Dyson v. Pickles, 869
- E.
- Eade v. Jacobs, 274, 758
 — v. Winsor, 358, 444
 Eames v. Hacon, (Add.) 66
 Earl v. Ferris, 584
 Earp v. Henderson, 712
 East, *re*, 925
 East and West Junction Railway Company, *re*, 188, 190
 East Assam Company v. Roche, 462
 Ecclesiastical Commissioners v. Kino, 433

Edd v. Winsor, 54
 Ede v. Vyse, 695, 1002
 Ede Brothers and Co., *ex parte*, 858
 Eden v. Naish, 192, 193, 805
 Edmunds, *re*, 533
 Edmunds v. Attorney-General, 2
 Edwards, *re*, 17, 420, 531
 Edwards v. Cunliffe, 398
 — v. Edwards, 752
 — v. Lowther, 591
 — v. Midland Railway Company, (Add.) 559
 Egremont, Earl of, v. Smith, 837
 Egremont Burial Board v. Egremont, &c., 288
 Egremont v. Thompson, 597
 Eldridge v. Burgess, 595, 597
 Elham Valley Railway Company, *re*, 971
 Elias v. Griffith, 324
 Ellerthorpe, *re*, 907
 Elliott, *re*, 783, 941
 Ellis, *re*, 906, 915, 916
 — v. Ambler, 276
 — v. Fleming, 728
 — v. Munson, 458, 464, 483, 707
 Ellison, *re*, 920, 922
 — v. Wright, 7
 Elmer v. Creasy, 275
 Elsom, *re*, 56
 Elton v. Elton, 617
 Emma Silver-Mining Company v. Grant, 884
 — v. Lewis, 66
 Emmanuel v. Bridger, 358
 Emmett v. Clarke, 922
 English v. Tottie, 284, 285
 — v. Vestry of Camberwell, 434
 Ennis, *re*, (Add.) 24
 Enraght, *re*, (Add.) 57
 Erskine, *re*, 941
 Escott v. Gray, 577, 588
 Esdaile v. Visser, 362, 369
 Estate Company, *re*, 178
 Etty v. Wilson, 484, 485, 558
 Evans, *ex parte*, 353, 753
 Evans' Settlement, *re*, 502, 942
 Evans v. Bagshaw, 605
 — v. Bear, 361
 — v. Buck, 707
 — v. Davis, 695, 1002
 — v. Puleston, 440
 — v. Wills, 367
 Evelyn v. Chippendale, 204
 — v. Evelyn, 290, 695, 757
 — v. Lewis, 752
 Evennett v. Lawrence, 61
 Evering v. Chiffenden, 204
 — v. Co-operative Beer Company, 959
 Ewart v. Williams, 10
 Exchange and Discount Bank v. Billinghurst, 61
 Eyre v. Hughes, 300
 — v. Sanders, 786, 794

F.

Fairclough v. Marshall, 434, 543, 592
 Faithfull v. Ewen, 826
 Fane v. Fane, 35, 900
 Fardon's Vinegar Company, *re*, 60, (Add.) 67
 Fariua, The, 863
 Farmer v. Curtis, 761
 Farnworth v. Hyde, 308
 Farrant, *re*, 925
 Faund v. Wallace, 556
 Fearnough v. Fernell, 767
 Fearn v. Young, 7
 Fell v. Brown, 761
 Fellows, *re*, 923, 925
 Felstead v. Gray, 805, 806
 Fenton v. Wills, 33
 Ferguson v. Ferguson, 361
 Fernandes, *re*, 818
 Fiddey, *re*, 825
 Field v. Field, 25, 868
 — v. Great Northern Railway Company, 208, 561
 Fielden v. Hornby, 658
 Finch v. Jukes, 945, 946
 Finlay v. Davis, 293
 Finney, *re*, 912
 — v. Hind, 360, 595
 Fischer v. Hain, 308
 Fisher v. Fisher, 511
 — v. Hughes, 287, 458, 924
 — v. Owen, 273, 277, 278
 Flemon, *re*, 513
 Fletcher v. Rodgers, 433
 Flitcroft, *re*, 913
 Flood v. Pritchard, 839, 843, 884
 Flower, *ex parte*, 512
 — v. Buller, 585
 — v. Lloyd, 65, 66, 485, 600, 602, 774
 Fluid v. Fluid, 801
 Foley, *ex parte*, 918
 Ford, *re*, 783
 — and Hill, *re*, 945, 946
 — v. Taylor, 874
 — v. Tynte, 6
 Fosbury, *re*, 939
 Forshaw v. Higginson, 898
 Forster, *re*, 792
 Fortescue v. Fortescue, 758
 Foster and Lister, *re*, 945
 — v. Alven, 196
 — v. Dawber, 920
 — v. Edwards, (Add.) 51
 — v. Foster, 481, 616
 — v. Gamgee, 464
 — v. Harvey, 327
 — v. Parker, 399, 485, 932
 — v. Roberts, 484
 — v. Usherwood, 873
 Fotherby v. Metropolitan Railway Company, 533
 Fowler v. Knoop, 720
 — v. Monmouthshire Canal Company, 827

Fox v. Amhurst, 502
 — v. Suwerkrop, 420
 Foxon v. Gascoigne, 823, 824
 Foyard, *re*, 940
 Frakes v. Breslow, 845
 Franklin, *re*, 796
 — v. Fern, 761, 762
 Franks v. Bollam, 535
 Fraser and Co. v. Burrows, 282
 Fray v. Voules, 192
 Freason v. Loe, 290
 Freeman v. Cox, 897
 French, *ex parte*, 447
 — *re*, 901
 — v. Lear, 1001
 Friend v. London, Chatham, and Dover
 Railway Company, 285
 Frith and Osborne, *re*, 945
 — v. The Queen, 678
 Fritz v. Hobson, 436, 437, 480, 553, 562
 Frodsham v. Frodsham, 924
 Fryer v. Royle, 20
 — v. Wiseman, 324
 Fulica, *the*, 866
 Fullwood v. Fullwood, 433
 Furness v. Booth, 708, 711
 Futvoye v. Kennard, 925

G.

Gamston, Rector of, *ex parte*, 501
 Garbutt v. Fawcus, 850
 Gardiner's case, 994
 Gardiner v. Downes, 898
 Gardner, *re*, 907, 919, 923
 — v. Cowles, 906, 914, 928
 — v. Hardy, 454
 — v. Irwin, 282
 — v. Wright, 333
 Garland v. Garland, 749
 Garlick v. Lawson, 257
 Garling v. Royds, 363, 886
 Garnet v. Bradley, 79, 208, 511, 929
 Garnier, *re*, 940
 Garrard, *ex parte*, 59
 Gartside, *re*, 919
 Gartz, *re*, 921
 Gaskell v. Gaskell, 606
 Gaskin v. Balls, 432, 433
 Gathercole v. Smith, (Add.) 57
 Gatti v. Webster, 5, 408
 Gaudet Frères Steamship Company, *re*,
 193, 964
 Gay v. Labouchere, 277, 278
 Gee, *re*; Laming v. Gee, 63
 Geoghegan v. Dormer, 845
 German Bank of London v. Schmidt,
 462
 Gething v. Keighley, (Add.) 12
 Gibbin, *re*, 922
 Gibbon v. Walker, 397
 Gibbons v. London Financial Associa-
 tion, 51
 Gibbs v. David, 730
 Gibson v. Woollard, 738
 Gilbert v. Comedy Opera Company,
 (Add.) 329

Gilbert v. Endean, 62, 63, 192, 325
 — v. Gilbert, 551
 — v. Russell, 411
 — v. Smith, 6, 465, 466, 608, 609,
 610
 Gillot v. Ker, 458, 465
 Ginesi v. Cooper, 619
 Girvin v. Grepe, 461
 Gladibanta, *The*, 63
 Glanville, *re*, 928
 Gledhill v. Hunter, 606, 756
 Gledstane's Trusts, *re*, 934
 Glossop v. Heston Local Board, 324,
 492, 532
 Gloucester Charities, *re*, 924
 Glover v. Ellison, 12, 13
 Goddard v. Poole, 598
 — v. Thompson, 66, 559
 Godden v. Corsten, 693, 1001
 Gold Company, *re*, 55, 984, 986, 987
 Golding v. Wharton Salt Works Com-
 pany, 55, 699, 705
 Gooch's Estate, *re*, 502
 Goodman, *re*, 936
 Goodrich v. Marsh, 568, 583, 606
 Goodright v. Noright, 847
 Goodwin, *re*, 780, 786
 — v. Budden, 768, 769
 Gordon v. Horsfall, 393
 Goucher v. Clayton, 10
 Gouger v. Latouche, 596
 Gough v. Bage, 924
 Grace v. Baynton, 931
 Graham v. Campbell, 55, 435
 Grant, *re*, 930
 Grant v. Banque Franco Egyptienne,
 66, 67, 68
 — v. Holland, 299, 559, 817
 — v. Yea, 744
 Gravenor, *re*, 745
 Graves v. Taylor, 773
 Gray v. Paull, (Add.) 192
 Graydon, *re*, 744
 Great Australian, &c., Company, *re*,
 1010
 Great Britain Life Assurance Society,
re, 993, 994
 Great Northern Committee v. Inett, 551
 Great Northern Railway, *ex parte*, 651
 Great Western Railway Company v.
 Waterford and Limerick Railway
 Company, (Add.) 291
 Great Yeldham Glebe Lands, *re*, 562
 Green, *re*, 600, 925
 Green v. Browning, 1010
 — v. Coleby, 693, 806
 — v. Mercer, 618
 — v. Pledges, 549
 — v. Sevin, 323, 465, 713, 844
 Greene, *re*, 785
 Greenhill, *re*, 357
 Greenhill v. Church, 97
 Greenough v. Littler, 397
 Green's Trustees v. Barrett, 768
 Grey v. Jenkins, 786, 794
 Grice v. Grice, 817
 Griffin v. Allen, 61

Griffin v. Griffin, 605
 Griffiths v. Jones, 743
 Grills v. Dillon, 68
 Grimoldby, *ex parte*, 502
 Grimshaw, *ex parte*, 862
 Groom, *re*, 906
 Groome v. Rathbone, 462
 Grundy v. Buckridge, 926
 Guest v. Smythe, 739, 743
 Guibert, *re*, 922
 Gunnell v. Whitear, 940
 Gunson v. Simpson, 909, 925

H.

H.'s Estate, *re*, 434, 743
 Habershon v. Gill, 289, 432
 Hadley v. McDougall, 288
 Hakes v. Hodgkins, 851
 Hakewill, *ex parte*, 424
 Haldane v. Bokford, 599
 Hall, *re*, 502
 — v. Eve, 712, 713
 — v. Hall, 372
 — v. Jupe, (Add.) 560
 — v. Laver, 815
 — v. London and North-Western
 Railway Company, 276
 — v. Old Talargock Company, 695
 — v. Pritchett, 357
 Halliday, *re*, 794
 Halsey v. Brotherhood, (Add.) 623, 699
 Halstead United Charities, *re*, 515
 Ham, *re*, 941
 Hamer v. Giles, 357, 622, 825, 856
 Hamilton v. Arrowsmith, 661
 — v. Dallas, 31
 — v. Davies, 469, 550, 1013
 — v. Johnson, (Add.) 560
 Hamilton Windsor, &c., Company, *re*,
 960
 Hamlyn v. Betteley, 877, 883 (Add.), 444
 Hammond v. Syrett, (Add.) 113
 Hanbury v. Noone, 300
 Hancock v. De Niceville, 300
 — v. Guerin, 282
 — v. Lablache, 584, 585
 Hancox v. Spittle, 918
 Hands v. Hands, (Add.) 106
 Haney, *re*, 940
 Hankin v. Turner, 848
 Hanley v. Pearson, (Add.) 113
 Hammer v. Mangles, 204
 Hanover, King of, v. Bank of England,
 920
 Hansford, *re*, 936
 Harbord v. Monk, 275, 693, 694, 700
 Harcourt v. Roe, 847
 Hardley, *re*, 936
 Hardy v. Eckersley, 698
 Hardwick v. Wright, 10
 Hare v. Hare, 831
 Harford, *re*, 922
 Hargraves v. Wright, 910
 Hargreaves, *re*, 863
 Hargreaves v. Scott, 52
 — v. White, 805

Harker, *re*, 61
 Harland v. Garbutt, (Add.) 597
 Harnett v. Vise, (Add.) 208
 Harper v. Great Eastern Railway, 99
 — v. Scrimgeour, (Add.) 368
 Harris, *re*, 788, 940
 Harris v. Aaron, 55
 — v. Barker, 319
 — v. Fleming, 1010
 — v. Franconia, 1010
 — v. Gamble, 701, 707, 877
 — v. Newton, 59
 — v. Petherick, 208, 561
 Harrison, *re*, 904, 919
 Harrison v. Bottenheimer, 460, 462
 — v. Cornwall, &c., Company,
 833
 — v. Southcote, 278
 — v. Smith, 924
 Harrold, *re*, 41
 Harry v. Davey, 594, 720
 Hart v. Hawthorne, 399
 — v. Swaine, 113
 Hartley, *re*, 926
 Hartley v. Owen, 287
 Hartnall, *re*, 903, 915
 Harvey, *re*, 909
 Harvey v. Clarke, 790
 — v. Hall, 102, 362, 363
 Hastie, *re*, 64
 Hastie v. Hastie, 481
 Hate v. Snelling, 395
 Hattatt, *re*, 922
 Havelock, *re*, 913
 Hawes v. Paveley, 539
 Hawke, *re*, 938
 Hawkesley v. Bradshaw, 703
 Hawkins v. Gathercole, 752
 Hawley v. Steele, 698
 Haycock, *re*, 933, 941
 Haymes v. Cooper, 826, 852
 Hayton v. Beall, (Add.) 357
 Hayward v. Pile, 297, 298
 — v. Smith, 616, 801
 Heap v. Marris, 699, 701
 Heapley, *re*, 919
 Heath v. Crealock, 396
 Hedges v. Fincham, 341
 Hedley v. Bates, 191, 302, 433, 492, 533,
 726
 Heinrich v. Sutton, 815
 Heiron, *re*, 349
 Helmsley, *re*, 798
 Heming, *re*, 941
 Hennessey v. Bohman, 731
 Herbert, *re*, 917
 Hermitage v. Kilpin, 370
 Herring v. Bischoffsheim, 694, 699
 — v. Clark, 911
 Hough v. Chamberlain, 705
 Hewitson v. Sherwin, 362
 Hewitt, *re*, 906, 912
 Hewitt v. Nanson, 397
 Hey, *re*, 913
 Hickman v. Upsall, 660
 Higginbottom v. Aynesley, 455
 Higginson v. Hall, 282

- Higgs v. Schrader, 825
 Highton v. Treherne, 60
 Hill, *re*, 922
 Hill v. Fulbrooke, 618
 — v. King, 14
 — v. Kirkwood, 440
 — v. Rimell, 548
 Hilliard, *re*, 802, 917
 Hilliard v. Fulford, 34
 Hillman v. Mayhew, 17, 835, 867
 Hills v. Springett, 596
 Hilton, *re*, 786
 Hind v. Whitmore, 573, 574
 Hinde v. Morton, 597
 Hiorns v. Holtom, 396
 Hirst, *ex parte*, 892
 Hobson's Estate, *re*, 502, 802
 Hoch v. Boor, (Add.) 53, 768, 769
 Hodding v. Starchfield, 846
 Hodge, *re*, 940
 Hodges, *re*, 938, 939
 Hodges v. Hodges, 703, 721
 Hodgson, *re*, 905, 923, 941
 Hodgson v. Foster, 502
 — v. Hodgson, 918
 Hodson, *re*, 921, 940
 Hodson v. Mochi, 584, 707
 — v. Richardson, 195
 Hoffman v. Duncan, 621
 — v. Postill, 274
 Hogg v. Darley, 721
 Holbrook, *re*, 916, 924
 Hole, *re*, 786, 800
 Holl, *re*, 786, 800
 Hollier v. Burne, 298, 506
 Hollingsworth v. Brodick, 195
 Holloway v. York, 708, 834, 866, 867
 Hollyford Copper Mining Company, *re*, 973
 Holm v. Grey, 502
 Holman's Settlement, *re*, 510
 Holmes, *re*, 678
 Holmes v. Harvey, 867
 Holt, *re*, 362, 367, 424, (Add.) 424, 425
 Holt v. Everall, 537
 — v. Jesse, 192
 Holywell - cum - Needingworth, Rector of, *ex parte*, 502
 Home Assurance Association, *re*, 207
 Home Investment Society, *re*, 816, 967
 Honduras Railway Company v. Lefevre, 582
 Hood, *re*, 41
 Hooke, *re*, 795
 Hooke v. Ind, Coope, and Co., 443, 447
 Hoole v. Earnshaw, 1001
 Hooper, *re*, 65, 901
 Hooper v. Giles, 700
 — v. Smart, 835
 — v. Strutton, 906, 908
 Hooson, *ex parte*, 362
 Hope, *re*, 362
 Hopewell v. Barnes, 851
 Hopkins v. Hopkins, 793
 Horbury Bridge Coal Company, *re*, 982
 Horlock v. Lidiard, 693
 Horn, *re*, 780
 Horner v. Ogler, (Add.) 211
 Horsnail v. Bruce, 367
 Horwell v. London General Omnibus Company, 717
 Hoskins, *re*, 899, 926, 941
 Hoskin's Legacies, *re*, 531
 Hoskin's Trusts, *re*, 54, 208
 Hotham, Lord, *re*, 901
 Houseman v. Houseman, 480, 849
 Howard, *re*, 1010
 Hoyle, *re*, 785
 Howarth, *re*, 427
 Howe, *ex parte*, (Add.) 60
 Hoyle, *re*, 785
 Hackwell, *re*, 693
 Hue, *re*, 941
 Huggons v. Tweed, 55, 710
 Hughes, *re*, 912
 Hughes v. Williams, 398
 Hull and County Bank, *re*, 54, 970, 973
 Hull Central Drapery Company, *re*, 975
 Hunby v. Moody, 602
 Hume v. Druff, 105, 106, 107
 Humphries v. Edwards, 867
 Humphry, *re*, 919
 Hunt v. Bishop, 903
 Hunt v. City of London Real Property Company, 470, 558, 880, 888
 Hunt v. Remnant, 903
 Hunter v. Hunter, 58, 62
 Hunter v. Young, 45, 584
 Hurle, *re*, 782
 Hurst v. Hurst, 396
 Hussey v. Payne, 67
 Hutchinson's Trusts, *re*, 785, 939
 Hutchinson v. Glover, 285
 — v. Hartmont, 340, 361, 362
 — v. Massarene, 753
 — v. Stephens, 907, 914
 Hutley, *re*, 868
 Hyam v. Terry, (Add.) 4, (Add.) 66, (Add.) 438
 Hyde and Co., *re*, 863, 864
 Hyde v. Warden, 730, 748

I.

- Imperial Land Company of Marseilles, *re*, 307
 Insley v. Jones, 873
 International Financial Society v. City of Moscow Gas Company, 60, 856
 Irlam v. Irlam, 8
 Irwin v. Grey, 679
 Isaacs, *ex parte*, 68
 Ives, *re*, 794
 Ivory, *re*, 17, 68
 Ivory v. Cruikshank, 372, 412, 453

J.

- Jackson v. Mawby, 103, 367
 Jackson v. North-Eastern Railway Company, 595, 597, 598
 Jackson v. Turneley, 257
 Jacobs v. Brett, 727

James, *re*, 789
 James v. Crow, 459
 — v. James, 391
 — v. The Queen, 678, 682, 683
 Jameson v. Brick and Stone Company, 581
 Jarman, *ex parte*, 827
 Jeffries v. Drysdale, 924
 Jenkins, *re*, 570
 Jenkins v. Bryant, 816
 — v. Davies, 465, 701
 — v. Morris, 558, 561
 John Brown and Co. v. Keeble, 954
 Johnes v. Claughton, 752
 Johnson, *re*, 794, 802
 Johnson's Patent, *re*, 492
 Johnson v. Burgess, 1002
 — v. Mills, 759
 — v. Moffatt, 865
 — v. Palmer, 874
 Jolliffe's Estate, *re*, 500, 513
 Jones, *ex parte*, 515
 Jones, *re*, 1, 2, 33, 785, 925, 941, 1005
 — Settled Estates, *re*, 514
 — v. Baxter, 469, 470, 558, 868
 — v. Bridgman, (Add.) 62
 — v. Caless, 33
 — v. Davis, 484
 — v. Frost, 823, 825
 — v. Hough, (Add.) 54, 557
 — v. Jones, 91
 — v. Lloyd, 620
 — v. Monte Video Gas Company, 283
 — v. Owen, 726
 — v. Quinn, 695, 701, 705
 — v. Victoria Graving Docks Company, 56, 95
 Jope v. Morshead, 606
 Joyce, *re*, 906, 908, 920
 Judd v. Green, 68
 Judkins, *re*, (Add.) 294
 Julia Fisher, The, 205, 710
 Julius v. Bishop of Oxford, 446
 Jupp v. Cooper, 349

K.

Kain v. Farrer, 283
 Kaye, *re*, 421
 Keane, *re*, 824, 825
 Keeler, *re*, 910, 912
 Kearsley and Clayton's Contract, *re*, 945
 Keavers v. Michell, 845
 Kelland v. Fulford, 601
 Kelly v. Byles, 63, 67
 Kendall v. Hamilton, 702
 Kenrick v. Wood, 574
 Kentish Town Estate, *re*, 785
 Kershaw, *re*, 901
 Kettlewell v. Barstow, 286, 288
 Kevan v. Crawford, 65
 Khedive, The, 66
 Kilmorey, Earl of, *re*, 794
 Kilner v. Bailey, 693
 Kimpton v. Willey, 726

King, *re*, 40, (Add.) 430
 King v. Corke, 698
 — v. Davenport, 290, 697
 — v. Hawkesworth, 208
 — v. Sandeman, 484
 Kingsman v. Kingsman, (Add.) 572, (Add.) 573
 Kingstone and Cardisley Railway Company, *re*, 190
 Kino v. Rudkin, 437, 702, 887
 Kirk v. The Queen, 679
 Kitching v. Kitching, 756
 Kit Hill Tunnel, *re*, (Add.) 970
 Kitto, *re*, (Add.) 34
 Knapman, *re*, (Add.) 34, (Add.) 232
 Knapping v. Tomlinson, 535
 Knatchbull v. Fowle, 324
 Knight v. Knight, 911
 Knowles, *re*, 901
 Knowles v. Rhyddfed Colliery Company, 600
 Krehl v. Burrell, 58, 437, 556, 557
 Kynaston v. MacKinder, 208

L.

Laing's Trusts, *re*, 779
 Laird v. Briggs, (Add.) 691, (Add.) 704
 Lamare v. Dixon, 834
 Lamb v. Whiteley, 295
 Laming v. Gee, 32
 Lamotte, *re*, 496, 906, 923
 Landon, *re*, 936
 Landore Siemens Steel Company, 868
 Lane v. Eve, 459
 — v. Newman, 447
 Langdale v. Briggs, 257
 Langdell v. Baker, 617
 Langhorne Railway Company, *re*, 185
 Langley, *ex parte*, 437
 Langmead v. Cockerton, 616
 Lapworth's Charity, *re*, 501, 503, 504, 514
 Large v. Large, 1003, 1006
 Larken, *re*, 902
 Lascelles v. Butt, 769, 879
 Laslett v. Cliffe, 397
 Latch v. Latch, 21, 568
 Latimer v. Aylesbury and Buckingham Railway Company, 435, 747
 Lauretta, The, 67
 Law, *re*, 786
 Law v. Garrett, 100, 747
 Lawes v. Carter, (Add.) 433
 Lawrence v. Fletcher, 824
 — v. Galsworthy, 904
 Lawrenceson v. Dublin, &c., Company, 1009
 Lawrie v. Lees, 839
 Lazarus, *re*, 941
 Lea, *re*, 912
 Lea v. Colyer, 710
 Leach v. Westall, 617
 Leadbeater v. Cross, 830
 Leader, The, 826
 Leake, *re*, 941

- Leathley v. McAndrew, 1004
 Lechmere v. Clamp, 551, 908, 924, 932
 Lee Conservative Board v. Button,
 (Add.) 232
 Leeming v. Murray (Lady), 192, 581
 Lees, *re*, 901, 903
 Lees v. Fisher, 397
 — v. Patterson, 708, 709
 Legard v. Hodges, 601
 Legg v. Mackrell, 924
 Legge, *re*, 796
 Leggott v. Barrett, 619
 Leigh, *re*, 277, 281, 515, 768, 771, 802
 Leigh's Estate, *re*, 283, 285
 Leigh v. Brooks, 768
 Lereculey v. Harrison, 717
 Leslie, *re*, 802, 901, 903
 Letchford, *re*, 429
 Levett, *re*, 938
 Lewes Trust, *re*, 660
 Lewis' case, 974
 Lewis, *re*, 793, 796, 818
 Lewis v. Hillman, 940
 — v. Nobbs, 572, 584
 Lewes, Earl of, v. Barnett, 366
 Liddiard, *re*, 922
 Liffin v. Pitcher, 854
 Lincoln Corporation, *ex parte*, 515
 Liscombe, *re*, (Add.) 92
 Lister's Hospital, *re*, 502
 Little, *re*, 925
 Little's case, 57
 Littlewood v. Collins, 24
 Litton v. Litton, 290, 458, 459, 465, 716
 Liverpool, &c., Company v. London,
 &c., Docks Company, 883
 — v. London
 Navigation Company, 768
 Liverpool Improvement Act, *re*, 512
 Lloyd, *re*, 87, 750, 933
 Lloyd v. Dimmack, 598
 — v. Jones, 596, 868, 889
 — v. Lewis, 89, 99, 468
 Lloyds v. Harper, 568
 Lloyd's Banking Company v. Ogle, 461
 Locke, *re*, 775
 Lodge v. Pritchard, 10
 Lomax's Arbitration, *re*, 92, 98
 London, Bishop of, *ex parte*, 512
 — Corporation of, *ex parte*, 673
 — Mayor of, v. Cox, 726, 727
 London v. Roffey, 558
 London and Birmingham and Bucking-
 hamshire Railway Company, *re*, 6
 — and Caledonian Marine Insur-
 ance Company, *re*, 986
 — and County Assurance Com-
 pany, *re*, 49
 — and County Banking Company
 v. Dover, 396
 — and North-Western Railway
 Company v. Lancashire and York-
 shire Railway Company, 432
 — and Provincial Bank v. Bogle,
 585
 London and Provincial Marine Insur-
 ance Company v. Davies, 276
 London and Southwark Insurance
 Corporation, *re*, 182
 — Bank of Mexico v. Hart, 306
 — Brighton and South Coast
 Railway Company, *re*, 514, 515
 — Chatham and Dover Railway
 Company, *re*, 513
 — Docks Company v. Metro-
 politan Railway Company, 712
 — Syndicate v. Lord, 897
 Londonderry, Marq. of, v. Rhoswydol
 Company, 591
 Longbourne v. Fisher, 85, 140, 591
 Long, *re*, 513
 Long v. Crossley, 592
 Longdendale Cotton Spinning Company,
re, 392, 486
 Longman v. East, 51, 89, 468, 768, 769,
 770, 772, 773
 Lord, *re*, 13, 621
 Lorenz, *re*, 901
 Lovesy v. Smith, (Add.) 113, (Add.) 477,
 (Add.) 572
 Lovett, *re*, 20
 Lowe v. Blakemore, 359
 — v. Lowe, 58, 59, 556
 Lowestoft, Yarmouth, &c., Company,
re, 665
 Lowry, *re*, 502, 514, 907
 Lowry's Will, *re*, 905
 Lows, *ex parte*, 62
 Lucas v. Dalziel, 422
 — v. Peacock, 824
 — v. South Kensington Hotel
 Company, 391
 Lunn's Charity, *re*, 916
 Lush's Estate, *re*, 907
 Luschner v. Comptoir D'Escompte de
 Paris, 730
 Lydall v. Martinson, 887
 Lymington Chapel, *re*, 501
 Lyne v. Lyne, 618
 Lyon v. Tweddle, 274, 275
 Lyon v. —, 728
 Lys v. Lys, 609

 M.
 Macallister v. Bishop of Rochester, 273
 Macann v. Borradaile, 573, 574
 Macdonald v. Carrington, 710
 Mackenzie v. Mackenzie, 915
 Mackintosh, *re*, 901
 Maclean, *re*, 941
 Machu v. O'Connor, 61
 McAndrew v. Barker, 59, 60, 444
 McArthur v. Dudgeon, 13
 McDonald v. Foster, 294
 McLay v. Sharpe, 707
 McLean and Co., *re*, (Add.) 979
 McMurray v. Spicer, 905, 907, 908
 McPhail, *ex parte*, 1011
 McStephens v. Carnegie, 1012
 McWade v. Broadhurst, 21
 M'Corquodale v. Bell, 279, 285
 M'Garel v. Moon, 275

- Mainwaring, *re*, 915
 Mais, *re*, 919
 Malcolm v. Hodgkinson, 206
 Mallack v. Galton, 399
 Mallin, *re*, 786
 Mammoth Copperopolis of Utah, *re*, (Add.) 984
 Manby v. Manby, 1006
 Manchester and Milford Railway Company, *re*, 747, 749, 750, (Add.) 191
 Manchester, Sheffield, &c., Company v. Brooks, 707
 Manisty v. Kenealey, 756
 Mann v. Perry, (Add.) 363
 Manning, *re*, 913, 919
 Mansel, *re*, 60, 61
 Mansfield v. Childerhouse, 275
 Mapleson v. Masini, 205
 Marcus v. General Steam Navigation Company, 55
 Margate Pier and Harbour Company v. Perry, 456, 700
 Mark, *re*, 514
 Markham, *re*, (Add.) 57
 Marmon's Trusts, *re*, 532
 Marner, *re*, 515, 939, 942
 Marriott, *re*, 922
 Marriott v. Marriott, 700
 Morris v. Ingram, 362, 364, 366
 Marsden v. Lancashire and Yorkshire Railway Company, (Add.) 208
 Marsh, *re*, 56
 Marsh v. Isaacs, 560
 ——— v. Mayor of Pontefract, 699
 Marshall, *ex parte*, 462
 ———, *re*, 793
 Marston v. Smith, 443
 Martano v. Mann, 572, 574, (Add.) 207
 Martin v. Butchard, 285
 ——— v. London, Chatham, and Dover Railway Company, 510
 Martinez, *re*, 921
 Masbach v. James Anderson and Co., 851
 Mason v. Brentini, (Add.), 220 (Add.) 221
 ——— v. Harris, 577
 Massam v. Thorley's Cattle Food Company, 435
 Massein, *re*, 938
 Massey v. Allen, 206
 Masters v. Pontypool Local Board, 710
 Mathews, *re*, 919
 Matthew v. Northern Assurance Company, 933
 Matthews, *re*, 913, 921, 925
 Matthews v. Antrobus, 270, 395
 ——— v. Whittle, 585, 695
 Mathias v. Mathias, 1006
 Maughan, *re*, 979
 Maynard, *re*, 269, 915, 921, 925
 Meacham v. Cooper, 12
 Measures v. Thomas, 718
 Meek v. Ward, 550
 Meikle, *re*, 859, 864
 Melhuish v. Milton, 17, 731
 Mellin v. Monaco, 51, 89, 463, 768
 Mellor's Policy, *re*, 537
 Mellor v. Sidebottom, 6, 465, 466
 Menhinick v. Turner, 705
 Menier v. Hooper's Telegraph Works, 589
 Mennard v. Welford, 919
 Menton v. Metcalf, 697
 Mercantile Marine Insurance Company v. Shoesmith, 282
 Mercantile River Plate v. Isaac, 592
 Mercer and Moore, *re*, 392, 761
 Mercer v. Lawrence, 343
 Mercers Company, *ex parte*, 168, 208, 511, 676, 929
 Meroier v. Cotton, 275
 Merry v. Nickalls, 66, 67
 Mersey Dock Board, *re*, 307
 Mersey Dock Commissioners v. Jones, 831
 Metcalfe, *re*, 27
 Metcalfe's case, 362
 Metropolitan Asylum District Board v. Hill, (Add.) 69, (Add.) 77
 Metropolitan Bank, *re*, 985, 986
 Metropolitan Bank v. Heiron, (Add.) 541, 557
 Metropolitan Bank and Jones, *re*, 945
 Metropolitan Board of Works v. New River Company, 55, 830, 833
 Metropolitan Company and Maire, *re*, 513
 Metropolitan Inner Circle Company v. Metropolitan Railway, 557, 880
 Metropolitan Railway Company v. Defries, 721
 Mette's Estate, *re*, 506
 Metzler v. Wood, 887
 Meyrick v. James, 331
 ——— v. Laws, 673
 Micklethwaite v. Fletcher, 363, 367
 Middlesbrough Company, *re*, 952
 Middleton v. Chichester, 361
 ——— v. Pollock, 600
 Midland Waggon Company v. Potteries Railway Company, (Add.) 191
 Mildmay v. Lord Methuen, 6
 ——— v. Quicke, 359, 616, 805, 826, 852, 853
 Milssich v. Lloyds, 560
 Military and General Tailoring Company, *re*, 957
 Millard v. Burroughes, (Add.) 52
 Miller v. Marriott, 617
 Millington v. Loring, (Add.) 709
 Mills v. Jennings, 583, 762, 763
 Milnes, *re*, 499, 503
 Milward, *re*, 786
 Minchin, *re*, 912
 Minet v. Morgan, 286
 Minors v. Battison, 79, 896
 Minton v. Metcalfe, 454
 Mirehouse v. Barnett, 878, 879, 885
 Mitchell, *re*, 860
 Mitchell's case, 974
 Mitchell's Trust, *re*, 60
 Mitchell v. Cobb, 934
 ——— v. Henry, 858, 860

Mockett, *re*, 901, 903
 Moffatt v. Cornelius, 91, 101
 Moggridge v. Hall, 306
 Molesworth v. Snead, 806
 Molloy v. Kilby, 273
 Molyneux, *re*, 931
 Money, *re*, 938
 Montreal, Bank of, v. Cameron, 460
 Moody v. Steward, 874
 Moor v. Robinson, 573
 Moore, *re*, 41
 Moore v. Dixon, 899
 Moravian Society, *re*, 919
 Mordue v. Palmer, 95
 — v. Palmer, 95
 Morgan, *re*, 780, 782, 801
 Morgan Jones, *re*, 198
 Morgan's Patent, *re*, 492, 623
 Morgan v. Elford, 66, 67
 — v. Swansea Sanitary Authority,
 910
 Morris, *re*, 96, 500, 513
 Morris v. Llanelly Railway and Dock
 Company, 6
 — v. Smith, 366
 Mortimer v. Picton, 801
 Mortimore v. Cragg, 348
 Morton's Estate, 535
 Morton v. Miller, 454, 549
 Mess v. Dunlop, 536
 Mostyn v. W. Mostyn Coal and Iron Com-
 pany, 17, 113, 285, 300, 707
 Motion v. King, (Add.) 600
 Mount, *re*, 916, 926
 Mountain v. Young, 933
 Mozley v. Cowie, 698, 699
 Mudge v. Adams, (Add.) 707, (Add.) 709
 Muggeridge, *re*, 901, 902
 Muirhead v. Direct United States Cable
 Company, 460
 Mulcaster, *re*, 279
 Mulkern v. Lord, 100, 101
 Mullins v. Howell, 193, 552, 774
 Mundel, *re*, 905, 909, 913, 921
 Munro v. Rendall, 773
 Murr v. Cooke, 56
 Murray, *re*, 901
 Mutlow's Estate, *re*, 510
 Muttlebury v. Haywood, 817
 Mycock v. Yorkshire Banking Com-
 pany, 463
 Myers v. Defries, 208, 511, 552, 561, 676,
 929, 940

N.

Naersnoss Company v. Royal Mail
 Company, (Add.) 68
 Nagle, *re*, 194
 Nagle-Gilman v. Christopher, 725, 886
 Nash v. Combs, 502
 — v. Dickenson, 348
 Nathan v. Bachelor, 720
 National Building Society, *re*, 990
 — Funds Assurance Company,
re, 59, 61

National Provincial Bank v. Bradley
 Bridge Company, 719
 — Provincial Bank v. Thomas,
 730
 — Provincial, &c., Company v.
 Prudential Company, 437
 Naylor v. Blount, 21
 — v. Farrer, 710
 Neath and Brecon Railway Company,
ex parte, 510
 Neera, The, (Add.) 220
 Neligan v. Roche, 897
 Nelson, *ex parte*, 354
 Nelson v. Booth, 11
 — v. Duncombe, 7
 New-bigin-by-the-Sea Gas Company v.
 Armstrong, 299, 548, 816
 New British Mutual Investment Com-
 pany v. Peed, 281, 286, 758
 Newbury v. Martin, 399
 Newby v. Sharpe, 698, 699
 Newcomen v. Coulson, 271
 Newill v. Vanpraagh, 368
 New Gas Company, *re*, 55, 63
 New Hamburg and Brazilian Railway
 Company, *re*, 441
 Newington Local Board v. Eldridge, 287
 Newland, *ex parte*, 822
 Newman, *re*, 801, 802
 New River Company v. Midland Rail-
 way Company, 59
 New Westminster Brewery Company v.
 Hannah, 324, 592
 Nicholas v. Dracachis, 541, 731
 Nicholl v. Jones, 191, 284, 285
 Nicholson v. Jackson, 710
 — v. Jeyes, 198
 Nicoll's Estates, *re*, 505, 596
 Nives v. Nives, 841
 Noad v. Murrow, 698, 699
 Nobel's Explosive Company v. Jones,
 593, 699, 714
 Nock v. Nock, 511
 Noel v. Noel, 83, 204, 584
 Norfolk, Duke of, v. Arbuthnot, (Add.)
 211
 Normanton Iron and Steel Company,
re, (Add.) 60
 Norris v. Beazley, 593, 717
 — v. Timmins, 618
 Northampton Coal Company v. Midland
 Waggon Company, 56, 205, 207
 North Central Waggon Company v.
 North Wales Waggon Company, 460
 Northern Counties of England, &c.,
 Company, *re*, 969
 Northey, *re*, 785
 Northfleet Brick Company, *re*, 957
 Northrop, *re*, 922
 North Wheal Exmouth Mining Com-
 pany, *re*, 13, 316
 Northumberland, Duke of, v. Todd, 326
 Northwick, *ex parte*, 501
 Norton v. Gover, 434, 747, 749
 — v. London and North-Western
 Railway Company, 57, 61
 — v. Russell, 623

Norwich Provident Company, *re*, 967,
971
Noyes, *re*, 793
Noyes v. Crawley, 721
Nurse v. Durnford, 816

O.

Oakwell Collieries, *re*, 61
Oastler v. Henderson, 557
O'Donnell, *re*, 911
Oglesby's Arbitration, *re*, 92
Oliver v. Lowther, 853
Omichund v. Barker, 321
O'Neile v. Clason, 1008
Oriental Bank Company v. Fitz-Gerald,
462
Original Hartlepool Collieries Company
v. Gibb, 706, 707, 709
Orr v. Diaper, 273
Orrell Colliery, &c., Company, *re*, 968,
987
Orr-Ewing, *re*, 858, 861, 862, 864
Orr-Ewing and Co. v. Johnston and Co.,
850
—— v. Registrar of Trade Marks,
858, 863
Ortner v. Fitzgibbon, 460
Osborn, *re*, 905, 908
Osborn v. Osborn, 617
Osborne, *re*, 503, 516, 673, 945-6
Osborne to Rowlett, *re*, 843
Osborne v. Homburg, 873
Otte v. Castle, 938
Oulton v. Radcliffe, 447
Outram v. Outram, 887
Owen, *re*, 124, 920, 923
—— v. Henshaw, 825, 865
—— v. Homan, 746
—— v. Pritchard, 364
—— v. Wynn, 286, 758
—— v. Emmens, 329
—— v. Woosman, 874
Oxenden, *re*, 496
Oxenham, 925
Oxford's case, Earl of, 845

P.

Packer, *re*, 790
Packman, *re*, 945, 946
Paddon's Trusts, *re*, 500, 514
Padley v. Camphausen, 1010
Padwick v. Scott, 707, 708, 711, 716, 719
Palin v. Brooks, 458
Palk v. Clinton, 761
Palmer, *re*, 194, 936
Palmer v. Fitz-Wygram, 560
—— v. Moore, 305
Pannell, *ex parte*; *re* England, 392
Pannell v. Nunn, (Add.) 54, (Add.) 65
Papayanni v. Coutpas, 462
Paraire v. Loibl, 703
Parby, *re*, 928
Pares, *re*, 607, 744
Paris Skating Rink Company, *re*, 17, 532
Parker, *re*, 919, 926

Parker, *re*; Cash v. Parker, 602, 747
Parker's Estate, *re*, 6
Parker v. Gerard, 605, 606
—— v. Parker, 913
—— v. Sidney, (Add.) 397
Parkinson v. Hanbury, 580
Parlement Belge, The, 590
Parpaite Freres v. Dickinson, 1001
Parry, *re*, 796, 942
Parsons v. Harris, 455, 465
Partington, *re*, 802
Pascoe v. Richards, (Add) 290, (Add.)
465
Pashler v. Vincent, 364
Patch v. Ward, 399, 765
Patching v. Barnett, 912
Patent Ventilating Company, *re*, 176
Patey v. Flint, 394
Patterson, *re*, 515, 516
Patterson v. Patterson, 925
Paxton v. Bell, 207
Payne, *ex parte*, 62
Peacock, *re*, 786, 801, 928
Peacock v. Harper, 329
Pearce, *re*, (Add.) 35
Pearce v. Morris, 765
—— v. Spickett, 395
Pearson, *re*, 923
Pearson v. Lane, 718
Peart, *re*, 939
Pease v. Fletcher, 746
Peek v. Trinsmaran Iron Company, 621
Peeke, *re*, 792
Pellas v. Neptune Marine Insurance
Company, 707
Pelling v. Goddard, 938, 939
Pemberton v. Barnes, 609
Pender v. Lushington, 578
Penn v. Jack, 323
—— v. Lord Baltimore, 834
Pennington v. Alvin, 574
—— v. Dalbiac, 610
People's Garden Company, *re*, 25, 850
Peppitt's Estate, *re*, 22, 572
Percy, &c., Company, *re*, 205
Perkes, *re*, 502
Perkins Beach Lead Mining Company,
re, 850
Perkins v. Dangerfield, 561, 892
—— v. Slater, 324
Petar v. Lailey, (Add.) 886
Peters v. Grote, 531
Peyton, *re*, 901, 915
Phené's Trusts, *re*, 660
Pheysey v. Pheysey, 58
Phillips, *re*, 925
Phillips and Gill, *re*, 546
—— v. Harris, 461
—— v. Phillips, 67, 281, 282, 694,
757, 758
—— v. South-Western Railway Com-
pany, 556
Phillipson v. Gibbon, 838, 839
Phoenix Bessemer Steel Company, *re*,
64
Phosphate Sewage Company v. Hart-
mont, 68, 331, 362

Picard v. Hine, 585
 Pickford v. Brown, 33
 Picknance, *re*, 926
 Pickup v. Thames Insurance Company, 556
 Piercey v. Young, (Add.) 91, (Add.) 100, 884
 Pigott v. Pigott, 736
 Pike v. Fitzgibbon, 465, 466, 585
 — v. Frank Keene and Byne, 280, 588
 Pileher, *re*, 83, 756, 856, 1002
 Pileher v. Arden, *re* Brook, 824, 825, 826
 Pilley v. Baylis, 879, 885
 Pinkerton v. Easton, 323
 Pinney v. Hunt, 17, 866
 Piper v. Piper, 340
 Pirie v. Iron, 308
 Pitt v. Jones, 608, 609
 Pitton v. Chatterburg, 275, 282
 Planet Building Society v. Part, 704
 Platt v. Platt, 607
 Playford v. Playford, 761
 Plimpton v. Spiller, 67, 68
 Plowden v. Campbell, 204
 Plum v. Normanton Iron Company, 282, 884
 Pocock v. Reddington, 899
 Polini v. Gray, 38, 66, 68, 205, 730, 731, 748
 Pomerania, The, 270
 Pond v. Dimes, 307
 Pontifex v. Severn, 51, 89, 468, 768
 Pooley v. Bosanquet, 529
 — v. Driver, 830, 887
 Poplar and Blackwall Free School, *re*, 153, 156, 502, 933, 936
 Popple and Barratt, *re*, 945
 Porter, *re*, 919, 922
 Porter v. West, (Add.) 825
 — v. Lopes, 609, 747
 — v. West, 826
 Post v. Marsh, (Add.) 834, (Add.) 836
 Potter, *re*, 430
 Potter v. Cotton, 54, 58, 59, (Add.) 68, 557
 — v. Jackson, 193, 622
 Potteries, &c., Company v. Minor, 188
 Potts, *re*, 794
 Poulett, Earl, v. Hood, 901
 Powell, *re*, 907, 926
 — v. Jewesbury, 720, 721
 — v. Matthews, 904, 907
 — v. Merrett, 536
 — v. Williams, 878, 879, 884, 885, 886, 890
 Power's Settlement, *re*, 514
 Preston v. Lamont, 1004, 1010, 1012
 Prestwick v. Poley, 192, 193
 Price, *re*, 920
 Price v. Bury, 391
 — v. Plummer, 445
 — v. Price, 61, 283, 735, 898, 900
 Primrose, *re*, 930
 Pring, *re*, 930
 Pritchard v. Roberts, 823, 824
 Robert's Purchase, *re*, 907

Protector Building Company v. Whitlam, 361
 Pryce, *re*, 513
 Pryce v. Monmouthshire Railway Company, 77, 79
 Pryse's Estates, *re*, 194
 Pulbrook, *re*, (Add.) 247
 Pullen v. Snelus, 702, 705
 Purnell v. Great Western Railway Company, 58, 65, 552, 560, 561
 — v. Hingston, 583
 Purvis v. Abraham, 925
 Puttrel, *re*, 939, 940
 Puxley, *re*, 788
 Pye, *re*, 925

Q.

Quinlan, *re*, 912

R.

Radcliffe, *re*, 747
 Radnorshire, the, (Add.) 277
 Raeburn v. Andrews, 204
 Rafael v. Ongley, 1013
 Raines v. Raines, (Add.) 26
 Ralph v. Carrick, 62
 Randall, *re*, 915
 — v. Campbell, 1010
 Randell v. Thompson, 91, 100, 101
 Rankin v. Longbourne, 208
 Raphael, *re*, 920
 Rathbone, *re*, 909, 913
 Rawlins, *re*, 784
 Ray v. Barker, 461
 Readman v. Broers, 319
 Real and Personal Advance Company v. McCarthy and Smith, 706, 747, 759
 Reddish, *ex parte*, 62
 Redhead's Trusts, *re*, 500
 Redmayne v. Vaughan, 696, 757, 884
 Redondo v. Chaytor, 205
 Reece, *re*, 32
 Rees, *re*, (Add.) 24, (Add.) 409, (Add.) 480
 Rees v. Metropolitan Board, 398, 506
 — v. Williams, 820
 Reeve's Trusts, *re*, 37
 Reeves v. Neville, 920
 Reg. v. Bishop of Oxford, 55
 — v. Scott, 1005
 Regent United Stores Association, *re*, 955
 Reiner v. Salisbury, 678
 Relph v. Horton, 1, 397
 Rennie v. Beresford, 693
 Renshaw, *re*, 619, 925
 Renshaw v. Renshaw, 697, (Add.) 471, (Add.) 691
 Republic of Bolivia v. National Bolivian Navigation Company, 830
 Republic of Costa Rica v. Erlanger, 204, 207, 276, 591, 828, 849
 — v. Strousberg, 282, 287

- Republic of Liberia v. Roye, 281
 Republic of Peru v. Weguelin, 66, 849
 Reuss-Kostritz, Prince of, *re*, 328
 Reveley, *re*, 783
 Reynault, *re*, 922
 Reynolds, *re*, 502, 802
 Rhodes v. Airedale Commissioners, 95
 ——— v. Barrett, 24
 Rica Gold Washing Company, *re*, 954
 Richards, *re*, 925
 Richards and Co. *re*, *ex parte* Crawshaw,
 983
 Richardson, *re*, (Add.) 36
 Richardson v. Elmit, 357
 ——— v. Kitchen, 363
 ——— v. Millett, 573
 Rigby v. Connell, 590
 Rimmington v. Hartley, 607
 Rio Grande de Sul Steamship Company,
re, 54
 Rives v. Rives, 914
 Roberts v. Buée, 822
 Roberts, *re*, (Add.) 31, 260, 261, 933, 941
 Roberts v. Ball, 940, 942
 ——— v. Evans, 573, 596
 ——— v. Guest, 462
 Robertson v. Howard, 694, 720
 ——— v. Norris, 10
 Robin, *re*, 503
 Robinson, *re*, 24, 860
 Robinson v. Chadwick, 196, 459
 ——— v. Davies, 321
 ——— v. Robinson, 771
 Robson v. Lees, 15
 Rochdale Property, &c., Company, *re*,
 963
 Rodney v. Rodney, 735
 Roe v. Davies, 354, 697, 699
 ——— v. Hammond, 348
 Roebuck v. Chadebet, 605
 Roffey v. Miller, 600
 Rogers v. Horn, 562
 ——— v. Jones, 17
 ——— v. London, Chatham and Dover
 Railway Company, 727
 ——— v. Manby, 323
 Rolfe v. Maclaren, 5, 458, 465, 467, 713
 Rolle's Charity, *re*, 924
 Rooke v. Lord Kensington, 257
 Rose v. Evans, 863
 ——— v. Gardden Lodge Company, 850
 Rosier, *re*, 941
 Ross, *re*, 933
 Rossiter v. Miller, 702
 Rotheram, *re*, 864
 Rotherham v. Priest, 460
 Boughton v. Gibson, 609
 Roundell v. Curren, 601
 Roupell v. Parsons, 454, 549
 Bourke v. White Moss Colliery Com-
 pany, 68
 Rousillon v. Ronsillon, 489
 Rowe v. Gray, 609
 Rowlands v. Evans, 622
 Rowley v. Adams, 904, 910, 924
 Rowsell v. Morris, 20
 Rudd v. Rowe, 846
 Ruel v. Tatnall, (Add.) 470
 Rumsey v. Reed, 466
 Runnacles v. Mesquita, 463
 Rush, *re*, 362
 Rushworth v. Walden, 554
 Russell, *ex parte*, 915, 924
 Russell, *re*, 906, 907, 925
 Russell, &c., Companies Arbitration,
re, 93
 Russell v. Russell, 100, 446, 619
 Rustomjee v. The Queen, 678
 Ruston v. Tobin, 55, 593, 878, 879, 885
 Rutter v. Chapman, 45
 ——— v. Tregent, 465, 705
 Ryan, *re*, 363, 915

 S.
 Saffery, *ex parte*, 57, 60, 61
 Saint Martin's, Rector of, *ex parte*, 500
 St. Nazaire Land Company, *re*, 410,
 492, 774
 St. Olaf, The, 464
 Saint Pancras Burial Ground, 508
 Salisbury, Marquis of, *re*, 944
 Salt v. Cooper, (Add.) 353, 747, 748,
 (Add.) 752
 Saltash, Mayor of, v. Goodman, (Add.)
 67
 Samuel v. Samuel, 20
 Sanders v. Homer, 914
 Saner v. Bilton, 221
 Saner v. Deavin, 883
 Sansom v. Sansom, 355
 Sargeant v. Read, 434, 435, 621, 748, 749
 Sarpedon, the, 717
 Saumarez, *re*, 925
 Saunders v. Jones, 274, 275
 Saunderson, *re*, 32
 Savage, *re*, 675, 677
 Savill v. Brown, 275
 Sawston, Rector of, *ex parte*, 514
 Saxby v. Easterbrook, 433, 892
 ——— v. Gloucester Waggon Company,
 769
 Schibsy v. The The Westenholtz, 489
 Schneider v. Batt, (Add.) 719
 Schofield, *re*, 906
 Schofield v. Barlow, (Add.) 62
 Schofield v. Lockwood, 824
 Schomberg v. Zoebelli, 693
 Scott v. Cumberland, 33
 ——— v. Heisch, 800
 ——— v. Miller, 278
 ——— v. Royal Wax Candle Company,
 451, 1010
 ——— v. Turner, (Add.) 62
 Scully v. Lord Dundonald, 193
 Scutt v. Freeman, 468
 Seaham, The, 866
 Seaman, *ex parte*, 828
 ——— *re*, Wilson v. Hood, 825
 Secretary for War v. Chubb, 435
 Seear v. Lawson, 599, (Add.) 600, 688
 Senior v. Hereford, 604
 Sexton Barus Estate, *re*, 798, 802
 Shakespeare Walk School, *re*, 513

- Shardlow v. Cotterill, (Add.) 721
 Sharp, *re*, 866
 Sharp v. Pickett, (Add.) 619
 Sharpe, *re*, 941
 Sharpe, Stewart, and Co., *re*, 178
 Sharpe v. Lush, 26, 34, 135, 136
 Sharpley, *re*, 925
 Shaw, *re*, 901
 Shaw v. Brown (Add.) 868
 — v. Hope, 559
 — v. Hudson, (Add.) 851
 — v. Neale, 822
 Sheehan v. Great Eastern Railway Company, (Add.) 567, (Add.) 593, (Add.) 623
 Shelford v. South and East Coast Railway Company, 460
 Shelmerdine, *re*, 919
 Shelton, 535
 Shephard, *re*, 780, 803
 Shepherd v. Beane, 549
 — v. Churchill, 917, 932
 Sheppard, *re*, 921, 924
 Sherard, *re*, 931
 Sheward v. Lord Lonsdale, 275
 Shipperdson, *re*, 922
 Shippey v. Grey, 357, 826
 Shipton-under Wyche, Rector of, *ex parte*, 514
 Shipway v. Ball, (Add.) 535
 Shoetensack v. Price and Co., 61
 Shore v. Shore, 898
 Siekles v. Morris, 63
 Siddons v. Lawrence, 208
 Silber Light Company v. Silber, 577, 578
 Sillar, *re*, 937
 Simmons v. Storer, (Add.) 240
 Simpson, Davies, and Sons, *re*, 862, 863
 Simpson v. Denny, 568, 583, 606
 — v. Ritchie, 617
 Simson, *re*, 901
 Singer Manufacturing Company v. Loog, 624, 885
 — v. Wilson, 474
 Singleton v. Hopkinson, 618
 — v. Tomlinson, 34, 36
 Sir Charles Napier, The, (Add.) 722
 Sir John Moore Gold Mining Company, *re*, 985
 Sir Robert Peel's School, 153
 Skitter, *re*, 905, 908, 912
 Skynner v. Pelichet, 916
 Slack, *re*, 797
 — v. Midland Railway Company, 839, (Add.) 225, (Add.) 438
 Slade v. Tucker, 278
 Slowman v. Government of New Zealand, 1012
 Sloper, *re*, 925
 Smirthwaite, *re*, 920, 925
 Smith, *ex parte*, 718
 Smith, *re*, 293, 294, 366, 458, 788, 800, 917, 922, 942, 1010
 Smith, *re*, Hutchinson v. Ward, 8, 880
 Smith v. Anderson, 932
 — v. Boucher, 908, 932
 — v. Cowell, (Add.) 353, (Add.) 440
 — v. Dale, (Add.) 816
 — v. Day, 433
 — v. De Berg, 278
 — v. Dobbin, 86, 451
 — v. Dynevor, Dyffryn, &c., Collieries Company, 983
 Smith v. Grinelle, 61
 — v. Leigh, 844
 — v. Morgan, (Add.) 28
 — v. Parkside Mining Company, (Add.) 98
 — v. Richardson, 700
 — v. Smith, 908, 912
 — v. White, (Add.) 68
 — v. Wilson, 1001
 — v. Winter, 824
 Smyth, *re*, 925
 Sneesby v. Lancashire and Yorkshire Railway Company, 62
 Snell v. Hyatt, 600
 Solicitor, *re*, 363, 549, 850, 812
 Solley v. Wood, 815
 South-Eastern Railway Company v. Railway Commissioners, 191
 South Kensington Stores, *re*, 961
 South of France Pottery Works Company, *re*, 25, 850
 Southwark and Vauxhall Water Company v. Quick, 285
 Southwell v. Bowditch, 66
 Southwold Railway Company's Bill, *re*, 500, 651
 Sowry, *re*, 501
 Sparks, *re*, 930
 Sparrow, *re*, 919, 923
 Spawforth, *re*, 915
 Speer's Trusts, *re*, 501, 802
 Sperling v. Rochfort, 536
 Spike v. Harding, 112
 Spiller, *re*, 903
 Spiller v. Paris Skating Rink Company, 308
 Spratt's Patent v. Ward, 624, 885
 Springall & Goldsack's Contract, *re*, 805, 945, 946
 Sprunt v. Pugh, 354
 Spurr v. Hall, 703, 705
 Spurstowe's Charity, *re*, 502
 Spurway's Settled Estates, 795
 Stace v. Gage, 568, 794
 Stafford and Uttoxeter Railway Company, *re*, 190
 — v. Coxon, 836
 Stahlschmidt v. Walford, 99, 271
 Stainbank v. Beckett, (Add.) 63
 Stainton v. Carron Company, 192
 Standard Discount Company v. Barten, 866
 — v. La Grange, 58
 Standering v. Hall, 503, 535, 616
 Stanhope Silkstone Collieries Company, *re*, 357

- Stansfield v. Hobson, 763
 Stapleton, *re*, 553
 Stead, *re*, 508
 Stebbing v. Atlee, 12, 13, 14
 Steel v. Dixon, 711, 718
 Steele v. Hutchings, (Add.) 103
 Stephens, *ex parte*, 860, 863
 Sterry, *re*, 508
 Stevens v. Midhants Railway Company, 190
 Stewart, *re*, 917
 Stewart and Bros., *re*, 955
 Stewart v. Bank of England, 1010, 1013
 ——— v. Gladstone, 308, 619
 Stirling v. Du Barry, 856
 Stirling-Maxwell v. Cartwright, 20
 Stock's Estate, *re*, 502
 Stock v. Hooper's Telegraph Works, 68
 Stocksbridge, *re*, 663
 Stockton Iron Furnace, *re*, 57, 58, 60
 Stokes, *re*, 922
 ——— v. Grant, 705
 Stokes v. Kromshroder, (Add.) 62
 Stone, *re*, 901
 Stone v. Bennett, 596
 ——— v. Stone, 914
 Stooke v. Taylor, (Add.) 209
 Storer v. Simmons, 331
 Storey v. Waddell, 834, 866, 867
 Storforth Lane Colliery Company, *re*, 958
 Stow v. Corporation of Maidstone, 207, 208
 Straus v. Francis, 192
 Street v. Gover, 707, 715
 Stralley v. Pearson, 433, 730, 731, (Add.) 266
 Strickland v. Strickland, 597
 Strutt, *re*, 794, 795
 Stubbs's Estate, *re*, 25, 867, 868
 Stubbs v. Boyle, 773
 Sturdy, *re*, 811
 Sturla v. Freccia, 55, 204, 207
 Sugden v. Lord St. Leonards, 65
 Sugg v. Silver, 878, 879, 888
 Sullivan v. Rivington, 772
 Sultan of Turkey v. Union Bank of London, 413, 734
 Summers, *re*, 31
 Sutcliffe v. James, 700, 757, 759
 Sutton, *re*, 933, 941
 Swaine v. Denby, 606
 Swan, *re*, 933, 941
 Swann v. Swann, (Add.) 573, 815, 846, 1002
 Swansea, Mayor of, v. Quirk, 279
 Swansea Shipping Company v. Duncan, 717, 1010
 Swift v. Nunn, 556
 Swindell v. Birmingham Syndicate, 60, 878, 879, 885
 Swinfen v. Swinfen, 192
 Syers v. Syers, 619, 620
 Sykes v. Firth, 885
 ——— v. Haig, (Add.) 323
 ——— v. Howarth, 624
 ——— v. Schofield, 294, 608
- Symes v. Hughes, 895
 ——— v. Pugh, 901
 Symonds v. Jenkins, 465
- T.
- T——, *re*, 901
 Taitt, *re*, 906
 Talbot v. Talbot, 575
 Talbot, Earl v. Hope—Scott, 432
 Tamplin v. James, 836
 Tapp v. Jones, 357
 Tarbutt, *re*, 792, 795, 796
 Tardrew v. Howell, 824
 Tasmanian Railway Company v. Clark, 884
 Tatham, *re*, 922
 Tawell v. Slate Company, 756, 1012
 Taylor, *ex parte*, 788
 ———, *re*, 424, 501, (Add.) 661, 792, 795, 801, 901, 913
 Taylor v. Batten, 283
 ——— v. Chichester and Midhurst Railway Company, 505
 ——— v. Dowlen, 54, 899
 ——— v. Duckett, 693, 806
 ——— v. Eckersley, 747, 748, 750
 ——— v. Fraser, 204
 ——— v. Grange, 605
 ——— v. Jones, 855
 ——— v. Keily, 329
 ——— v. Nicholls, 728
 ——— v. Taylor, 788
 Taylor's case, 59, 61
 Tebb v. Lewis, 718
 Telegraph Construction Company, *re*, 178
 Tempest, *re*, 922
 Temple Church Lands, *re*, 513
 Templar, *re*, 908
 Tenant v. Ellis, (Add.) 208
 ——— v. Frenchard, 392
 Terrell v. Matthews, 896
 Thackeray v. Parker, 618
 Thames Ferry Company, *re*, 867, 963
 Tharp, *re*, 744
 Theodor Korner, The, 285
 Thom v. Smith, 587
 Thomas v. Elsom, 420
 ——— v. Parry, 52
 ——— v. The Queen, 678, 681
 ——— v. Walker, 924
 ——— v. Williams, 432, (Add.) 433
 Thompson, *ex parte*, 823
 ———, *re*, 782, 786, 803, 901
 Thompson v. Dunn, (Add.) 275
 ——— v. Marshall, 461
 Thorley's Cattle Food Company v. Massam, 433
 Thorn v. Smith, 1007
 Thorne, *re*, 794
 Thorne v. Seel, 461
 Thornhill v. Millbank, 802
 Thornton, *re*, 923, 942
 Thorp, *re*, 795
 Thorp v. Houldsworth, 689, 701

Throckmorton v. Crowley, 822
 Tibbett, *re*, 794
 Tichborne v. Tichborne, 570
 Tildesley v. Harper, 55, 466, 592, 593, 691, 702
 Tilney v. Stansfield, 363
 Timms, *re*, 867
 Tipton Green Company v. Tipton Moat Company, 7
 Tobin v. The Queen, 678, 681
 Tolson v. Sheard, 785
 Tomline v. The Queen, 281, 681
 Tonkinson v. Cartledge, 437
 Toomer v. London, Chatham, and Dover Railway Company, 191
 Topham v. Burgoynes, 535
 Tottenham v. Barry, 1011
 Tournay, *ex parte*, 938
 Tozer v. Walford, 734
 Tracy v. Open Stock Exchange, 721
 Trail v. Jackson, 60
 Travis v. Illingworth, 919
 Trelevan v. Bray, 708, 711, 716, 720
 Trethewy v. Helyar, 33
 Trick, *re*, 941
 Trotter v. Maclean, (Add.) 208
 Troughton v. Binks, 762
 Trowell v. Shenton, 59, 723
 Trower, *re*, 940
 Tuck, *re*, 901, 902
 Tufnell, *re*, 678, 682
 Tulloch v. Tulloch, 736
 Tunstall, *re*, 800, 922
 Turnbull v. Janson, 52
 Turner v. Hednesford Gas Company, 708
 — v. Heyland, 208
 — v. Morgan, 605
 — v. Rennoldson, 38
 — v. Sanson, 722
 Turquand v. Pearson, 592, 593, 695, 699, 816
 — v. Wilson, 840, 841
 Tweedy, *re*, 925
 Twycross v. Grant, 595
 Twynam v. Porter, 823, 825
 Tyler, *re*, 920
 Tynn v. Billingsley, 331

U.

Underwood, *re*, 904, 909
 Underwood v. Secretary for India, 283
 Ungley v. Ungley, 63
 Union Bank of Kingston-upon-Hull, *re*, 985
 Union Bank of London v. Ingram, 752, 765
 — v. Manby, 282
 United States of America v. Wagner, 581
 Upperton v. Nicholson, 839, 843
 Uruguay, &c., Railway Company, *re*, 955
 Usill v. Brearley, 68

V.

Val de Travers Asphalte Company v. London Tramways Company, 592, 593
 Vale v. Oppert, 2, 3, 66, 68
 Vallance v. Midland Land and Investment Corporation, 594
 Vane v. Vane, 335, 531
 Vant, *re*, 818, 820
 Vavasaur v. Krupp, 591, 710, (Add.) 270
 Veal v. Veal, 661
 Veale v. Warner, 97
 Velati v. Braham, 731
 Venables v. Schweitzer, 12
 Venner, *re*, 789
 Verbeek v. Hunnex, 873, (Add.) 255
 Verminek v. Edwards, (Add.), 286
 Vernon v. St. James's Vestry, 323
 Verrall v. Cathcart, 610
 Vickers, *re*, 919, 923
 Vickers v. Bell, 20
 Vidler v. Parrott, 804
 Vincent, *re*, 21
 Viney, *re*, 824
 — *ex parte*, 60
 Vivar, The, 1010
 Vyse v. Foster, 620

W.

Waddell's Contract, *re*, 945, 946
 Waddell v. Blockey, 57, 61, 68, 560
 — v. Tollman, 392
 Waddilove v. Taylor, 817, 853
 Wade, *re*, 789
 Wagstaffe v. Anderson, 282, 283
 Wainwright, *re*, 744
 Wainwright v. Bland, 308
 Wake v. Wake, 910, 911
 Wakelee v. Davis, 721
 Wall v. Rogers, 191, 192
 Wallingford v. Mutual Society, 461, 462, 856
 Walker, *re*, 905, 908, 923, 940
 Walker v. Banagher Distillery Company, 25, 850
 — v. Blackmore, 600
 — v. Budden, 56
 — v. Easterley, 204
 — v. Hicks, 1001
 — v. Robinson, 293, 295
 — v. Seligmann, 480
 Wallace, *re*, 783
 Wallace v. Greenwood, (Add.) 607
 Wallis v. Hepburn, 290, 697
 — v. Litchfield, 773
 Walsh v. Wason, 851
 Walters v. Woodbridge, 900
 Walton v. Universal Salvage Company, 1009
 Ward, *re*, 901
 Ward v. Eyre, 818, 820
 — v. Hall, 768
 — v. Pilley, (Add.) 90, 768, 769

- Ward v. Sinfield, (Add.) 322
 — v. Swift, 816
 — v. Wyld, 872
 Waring, *re*, 935, 941
 Warne v. Dell, 17
 Warner v. Baynes, 605
 — v. Mosses, (Add.) 304, (Add.) 305, (Add.) 324
 — v. Murdock, 880, 890
 — v. Twining, 711
 Warwick, &c., Navigation v. Birmingham Canal Navigation, 194
 Washoe v. Ferguson, 205
 Watkin, *ex parte*, 816
 Watson v. Cave, (Add.) 57
 — v. Coleman, 846
 — v. Great Western Railway Company, (Add.) 232
 — v. Rodwell, 45, 695, 699
 Watson v. Row, 816
 Watt v. Barnett, 403, 1013
 — v. Leach, 576
 Watts, *re*, 919
 Watts v. Watts, 64
 Wayn v. Lewis, 396
 Waynes' Merthyr Company v. Powell's Dyffryn Steam Company, 286
 Way's Settlement, *re*, 940
 Webb, *re*, 535
 Webb v. Bomford, 278
 — v. East, 285, 286
 — v. Mansell, 61
 Webster v. British Empire Company, 569
 — v. Whewall, 286, 433
 Wedderburn, *re*, 901
 Wedderburn v. Pickering, 878, 879, 885, 886
 Weeding, *re*, 905, 926
 Wellesley v. Mornington, 851
 — v. Wellesley, 931
 Wells v. Chelmsford Local Board, (Add.) 507
 Wells v. Malbon, 945
 Welply v. Buhl, 206, 290, 874
 West v. Downman, 867
 — v. White, 878, 885, 886, 890
 Westbourne Grove Drapery Company Limited, *The*, *re*, 986
 Westbrooke, *re*, 675
 Western and Brazilian Telegraph Company v. Bibby, 960
 Western District Bank, *re*, *The*, 987
 Western of Canada, &c., Company, *re*, 314
 Westman v. Aktiebolaget Ekman's Mekaniska Snickarefabrik, 1010
 West of England Bank v. Canton Insurance Company, 288
 — v. Nicholls, 279
 Western of Canada, &c., Company v. Walker, 205
 Weston's Case, 64
 Westwood, *re*, 914
 Whalley v. Whalley, 817
 Wheeler, *re*, 924
 Whetstone v. Lewis, 22, 606, 756
 Whistler v. Hancock, 290, 697
 Whitaker v. Robinson, 25, 868
 — v. Thurston, 454, 549
 White, *re*, 915, 916
 White and Hindle's Contract, 945
 White v. Boby, 437
 — v. Bromige, 849
 — v. Herrick, 535
 — v. James, 736
 — v. Simmons, 392
 — v. Witt, 58, 65
 Whitehaven, Bank of, v. Thompson, 1013
 Whiteley, *re*, 864
 Whitfield v. Poe, 847
 Whitling, *re*, 939
 Whitton, *re*, 941
 Wickens, *re*, 926
 Wicks v. Wood, 445
 Widgery v. Tepper, 359, 851
 Wigan Junction Railway, *re*, 663
 Wilding v. Bolder, 922
 Wilkes, *re*, (Add.) 506
 Wilks v. Groom, 906, 908
 — v. Judge, (Add.) 58
 Wilkinson, *re*, 906
 Wilkinson's Trusts, *re*, 910
 Williams, *re*, 430, 788, 905, 941
 Williams v. Aylesbury Railway Company, 502, 802
 Williams v. Bristol Marine Insurance Co., 960
 Williams v. Cardwell, 454, 549
 — v. Games, 608
 — v. Guest, 558
 — v. Llanelly Company, 597
 — v. Meakin, 562, 563
 — v. South-Eastern Railway Company, 719
 — v. Williams, 618, 788
 Williamson v. Barber, (Add.) 12
 — v. Cotterill, (Add.) 539
 Wilkes v. Saunton, 7
 Wilkinson, *re*, 513
 Wilkinson's Estates, *re*, 499
 Wilkinson's Mortgage Trusts, *re*, 194
 Wilks v. Parker, 721
 Willcock v. Terrell, 355
 Willis, *re*, 930
 Willis v. Earl Howe, 721
 Willmott v. Barber, 835, 836
 Willway, *re*, 194
 Wilson, *re*, 781
 Wilson v. Allen, 843, 844
 — v. Church, 65, 66, 67, 272, 276, 345, 567, 594, 731
 — v. Dundas, 357, 358
 — v. Gann, 624
 — v. Northampton Railway Company, 284, 286
 — v. Rhodes, 582
 — v. Round, 823
 — v. Watson, 944
 — v. Wilson, 597
 Wilton v. Hill, 191
 Winder, *ex parte*, 507, 508, 509
 Windle v. Stephens, 836

- Wingrove v. Thompson, 569, 597
 Winkworth v. Winkworth, 940
 Winstone's case, 971
 Winteringham's Trusts, 910, 925
 Winterfield v. Bradnum, 205
 Wise, *re*, 912, 925, 926
 Wiseman, *re*, 930
 Witham v. Vane, 719, 720
 Withernsea Brickworks Company, *re*, 970
 Witt v. Corcoran, 55
 — v. Parker, 56, 444
 Wollaston v. Wollaston, 21, 571
 Wolverhampton, &c., Company v. Bond, 1018
 Wood, *re*, 802, 906, 925, 940
 Wood's Estate, *re*, 298, 506
 Wood v. Anglo-Italian Bank, 277, 286
 — v. Barnicott, 51, 52, 772, 773
 — v. Beestlestone, 924, 931
 — v. Hamblet, 889, 890
 — v. Kay, 886
 — v. Wakefield, 845
 Woodburn, *re*, 941
 Woodcock, *re*, 789, 801, 803
 Woodfall v. Arbuthnot, 917, 928
 Woodfine, *re*, 323
 Woodgate, *re*, 919
 Woods v. M'Innes, 1011
 — v. Oliver, 13
 Woolard, *re*, 940
 Woolf v. Pemberton, 574
 Woollands v. Crowther, 536
 Wormsley v. Sturt, 12, 13
 Worraker v. Pryer, 20
 Worthington, *re*, 535, 863
 Wortley, *re*, 594, 595
 Wragg, *re*, 924
 Wreck Recovery and Salvage Company, *re*, 963
 Wrench v. Wynne, 851
 Wright, *re*, 940, 941
 Wright v. Clifford, 484
 — v. Freeman, 443
 — v. King, 917
 — v. Monarch Investment Building Society, 101
 — v. Redgrave, 431, 850
 — v. Swindon, &c., Railway Company, 455, 598
 Wyatt v. Byron, 847
 Wycherley, *re*, 925
 Wye Valley Railway Company v. Hawes, 717
 Wylly, *re*, 941
 Wymer v. Dodds, 594
 Wynn's Devised Estates, 194

 Y.
 Yearsley v. Yearsley, 552
 Yeatman v. Snow, 694, 1001
 Yetts v. Foster, 484, 558
 York Union Banking Company v. Artley, 391
 Yorkshire Banking Company v. Beatson, 560
 — Waggon Company v. Newport and Abercarne Coal Company, 719, 720, (Add) 235
 Young, *re*, 925, 939
 — v. Brassey, (Add.) 434, 550, 1001, 1011, 1012
 — v. Kitchin, 707
 Younghusband v. Gisborne, 358

ADDENDA ET CORRIGENDA.

N.B.—The Heading of the Page is not counted as a Line.

- PAGE 4.—*Between lines 17 and 18 from bottom insert*:—The ordinary rule is that an order for an account or an inquiry will not be stayed pending an appeal unless irreparable injury would be inflicted by the account or inquiry being taken or made in the meantime: (*Hyam v. Terry*, 70 L. T. 25; 29 W. R. 32.)
- P. 5.—*After line 14 insert*:—Under this rule any matter required on further consideration as to costs may be proved by affidavit: (*Beanev v. Elliott*, W. N. 1880, p. 99.)
- P. 12.—*Between lines 12 and 13 insert*:—When a settled account is impeached, proof of a single error of importance is sufficient to entitle to relief; but, except in cases of fraud, the rule is not to open the whole account, but to give liberty to surcharge and falsify: (*Gething v. Keighley*, L. Rep. 9 Ch. Div. 547; 48 L. J. 45, Ch.; 27 W. R. 283.)
And see *Williamson v. Barbour*, 50 L. J. 147, Ch.
- P. 20.—*Between lines 11 and 12 from bottom insert*:—A legal personal representative is a necessary party to every administration action: (*Oary v. Hills*, 15 Eq. 79.)
- P. 21.—*Between lines 17 and 18 insert*:—The right of an executor who is a creditor to retain in full his own debt out of the assets of an estate being administered in court in preference to the debts of other creditors is not lost or affected by the circumstance that the executor has himself instituted the action for administration on behalf of himself and all other the creditors of the testator: (*Re Campbell*; *Campbell v. Campbell*, L. Rep. 16 Ch. Div. 198; 43 L. T. Rep. N. S. 727; 29 W. R. 233.)
- P. 21.—*Between lines 25 and 26 insert*:—Persons having only an expectation cannot maintain an action: (*Clowes v. Hilliard*, L. Rep. 4 Ch. Div. 413.)
- P. 22.—*At end of line 12 from bottom, add*:—And see RECOVERY OF LAND, II.
- P. 24.—*Between lines 8 and 9 insert*:—In an action for the administration of the estate of a deceased intestate, the inquiry as to advances made by the intestate in his lifetime to his children must follow the wording of the Statute of Distributions (22 & 23 Car. 2, c. 10), s. 5: (*Re Ennis*, W. N. 1880, p. 154; 28 W. R. 885; 43 L. T. Rep. N. S. 748.)
- P. 24.—*Between lines 16 and 17 insert*:—When notice of an administration judgment has been served on parties interested, and afterwards, on further consideration, it is desired to obtain an order against them personally for payment of money, they should be served with notice of the action having been set down for further consideration, even though they have not obtained an order to attend the proceedings: (*Re Rees*; *Rees v. George*, L. Rep. 15 Ch. Div. 490.)
- P. 26.—*After line 21 insert*:—In taking the accounts of an executor in chambers, the judge may exercise a discretion, and not require strict legal evidence of every item, especially after the death of the executor. The court will act upon fair probability, and will set its face against any attempt to plunder what remains of the estate: (*Raines v. Raines*, W. N. 1880, p. 145.)

- P. 28.—*Between lines 26 and 27 insert* :—The priority which a judgment creditor is entitled to in administration under a decree in an administration action is not affected by sect. 10 of the Judicature Act, 1875, whether such judgment be registered or not : (*Smith v. Morgan*, L. Rep. 5 C. P. Div. 337.)
- P. 28.—*After line 31 insert* :—Although judgment has been given for the administration of an estate, the court has no power to restrain a foreign creditor from proceeding in a foreign court against the administrator; but if judgment were obtained in the foreign court against the administrator by default, it would only be treated in the administration action as *prima facie* evidence of the debt : (*Re Boyse* ; *Crofton v. Crofton*, L. Rep. 15 Ch. Div. 591 ; 29 W. R. 169.)
- P. 31.—*Between lines 4 and 5 insert* :—Where by a mortgage deed reciting an agreement for an advance at 10l. per cent. the mortgagor covenanted for payment of the principal sum at the expiration of twelve months, and for the payment of interest in the meantime at the rate of 10l. per cent. per annum, but there was no covenant as to payment of interest in the event of the principal sum, or any part of it, remaining unpaid after the day named for repayment, and the money was not repaid on the day, but interest at 10l. per cent. was paid for several years, a decree having been made for administration of the deceased mortgagor's estate, the mortgagee, proving as a creditor for the principal sum and interest, was allowed interest only as damages, and at 5l. per cent. : (*Re Roberts* ; *Goodchap v. Roberts*, L. Rep. 14 Ch. Div. 49.)
- P. 33.—*At end of page add* :—Where the action was to ascertain whether contingent remainder was preserved, and it was held that it was as to part of the estate, Malins, V.C., held that the costs must be apportioned between the specifically devised and the residuary estate : (*Astley v. Micklethwait*, 43 L. T. Rep. N. S. 58.)
- P. 34.—*Between lines 6 and 7 from bottom insert* :—Where legatees have been ordered to pay to executors the costs of an action in the Probate Division to set aside the will, their costs may be deducted from their shares : (*Re Knapman*, 43 L. T. Rep. N. S. 25.)
- P. 34.—*Before line 3 from the bottom insert* :—Where the action was brought against the executrix of the testator's defaulting executor, who was insolvent, it was held that the executrix was entitled to the costs of taking an account against herself, but to no costs of taking an account against the defaulting executor, and that she should have half her general costs of the action : (*Re Kitto*, 28 W. R. 411.)
- P. 35.—*Between lines 26 and 27 from bottom insert* :—Where a residuary legatee objected to certain items in the accounts delivered by executors as being excessive to about 100l., the executors declined to allow any of these objections, and thereupon the legatee commenced an action against the executors, and by her writ, indorsed under Order III., r. 8, claimed to have the account of the personal estate of the testator rendered to her by the defendants taken under the direction of the court, and to have certain items of payment therein charged disallowed as excessive and improper, and the usual order for account was made under Order XV., r. 1, and there were no pleadings and no claim for administration, and the chief clerk took the same view of the accounts as the plaintiff had done, and disallowed items amounting to 105l. ; on further consideration, when the question as to who should bear the costs of these proceedings was raised, it was held that, as the plaintiff's original objections to the accounts had been fully sustained and made out, the executors must pay the costs of the proceedings necessary to take the accounts properly, out of their own pockets : (*Re Pearce* ; *Radcliffe v. Pearce*, 70 L. T. 259 ; W. N. 1881, p. 18.)
- P. 36.—*Between lines 8 and 9 insert* :—The rule that a creditor who brings an

action on behalf of himself and all other creditors for the administration of an estate which turns out to be insufficient for the payment of debts is entitled to his costs as between solicitor and client, applies equally to the case of a creditor who obtains the conduct of an action originally commenced by a legatee or next of kin: (*Re Richardson*; *Richardson v. Richardson*, L. Rep. 14 Ch. Div. 611; 43 L. T. Rep. N. S. 211; 49 L. J. 612, Ch.; 28 W. R. 942.)

P. 47.—*Between lines 5 and 6 insert*:—3A. WHO MAY APPEAL.

P. 49.—*Between lines 29 and 30 insert*:—The Master of the Rolls directs that any party dissatisfied with a certificate as settled by the chief clerk and intending to apply by motion or summons to vary such certificate, shall before such certificate is signed by the chief clerk carry into chambers a short statement in writing of his objections thereto: (*Notice*, July, 1880, 70 L. T. 34.)

P. 51.—*Between lines 28 and 29 insert*:—A judge may vary, as to costs, the order of a district registrar dismissing an action without costs: (*Foster v. Edwards*, 48 L. J. 767, C. P.)

P. 52.—*Between lines 23 and 24 from bottom insert*:—As to allowances for witnesses, see *Thomas v. Parry*, W. N. 1880, p. 184.

P. 52.—*Between lines 17 and 18 from bottom insert*:—Where there has been a hearing before Fry, J., the application to review should be made to the same judge, and, as he has no machinery for chamber practice, the application is properly made by motion: (*Millard v. Burroughes*, W. N. 1879, p. 198.)

P. 53.—*Between lines 9 and 10 from bottom insert*:—The general right to appeal extends to all cases of orders and judgments, unless there is something in some Act which took away the right of bringing error or appealing: (per Bramwell, L.J., *Barton v. Titchmarsh*, 42 L. T. Rep. N. S. 610.)

P. 53.—*Between lines 2 and 3 from bottom insert*:—An appeal from an order of reference made by a judge at Nisi Prius is direct to the Court of Appeal: (*Hoch v. Boor*, 43 L. T. Rep. N. S. 425.)

P. 54.—*After line 3 insert*:—*Pannell v. Nunn*, 28 W. R. 940.

Where the jury were discharged after the opening of the plaintiff's counsel, and the judge afterwards held that the claim was barred by the Statute of Limitations, the Court of Appeal held that, as the case had been in fact without a jury, the proper mode of disputing the decision was by appeal, and not by motion: (*Metropolitan Bank v. Heiron*, 30th June, 1880.)

And after a trial without a jury the Court of Appeal may, in all cases except that of surprise, review the findings as to facts, without a rule for a new trial having been obtained: (*Jones v. Hough*, L. Rep. 5 Ex. Div. 115; 42 L. T. Rep. N. S. 108.)

P. 54.—*At end of line 5 from bottom, add*:—*The City of Manchester*, 42 L. T. Rep. N. S. 521.

P. 56.—*At line 24 from bottom for Ex. 437 read Ex. 457.*

P. 57.—*Between lines 4 and 5 insert*:—The Court of Appeal has power to release upon bail until the hearing, persons appealing against a refusal of the court below to grant a writ of *habeas corpus*: (*Re The Rev. T. Pelham Dale and the Rev. Richard Wm. Enraght*, 70 L. T. 132.)

P. 57.—*Between lines 13 and 14 insert*:—

3A. WHO MAY APPEAL.

Generally any party to the action affected by the judgment or order below may appeal from it.

An appeal against an injunction restraining the use of a trade mark may be brought although the appellant has become bankrupt and his

trustee has not joined in the appeal: (*Dence v. Mason*, 41 L. T. Rep. N. S. 573.)

Leave to a person interested in, but not a party to an action, to appeal from an order, may be obtained by *ex parte* application to the Court of Appeal: (*Re Markham*; *Markham v. Markham*, L. Rep. 16 Ch. Div. 1; 29 W. R. 228.)

But where W. sued in an action on behalf of himself and all other foreign holders of Peruvian bonds, and Jessel, M.R., refusing to hear L., who was a foreign holder of Peruvian bonds to a large amount, but not a party to the action, made two orders, dated the 17th Dec. 1880 and the 24th Jan. 1881, appointing receivers, and L., pursuant to leave, moved the Court of Appeal for leave to appeal from the orders, though not a party to the action, it was held that it was contrary to the practice of the court to grant such an application; that the order below was in favour of the class to which the applicant belonged; that there was no order against that class from which to appeal, and that the proper course for the applicant was to apply to the court below to discharge or stay proceedings upon the order complained of, after which he might have the right to appeal against any order made upon the application below: (*Watson v. Cave*, 70 L. T. 259; W. N., 1881, p. 15.)

P. 57.—*Between* lines 24 and 25 from the bottom *insert*:—See *Gathercole v. Smith*, W. N., 1880, p. 102.

P. 58.—*At the end* of the page *add*:—The decision of a divisional court on a special case stated by an arbitrator: (*Collins v. Vestry of Paddington*, 42 L. T. Rep. N. S. 573; 49 L. J. 264, Q. B.)

An order discharging a rule for a new trial: (*Wilks v. Judge*, W. N., 1880, p. 98.)

P. 59.—*Between* lines 17 and 16 from the bottom *insert*:—An addition made to a decree upon motion, giving directions as to costs as to which the decree itself was silent, is a portion of the decree, and therefore can be examined on an appeal from the decree, and is not an interlocutory order within the meaning of Order LVIII., r. 15: (*The City of Manchester*, 42 L. T. Rep. N. S. 521.)

P. 59.—*At end* of page *add*:—Where an order contains a declaration as such, or as an expression of the opinion of the court, so as to bind the rights of the parties, it does not amount to a simple refusal to make an order, so as to compel the bringing of an appeal within twenty-one days from the date of the pronouncing of the order: (*Clay v. Tetley*, L. Rep. 16 Ch. Div. 3; 43 L. T. Rep. N. S. 402; 29 W. R. 5.)

P. 60.—*After* line 25 from bottom *insert*:—Per Baggallay and Thesiger, L.JJ.: Special leave to appeal from a judgment on the merits after the time for appealing has expired is an indulgence which ought not to be granted unless a strong case is made out. Per Bramwell, L.J.: Where the omission to appeal in time arises from a *bonâ fide* mistake, and no damage is done to the other side, which cannot be repaired by payment of costs or otherwise, such leave ought to be granted *ex debito justitiæ*: (*Collins v. The Vestry of Paddington*, L. Rep. 5 Q. B. Div. 368; 42 L. T. Rep. N. S. 573; 49 L. J. 264, Q. B.)

And see *Re Blyth and Young*, L. Rep. 13 Ch. Div. 416; 41 L. T. Rep. N. S. 746; 28 W. R. 266.)

P. 60.—*At end* of line 10 from bottom *add*:—*Ex parte Howe*, W. N., 1879, p. 6.)

P. 60.—*At* line 4 from bottom, *after* 292 *insert*:—But where, in the winding-up of a company, the Master of the Rolls, following a decision of his own, ordered a certain fund to be paid to the official liquidator, and afterwards his former decision was overruled by the Court of Appeal, and the fund was still within the control of the court, leave to appeal was given

although the time had expired: (*Re Normanton Iron and Steel Company*, 29 W. R. 800.)

- P. 61.—*At end of line 22 add*:—With costs of the appeal and of the motion, which must be on notice: (*Conthupe v. Lewis*, W. N., 1879, p. 180.)
- P. 62.—*Between lines 3 and 4 insert*:—Where the Court of Appeal had granted a rule nisi, and when the case was called on no counsel appeared to support the rule, the court discharged the rule, reserving the power to restore it if the party obtaining it could satisfactorily account for the absence of counsel: (*Stokes v. Kromshroder*, W. N., 1879, p. 196.)
- P. 62.—*Between lines 5 and 6 insert*:—Where a case was called on and neither party appeared, and it was intimated by counsel present that the action had been compromised, the appeal was struck out: (*Jones v. Bridgman*, W. N., 1880, p. 116.)

Wherever an action has been settled after entry for hearing, notice ought to be given to the proper officers so that the case may not be put into the lists: (*Scott v. Turner*, W. N., 1879, p. 178.)

If an appellant gives notice to the respondent that the appeal is withdrawn, it is unnecessary for the appellant to strike the case out of the paper, or for the respondent to do so or to apply to the court to dismiss the appeal. Where such a notice had been given, and the respondent appeared, and asked that the appeal might be dismissed with costs, the court ordered the appeal to be dismissed with costs, the taxing master to see that they were such costs as were proper, having regard to the notice of withdrawal: (*Schofield v. Barlow*, 70 L. T. 24.)

- P. 62.—*Between lines 19 and 20 insert*:—Where B. appealed, and F. and W. had previously appealed to vary the order below on a point in which B. had no interest, but on B.'s appeal being presented they withdrew their notice of appeal and gave notice under rule 6, and on the appeal coming on, B. withdrew it, the court held that F. and W. must give notice of appeal, and gave them leave to do so within a week: (*Re Cavander*, W. N., 1881, p. 9.)
- P. 63.—*Between lines 17 and 16 from bottom insert*:—When the judge's notes are required it is irregular merely to bespeak them of the judge's clerk. Application must be made to the master or registrar in attendance in the Court of Appeal, stating the name of the case and judge, and the date and place of trial, and thereupon one of the Lords Justices will request the judge below to furnish his notes: (*Daun v. Simmins*, W. N., 1879, pp. 178-9; *Stainbank v. Beckett*, W. N., 1879, p. 203.)
- P. 65.—*Before line 18 from bottom insert*:—The Court of Appeal will be extremely slow to differ from a divisional court when the latter court has refused a new trial, and the judge who tried the case is not dissatisfied with the verdict: (*Pannell v. Nunn*, July 21, 1880.)
- P. 65.—*At end of last line add*:—L. Rep. 14 Ch. Div. 1; 49 L. J. 21, Bk.; 28 W. R. 433.
- P. 66.—*Between lines 27 and 28 insert*:—The ordinary rule is that an order for an account or an inquiry will not be stayed pending an appeal, unless irreparable injury would be inflicted by the account or inquiry being taken in the meantime: (*Hyam v. Terry*, 70 L. T. 25.)
- In a recent case *Malins, V.C.*, ordered payment of costs to be made to the respondent, and that he should give security for repayment in case of the success of the appeal: (*Eames v. Hacon*, W. N., 1881, p. 4.)
- P. 67.—*Between lines 21 and 22 from bottom insert*:—A respondent who successfully raises the objection that an appeal is out of time will not get the costs of his affidavits filed after the appeal was set down: (*Ex parte Fardon's Vinegar Company*; *Re Jones*, 43 L. T. Rep. N. S. 11.)
- P. 67.—*At end of line 18 from bottom add*:—And see *Chamberlain v. Barnwell*, W. N., 1880, p. 110.

- P. 67.—*Between lines 3 and 4 from bottom insert*:—An application for security for the costs of an appeal will be refused, unless it is made promptly, before costs of the appeal have been already incurred: (*Mayor of Salford v. Goodman*, W. N., 1880, p. 167; 43 L. T. Rep. N. S. 464.)
Where judgment was given in an action on the 22nd March, and on the 6th April, the defendant gave notice of appeal, the taxation of costs was not completed until the 4th Nov., the delay not being occasioned by either party, the plaintiffs then issued a *fi. fa.* for the amount of their taxed costs, to which the sheriff's return was *nulla bona*, and on the 11th Nov. the plaintiffs applied to the Court of Appeal that the appellant should give security for costs, the case being then ninth out of the list for hearing, it was held that the application was too late, and on that ground must be refused: (*Id.*)
- P. 68.—*At end of line 13 add*:—*Naersmoss Company v. Royal Mail Company*, W. N., 1880, p. 133.
Great delay in bringing the action to trial has also been held a sufficient "special circumstance:" (*Smith v. White*, W. N., 1879, p. 203.)
As to vexatious conduct, see *Potter v. Cotton*, W. N., 1879, p. 204.
- P. 69.—*Between lines 10 and 11 insert*:—Where the Queen's Bench Division made absolute a rule for a new trial, the costs of the first trial to await the event of the second, and the Court of Appeal, on plaintiff's application, varied this order by directing a new trial on payment by defendants of the costs of the first trial, defendants to have two months to elect whether they would accept these terms, it was held that the defendants could appeal from this order to the House of Lords: (*Metropolitan Asylum District Board v. Hill*, 28 W. R. 663; L. Rep. 5 App. Cas. 582; 43 L. T. Rep. N. S. 225.)
- P. 76.—*Between lines 1 and 2 from bottom insert*:—The House of Lords will not admit evidence which was not tendered in the court below: (*Banco de Portugal v. Waddell*, L. Rep. 5 App. Cas. 161, 170; 42 L. T. Rep. N. S. 698; 49 L. J. 33, Bk.; 28 W. R. 477.)
- P. 77.—*Between lines 3 and 4 insert*:—When a question of law was involved which might decide the result of the action, it was intimated by Selborne, L.C., on a preliminary application as to the competency of the appeal, that counsel on each side should come to an arrangement to postpone the printing of voluminous evidence till the question of law had been determined: (*Metropolitan Asylum District v. Hill*, L. Rep. 5 App. Cas. 587.)
- P. 90.—*At end of line 10 from bottom, add*:—But see observations of Bramwell, L.J., in *Ward v. Pilley*, L. Rep. 5 Q. B. Div. 429; 43 L. T. Rep. N. S. 301; 28 W. R. 937.)
- P. 91.—*Between lines 18 and 17 from bottom insert*:—A general agreement to refer to arbitration cannot be revoked by one of the parties: (*Piercy v. Young*, L. Rep. 14 Ch. Div. 200; 43 L. T. Rep. N. S. 710; 28 W. R. 845.)
- P. 91.—*At end of line 10 from bottom, add*:—On appeal, it was held that, as the reference was made by the court itself, and the award had been made an order of court, and had never been appealed against, the award was as binding as any other order; but it was intimated that it was the proper course to make the submission, not the award, a rule of court: (L. Rep. 14 Ch. Div. 593; 43 L. T. Rep. N. S. 76; 29 W. R. 65.)
- P. 92.—*Between lines 6 and 7 insert*:—In a recent case it was held that the application should be made by summons *ex parte*: (*Davey v. Railway Passengers Assurance Company*, 49 L. J. 568, Ch.)
- P. 92.—*Between lines 11 and 12 insert*:—A motion to make a submission a rule of court, the order not being required for any present purpose, was refused, with costs: (*Re Liscombe*, 49 L. J. 236, Ch.)

- P. 92.—*At end of line 25 add*:—42 L. T. Rep. N. S. 391.
- P. 98.—*Between lines 11 and 12 insert*:—Where an action was referred to arbitration; and the award was published on the 14th July, and on the 24th Nov. (being the last day but one of the old Michaelmas Term) the defendants moved the court to set aside the award, but the court refused the application on the ground that notice of motion had not been given to the plaintiff as required by Order LIII, r. 3 and 4; and the defendants afterwards on the same day served on the plaintiff a notice that on the 27th Nov. they would move the court to set aside the award, it was held that the service of notice of motion on the 24th Nov. was a complaint made in the court before the last day of the next term after the publication of the award within 9 & 10 Will. 3, c. 15, s. 2, although no affidavit was filed before the last day: (*Smith v. Parkside Mining Company*, L. Rep. 6 Q. B. Div. 67; 29 W. R. 154.)
- P. 100.—*Between lines 15 and 14 from bottom insert*:—The question whether matters in dispute are within the agreement for arbitration is one which the court will not leave to the arbitrator, but will decide itself: (*Piercy v. Young*, 42 L. T. Rep. N. S. 710; L. Rep. 19 Ch. Div. 200.)
- P. 100.—*At line 6 from bottom, after 112, add*:—L. Rep. 14 Ch. Div. 471.
- P. 102.—*Between lines 18 and 17 from bottom insert*:—Where on a motion for an injunction defendant undertook not to publish a certain advertisement likely to injure plaintiff's business until the trial, and afterwards published in a newspaper a notice of the hearing of the motion and of his undertaking which virtually repeated the advertisement, it was held that he had not committed a contempt of court: (*Buenos Ayres Gas Company v. Wilde*, 42 L. T. Rep. N. S. 659.)
- P. 103.—*Between lines 4 and 5 insert*:—On a motion day a motion to discharge a prisoner from custody is entitled to priority over all other motions: (*Ashton v. Shorrocks*, 43 L. T. Rep. N. S. 530; 29 W. R. 117.)
- P. 103.—*Between lines 7 and 8 insert*:—On motion to commit for breach of an undertaking, where the plaintiff did not press for actual commitment, but asked for costs; Jessel, M.R., ordered the defendant to pay the costs of the motion as between solicitor and client, and directed that, if there was any further breach of the undertaking, or if the defendant failed to pay the costs, the motion might be brought on again: (*Steele v. Hutchings*, W. N., 1879, p. 18.)
- P. 104.—*Between lines 18 and 19 insert*:—A statement in an affidavit for arrest that the defendant is a material witness is not enough; the affidavit should show why his presence is required, as for instance, that the case for the plaintiff cannot be proved without examining the defendant, or that he is in possession of documents material to it, and discovery is necessary: (per Lopes, J., *Comedy Opera Company v. Carte*, W. N., 1879, p. 210.)
- P. 106.—*At line 18, after 110 insert*:—*Hands v. Hands*, 43 L. T. Rep. N. S. 750.
- P. 109.—*Between lines 15 and 16 insert*:

ATTACHMENT.

WRIT OF.

[See EXECUTION, XX.]

OF DEBTS.

[See EXECUTION, XVIII.]

- P. 113.—*Between lines 21 and 22 from bottom insert*:—There is no absolute rule that in no case can a decree for the rectification of a settlement be made upon the uncorroborated evidence of an interested party; but it is the duty of the court to act upon such evidence with extreme caution: (*Lovesy v. Smith*, L. Rep. 15 Ch. Div. 655; 43 L. T. Rep. N. S. 240; 28 W. R. 980.)

The court will order rectification of a settlement which is shown not to have carried out the intentions of the parties, on the evidence of the plaintiff alone, when other evidence is not procurable, and the probabilities of the case are in favour of the suggested alteration: (*Hammond v. Syrett*, 70 L. T. 25.)

By a marriage settlement, settling the wife's property only, the ultimate trust on the death of the husband without issue of the marriage was declared in favour of the wife's next of kin. The husband having died, the settlement was rectified so as to give the wife a power of appointing the whole trust fund by deed or will, on her deposing that she did not intend to part with control over it under such circumstances: (*Hammond v. Syrett*, *sup.*)

It makes no difference in the wife's right to the rectification of the settlement of her own property that she claims the benefit of the settlement with regard to her husband's property: (*Lovesy v. Smith*, *sup.*)

Where, by a marriage settlement, certain real estate of the wife was limited to her for an equitable estate for her life, with a legal remainder, in the event of her surviving her husband (which event happened) to her heirs and assigns, thus preventing the operation of the rule in *Shelley's* case, upon her sole and uncontradicted evidence that it was intended that in the events which had happened she should have an absolute estate in fee, it was held that she was entitled to have the settlement rectified: (*Hanley v. Pearson*, L. Rep. 13 Ch. Div. 545; 41 L. T. Rep. N. S. 673.)

P. 122.—*Between* lines 21 and 22 *insert*:—The form of writ, in County Court cases, is given in Schedule G. 8, to the Rules of April, 1880.

P. 123.—*Between* lines 17 and 18 from bottom *add*:—The form of order is given in Sched. H. to the Rules of April, 1880.

P. 130.—*Between* lines 23 and 24 from bottom *insert*:—A chief clerk has no power, in vacation, to give leave to serve short notice of motion. Application should be made to the vacation judge: (*Conacher v. Conacher*, 70 L. T. 186; W. N., 1881, p. 2; 29 W. R. 230.)

If such an order has been drawn up, it will be valid as an order of the judge: (*Id.*)

P. 136.—*Between* lines 16 and 17 *insert*:—When a solicitor has obtained an order giving him leave to attend proceedings under a decree without any written authority from his client, if the solicitor's authority to obtain such order is subsequently disputed, the onus of proof lies on the solicitor, and if he can produce no written authority and there is consequently nothing but assertion against assertion, the court will treat him as unauthorised: (*Bird v. Harris*, 70 L. T. 25; W. N., 1880, p. 166; 29 W. R. 45.)

P. 147.—*Between* lines 17 and 18 from bottom *insert*:—As to alteration of a scheme, see *Re Campden Charities*, W. N. 1880, p. 151.

P. 154.—*At end* of line 31, *add*:—*Attorney-General v. Dean of Manchester*, W. N. 1881, p. 21.

P. 173.—*At* line 28 *del.*:—See *sup.* (a) (2).

P. 182.—*At end* of line 24, *add*:—42 L. T. Rep. N. S. 247.

P. 184.—*Between* lines 8 and 9 *insert*:—Any person who provides such money or any part thereof, or who entered into such bond, may, subject to any directions or rules of the court, attend all proceedings under [the 5th section] and other proceedings in the winding-up, and apply to the court to act under [the] section: (*Id.*)

P. 185.—*Between* lines 16 and 17 *insert*:—As to dispensing with inquiries as to landowners, see *Re Brewood Railway Company*, W. N., 1879, p. 109.

P. 191.—*At end* of line 12 *add*:—But see *Re Manchester and Milford Railway Company*, 43 L. T. Rep. N. S. 714; 29 W. R. 78.

The protection from seizure in execution by a judgment creditor,

given by the Railway Companies Act 1867, s. 4, to the rolling stock and plant of a railway, after such railway is open for public traffic, continues although the railway is afterwards closed for traffic: (*Midland Waggon Company v. Potteries Railway Company*, L. Rep. 6 Q. B. Div. 36; 50 L. J. 6, Q. B.)

P. 191.—At end of line 21 add:—*Great Western Railway Company v. Waterford and Limerick Railway Company*, 70 L. T. 276.

P. 192.—At end of line 18 from bottom, add:—And see *Gray v. Paull*, W. N., 1877, p. 186.)

The court will not compromise proceedings in which infants are concerned against the wishes of their next friends or guardians, though, if they unreasonably refuse their consent, the court may remove them. The practice of the Master of the Rolls, approved by the Court of Appeal, is to require an application to be made by the next friend or guardian, supported by an affidavit of his solicitor, and a written opinion of his counsel, that the compromise will be for the infant's benefit: (*Re Birchall*, *Wilson v. Birchall*, L. Rep. 16 Ch. Div. 41; 70 L. T. 24; 29 W. R. 27.)

P. 205.—Add to line 19:—42 L. T. Rep. N. S. 531.

P. 205.—Between lines 23 and 24 from bottom insert:—A foreigner residing abroad, who is plaintiff in an interpleader issue, but really in the place of a defendant, will not be ordered to give security: (*Belmonte v. Gutschow*, W. N., 1879, p. 114.)

P. 207.—After line 6 add:—The old rule in Chancery that an application that a next friend should give security for costs must be made before the next material step in the cause is taken, and the old rule at common law that the like application must be made before issue joined, are now abrogated, and the court has a judicial discretion to direct security for costs to be given at any time: (*Martano v. Mann*, L. Rep. 14 Ch. Div. 419; 42 L. T. Rep. N. S. 890; 49 L. J. 510, Ch.)

P. 207.—Line 12:—For (c) read (e).

P. 208.—Between lines 2 and 3 insert:—An offer by the solicitors of a defendant, who ultimately fails, to advise him to consent to a settlement on certain terms, is not such an offer as will relieve the defendant of his liability to pay costs after the date of the offer: (*Trotter v. Maclean*, L. Rep. 13 Ch. Div. 683; 49 L. J. 256, Ch.; 42 L. T. Rep. N. S. 118.)

P. 208.—Between lines 13 and 14 insert:—Where an action is brought to enforce a legal right, and there is no misconduct on the part of the plaintiff, the court has no discretion to refuse him costs: (*Cooper v. Whittingham*, L. Rep. 15 Ch. Div. 501; 43 L. T. Rep. N. S. 16.)

P. 208.—At end of line 25 from bottom insert:—And see *Tenant v. Ellis*, L. Rep. 6 Q. B. Div. 46; 43 L. T. Rep. N. S. 506; 50 L. J. 143, Q. B.; 29 W. R. 121.)

P. 208.—At line 23 from bottom, after 459 add:—*Marsden v. Lancashire and Yorkshire Railway Company*, 42 L. T. Rep. N. S. 630.

P. 208.—Between lines 20 and 21 from bottom insert:—In exercising his discretion to deprive a successful party of his costs under Order LV., the judge is not confined to the consideration of the conduct of the party in the course of the litigation, but may consider his conduct previous to and conducing to the action. He must, however, assume the truth of the facts found by the jury: (*Harnett v. Vise*, L. Rep. 5 Ex. Div. 307; 43 L. T. Rep. N. S. 645; 29 W. R. 7.)

P. 208.—At end of line 5 from bottom add:—Even where they have been dealt with, and an order made by the judge at the trial: (*Marsden v. Lancashire and Yorkshire Railway Company*, *sup.*)

P. 209.—Between lines 8 and 9 insert:—Where on the trial by jury of an action in which both the claim and counter-claim are for liquidated demands a

balance is found in favour of a defendant on his counter-claim, he is entitled to the "costs of the cause:" (*Baines v. Bromley*, 43 L. T. Rep. N. S. 735; 50 L. J. 129, Q. B.; 29 W. R. 245.)

Where in an action brought to recover from the defendants commission alleged to be due under an agreement made between them and the plaintiff, the defendants counter-claimed for 230*l.* 0*s.* 9*d.* for goods sold by them to the plaintiff, who by his reply admitted that he was indebted to the defendants in the sum claimed, and at the trial the jury found for the plaintiff on his claim for 114*l.* 17*s.* 6*d.*, and for the defendants on their counter-claim for 230*l.* 0*s.* 9*d.*, and judgment was then directed to be entered for the plaintiff on his claim, and for the defendants for 115*l.* 3*s.* 3*d.*, being the balance, and the associate's certificate was drawn up accordingly; the taxing master having allowed the defendants the "costs of the cause," including the costs of certain interrogatories administered by the plaintiff to defendants, and allowed the plaintiff only the costs of the witnesses necessary to establish his claim against the defendants to the extent to which he had succeeded, it was held that he had acted correctly: (*Id.*)

- P. 209.—*After* line 30 *add*:—Where a plaintiff "recovers," in an action brought in the Superior Court, a sum more than 20*l.*, and the defendant in the same action "recovers" on his counter-claim which is in the nature of a claim for unliquidated damages, or which is partly a set-off and partly a claim for unliquidated damages, such a sum that the actual amount for which the plaintiff gets judgment is less than 20*l.*, sect. 67 of the Judicature Act, 1873, does not apply, and the plaintiff is entitled to the costs of the proof of his claim, and the defendant is likewise entitled to the costs of proving his counter-claim: (*Stooke v. Taylor*, L. Rep. 5 Q. B. Div. 569; 43 L. T. Rep. N. S. 200; 29 W. R. 49.)
- P. 209.—*After* line 40 *add*:—As to the rule in the Court of Chancery when a bill was filed in respect of a matter within the equitable jurisdiction of the County Court, see *Brown v. Rye*, L. Rep. 17 Eq. 343.
- P. 211.—*At end* of line 26 *add*:—Affirmed: (L. Rep. 5 Q. B. Div. 431; 49 L. J. 449, Q. B.; 42 L. T. Rep. N. S. 612; 28 W. R. 592; and see *Horner v. Oyler*, 49 L. J. 655, Q. B.)
- P. 211.—*Between* lines 20 and 21 from bottom *insert*:—The discretionary power extends to all cases, whatever the relief sought, and whether the action would have been strictly a common law action before the Judicature Acts or not, but will only be exercised in exceptional cases. An application to the court for the exercise of this discretionary power may be made to a divisional court in the first instance: (*Duke of Norfolk v. Arbuthnot*, 70 L. T. 79; 29 W. R. 337.)
- P. 216.—*At end* of line 16 *add*:—In form the plaintiff pays the costs, and has them over against the other defendant.
- P. 220.—*At end* of line 10 *add*:—*Mason v. Brentini*, 42 L. T. Rep. N. S. 726; 29 W. R. 126.
- P. 220.—*At end* of line 25 *add*:—*Brown v. Sewill*, 29 W. R. 295; *The Neera*, L. Rep. 5 P. Div. 118; 42 L. T. Rep. N. S. 743; 28 W. R. 116.
- P. 220.—*At end* of line 20 from bottom *add*:—Affirmed, 42 L. T. Rep. N. S. 834.
- P. 221.—*At end* of line 15 *add*:—Followed by the Court of Appeal in *Mason v. Brentini*, L. Rep. 15 Ch. Div. 287; 43 L. T. Rep. N. S. 557.
- P. 225.—*At* line 2 for "*Boyton v. Boyton*" read "*Boynnton v. Boynnton*."
- P. 225.—*Between* lines 29 and 30 from bottom *insert*:—*Inquiry*.—Fry, J. on directing an inquiry in chambers as to damages, has reserved the question of costs so that the judge in whose chambers the proceedings on the inquiry might take place might have full control over the costs: (*Slack*

v. *Midland Railway Company*, L. Rep. 16 Ch. Div. 81; 43 L. T. Rep. N. S. 434.)

P. 225.—*Between* lines 23 and 24 from bottom *insert* :—A successful party can be allowed no costs of producing documents at the office of his own solicitor, or of inspecting his opponent's documents: (*Brown v. Sewill*, 29 W. R. 295.)

P. 232.—*After* line 14 *add* :—A taxing master has no jurisdiction to adjust costs by way of deduction or set-off except between parties to the same action or the same proceedings. Where a plaintiff is liable to pay costs to a defendant in an action, and, in interpleader proceedings arising out of the same action, the plaintiff is entitled to receive costs from such defendant, the costs cannot be set off on taxation: (*Barker v. Hemming*, L. Rep. 5 Q. B. Div. 609; 43 L. T. Rep. N. S. 678.)

As to setting off costs of a probate action in an administration action, see *Re Knapman*, 43 L. T. Rep. N. S. 25.

P. 232.—*After* line 16 *add* :—The right of set-off prevails also against assignees and incumbrancers: (*Re Knapman*, *sup.*)

P. 232.—*Before* line 11 from bottom *add* :—Where shorthand notes of evidence are essential to the proper hearing of a case, the costs will be allowed: (*Lee Conservancy Board v. Button*, L. Rep. 12 Ch. Div. 383.)

P. 232.—*Before* line 3 from bottom *add* :—On appeal the costs of shorthand notes in the court below are not to be allowed as a matter of course, but only where a special case is made for such allowance: (*The Duchess of Westminster Silver Lead Ore Company*, L. Rep. 10 Ch. Div. 307.)

P. 232.—*At* line 2 from bottom, *after* 98, *add* :—43 L. T. Rep. N. S. 462; 28 W. R. 664.

It is competent to the court to make an order for the allowance, on taxation between party and party, of the expenses of the shorthand notes of the evidence given at the trial, as part of the costs of a rule for a new trial on the ground that the verdict was against the weight of evidence, in a case where from the nature and extent of the evidence it is manifest that the matter could not have been properly disposed of without their aid: (*Watson v. Great Western Railway Company*, L. Rep. 6 Q. B. Div. 163.)

P. 233.—*At end* of line 18 *add* :—And see SOLICITORS, III., 2.

P. 235.—*At end* of line 11 *add* :—42 L. T. Rep. N. S. 686; 28 W. R. 812.

P. 235.—*Between* lines 11 and 12 *add* :—The judge has power under Order XVI., r. 21, to impose the costs of a third party called in to defend an action on defendant who brought him in: (*Dawson v. Shepherd*, 42 L. T. Rep. N. S. 611; 28 W. R. 805.)

The case of *The Yorkshire Waggon Company v. The Newport Coal Company* is not to be taken as laying down the principle that costs cannot be awarded to a third party who has been brought in by notice: (*Id.*)

P. 240.—*Between* lines 10 and 11 from bottom *insert* :—A direction to inquire what is due to a party for costs does not imply that he is entitled to any costs, and the taxing master ought to disallow the whole claim if he thinks the costs were improperly incurred: (*Simmons v. Storer*, L. Rep. 14 Ch. Div. 154; 49 L. J. 121, Ch.; 42 L. T. Rep. N. S. 291.)

P. 242.—*Under* (b) *Authorising Actions, &c.*, *del.* lines 28–34, and *substitute* :—It shall be lawful for any judge of the Superior Courts of law and equity to authorise an attorney or solicitor to commence an action or suit for the recovery of his fees, charges, or disbursements against the party chargeable therewith, and also to refer his bill of fees, charges, and disbursements, and the demand of such attorney and solicitor thereupon, to be taxed and settled by the proper officer of the court in which such reference shall be made, although one month shall not have expired

from the delivery of the bill of fees, charges, or disbursements, on proof to the satisfaction of the said judge that there is probable cause for believing that the party chargeable therewith is about to quit England, or to become a bankrupt or a liquidating or compounding debtor, or to take any other steps or do any other act which, in the opinion of the judge, would tend to defeat or delay such attorney or solicitor in obtaining payment : (38 & 39 Vict. c. 79, s. 2.)

- P. 247.—*Between* lines 9 and 10 from bottom *insert* :—Where a memorandum of agreement drawn up between Melhado and Watson and Anthony Pulbrook, their solicitor, by which it was agreed that, upon a balance of accounts between them, Melhado and Watson should pay 16*l.* to Pulbrook, and give up to him the bill of costs delivered, which was merely a memorandum of a lump sum received by him in respect of costs, and Melhado and Lloyd applied for an order that Pulbrook should deliver his bill of costs in order that it might be taxed, it was held that the settlement was equivalent to payment within 6 & 7 Vict. c. 73, s. 41, and that the court was therefore precluded from granting the application, it not having been made within twelve calendar months after payment : (*Re Pulbrook*, 70 L. T. 115.)
- P. 253.—*After* line 1 *add* :—[At the Rolls] no payment will be made on account of costs until they are actually taxed and certified : (Notice July, 1880, 70 L. T. 34.)
- P. 255.—*Between* lines 3 and 4 *insert* :—Where, by the indorsement on the writ, the plaintiff claimed 39*l.* 13*s.* 4*d.*, as the balance due to him, after giving credit to the defendants for the payment of 20*l.* for certain willows sold to the defendants, the statement of claim alleged that the 20*l.* for which credit was given had been paid by the defendants on account of the plaintiff's claim, but this was denied by the statement of defence, which alleged that the sum had been borrowed from them by a forwarding agent, and at the trial in the County Court the jury found this issue in the defendant's favour, it was held that the master had jurisdiction to make the order, as the real amount claimed by the plaintiff was the sum of 39*l.* 13*s.* 4*d.* : (*Verbeeck v. Hunnax*, 70 L. T. 25-6.)
- P. 266.—*Between* lines 5 and 6 *insert* :—When the court directs a reference to chambers to settle the terms of a lease, it will, when convenient, at the same time make a declaration as to the insertion of a particular clause with regard to which an issue has been raised in the pleadings : (*Strelley v. Pearson*, L. Rep. 15 Ch. Div. 113.)
- P. 270.—*At end* of page *add* :—Where the plaintiff discontinues his action after delivery of defence and counter-claim, the defendant cannot proceed with the counter-claim : (*Vavasseur v. Krupp*, L. Rep. 15 Ch. Div. 474 ; 28 W. R. 366.)
If the plaintiff gives a notice of discontinuance after giving notice of appeal, the appeal is at an end : (*Conybeare v. Lewis*, L. Rep. 13 Ch. Div. 469 ; 28 W. R. 330.)
- P. 273.—*At end* of line 20 from bottom *insert* :—L. Rep. 15 Ch. Div. 162 ; 29 W. R. 127.
- P. 273.—*Between* lines 20 and 21 from bottom *insert* :—Malins, V.C., has given leave to interrogate the secretary of a company claiming in the winding-up of another company to have its name removed from the list of contributories : (*Re Alexandra Palace Company*, L. Rep. 16 Ch. Div. 58 ; 43 L. T. Rep. N. S. 406 ; 50 L. J. 7, Ch. ; 29 W. R. 70.)
- P. 274.—*At end* of line 22 *add* :—But, query, whether this is the rule acted on in the Chancery Division.
- P. 274.—*Between* lines 27 and 28 *insert* :—But where in an action to restrain the defendants from alleging that the soap manufactured by the plaintiffs was an imitation of the soap manufactured by the defendants, or that

the plaintiffs' labels and wrappers were a counterfeit of the defendants' labels or trade marks, and from interfering with such sale and use of labels by the plaintiffs, the defendants set up that the plaintiffs were selling soap in connection with the trade mark and labels of the defendants, and claimed an injunction and damages, or an account, and the defendants also administered interrogatories, the fifth of which required the plaintiffs to set forth the respective quantities of soap sold by them and their predecessors in business in connection with their labels and wrappers during a certain number of years, distinguishing the quantities sold in each year, and the countries in which the soap was sold, it was held that the interrogatory was not material to the defendant's case, and that the plaintiffs were justified in refusing to answer it: (*Benbow v. Low*, L. Rep. 16 Ch. Div. 93; 50 L. J. 35, Ch.; 70 L. T. 24; 29 W. R. 265.)

P. 275.—*At end of line 28 from bottom add*:—But see *Thompson v. Dunn*, L. Rep. 5 Ch. App. 573.

P. 277.—*Between lines 24 and 25 insert*:—A general interrogatory will be struck out as vexatious if too vague in its character to admit of a precise answer: (*The Radnorshire*, L. Rep. 5 P. Div. 172; 43 L. T. Rep. N. S. 319.)

P. 283.—*At end of line 22 insert*:—L. Rep. 5 Q. B. Div. 556.

P. 286.—*At end of line 22 from bottom add*:—*Vermineck v. Edwards*, 29 W. R. 189.)

P. 286.—*At end of line 11 from bottom add*:—L. Rep. 15 Ch. Div. 120.

P. 290.—*Between lines 20 and 21 insert*:—A defendant, who has put in a rejoinder but not counter-claimed, is entitled to move, under Order XL., r. 11, to have the action dismissed on the ground that, on the admissions in the pleadings, the plaintiff is not entitled to the relief claimed: (*Pascoe v. Richards*, 70 L. T. 240-1; 29 W. R. 330.)

P. 290.—*At end of line 19 from bottom add*:—*Carter v. Stubbs*, L. Rep. 6 Q. B. Div. 116; 50 L. J. 4, Q. B.; 43 L. T. Rep. N. S. 746; 29 W. R. 132.

P. 294.—*Between lines 7 and 8 insert*:—Upon a petition class inquiries under a will may be taken in a district registry: (*Re Judkins*, W. N., 1880, p. 198.)

P. 296.—*At end of line 3 from bottom add*:—But compare A. J. A. 1876, s. 17, and O. LVII., r. 1.

P. 298.—*Before ENROLMENT OF DEEDS insert*:—

ENFRANCHISEMENT OF COPYHOLDS.

[See LAND TAX REDEMPTIONS ACT, III.]

P. 304.—*At end of page add*:—The only exceptions to the rule that the evidence at the trial of an action shall be taken *vivâ voce* and in open court, are where the evidence is by agreement taken by affidavit, and where it appears to the judge necessary for the purposes of justice that an examination of particular witnesses shall be taken before any officer of the court or other person: (per Jessel, M.R., in Court of Appeal, in *Warner v. Mosses*, L. Rep. 16 Ch. Div. 100; 43 L. T. Rep. N. S. 401; 50 L. J. 28, Ch.; 29 W. R. 201.)

P. 305.—*Between lines 11 and 12 insert*:—Rule 4 of Order XXXVII. is copied from 1 Will. 4, c. 22, and, like that statute, can only be made use of where the person to be examined cannot be examined at the trial: (*Warner v. Mosses*, L. Rep. 16 Ch. Div. 100; 43 L. T. Rep. N. S. 401; 50 L. J. 28, Ch.; 29 W. R. 201.)

Where, after consenting that the evidence should be taken by affidavit, a solicitor for one party was unable to get his witnesses to make affidavits, the Court of Appeal held (reversing the decision of Bacon, V.C.), that the court had no jurisdiction to allow him to "examine witnesses *ex parte*"

before a special examiner, and to use the depositions on the trial, subject to cross-examination of witnesses at the trial: (*Id.*)

P. 306.—At line 16 from bottom, for commission read special examiner.

P. 322.—At end of page add:—A witness in a cause may be cross-examined as to whether he has been convicted of any felony or misdemeanour, and if he denies it or refuses to answer, the opposite party may prove such conviction under sect. 25 of the Common Law Procedure Act, although the fact of such conviction is not material to the matter in issue in the cause: (*Ward v. Simfield*, 43 L. T. Rep. N. S. 322.)

P. 323.—Between lines 10 and 11 insert:—Where a defendant in an action, who claimed to be owner of a mill, denied that he had ever stated that he was tenant only; after the evidence for the defence was closed, the plaintiff was allowed to call a witness to prove that, on a certain occasion, the defendant had stated that he was tenant of the mill, though the same witness had previously been called and examined: (*Sykes v. Haig*, 70 L. T. 115.)

P. 323.—Between lines 12 and 13 from bottom insert:—A judge may at any period in a case allow further evidence to be called by either party for his own satisfaction, even though it is doubtful whether it is admissible on the request of the party desiring it as a right: (*Budd v. Davidson*, 29 W. R. 192.)

And see *Bigsby v. Dickinson*, L. Rep. 4 Ch. Div. 24; 25 W. R. 89.)

P. 324.—Between lines 19 and 20 insert:—If a party to an action, by mistake, consents to the evidence being taken by affidavit, he will, on proving to the satisfaction of the judge that, to his surprise, witnesses will not make affidavits, be relieved from the consequences of his mistake: (*Warner v. Mosses*, L. Rep. 16 Ch. Div. 100; 43 L. T. Rep. N. S. 401; 50 L. J. 28 Ch.; 29 W. R. 201.)

P. 329.—At end of page add:—The court has no power to order plaintiff's affidavits in reply to be taken off the file, if not confined strictly to matters in reply, but may at the trial disregard them, or give the defendants leave to answer them: (*Gilbert v. Comedy Opera Company*, 29 W. R. 169.)

P. 350.—Between lines 12 and 13 insert:—Under a writ of *elegit* the sheriff is entitled to seize the debtor's goods at once, before the holding of the inquisition: (*Ex parte Abbott*; *Re Gourlay*, L. Rep. 15 Ch. Div. 447; 43 L. T. Rep. N. S. 417; 50 L. J. 80, Ch.; 29 W. R. 143.)

P. 351.—Between lines 12 and 13 insert:—From the time of the seizure of the goods, even before inquisition, the creditor becomes a secured creditor within the meaning of sect. 16 (sub-sect. 5) of the Bankruptcy Act, 1869, and sect. 87 of that Act has no application to a seizure of goods under an *elegit*: *Ex parte Abbott*; *Re Gourlay*, L. Rep. 15 Ch. Div. 447; 43 L. T. Rep. N. S. 417; 29 W. R. 143; 50 L. J. 80, Ch.)

P. 353.—Between lines 19 and 20 from bottom insert:—If a petition in bankruptcy has been presented against the defendant, and before the receiver in the action is appointed a receiver has been appointed in the bankruptcy proceedings, the bankruptcy receiver's title will prevail over that of the receiver in the action: (*Salt v. Cooper*, W. N., 1880, p. 203; 43 L. T. Rep. N. S. 682.)

P. 353.—Between lines 12 and 13 from bottom insert:—The receiver may be obtained on motion in the division in which the action in which the execution was issued, without commencing proceedings in the Chancery Division: (*Smith v. Cowell*, L. Rep. 6 Q. B. Div. 75; 43 L. T. Rep. N. S. 528; 50 L. J. 38, Q. B.; 29 W. R. 227.)

P. 356.—Between lines 18 and 19 from bottom insert:—In the oral examination of a judgment debtor "as to whether any, and what, debts are owing to him," the examination is not confined to the question whether any debts are owing, and what they are; but any question fairly pertinent and

properly asked, with a view to ascertain full particulars of what debts there are, and which of them may be attached, must be answered: (*Republic of Costa Rica v. Strousberg*, L. Rep. 16 Ch. Div. 8; 43 L. T. Rep. N. S. 399; 50 L. J. 7 Ch.; 29 W. R. 179.)

Per James, L.J.—The examination may take the form of the severest cross-examination: (*Id.*)

P. 357.—*At end of line 21 from bottom add*:—L. Lep. 14 Ch. Div. 638; 42 L. T. Rep. N. S. 866.)

P. 357.—*Between lines 6 and 7 from bottom insert*:—Where by three contemporaneous indentures of mortgage, 1st, 2nd, and 3rd, mortgages were created by M. on a leasehold public house in favour of W., V., and B., respectively, and by a subsequent deed a fourth mortgage was created by M. in favour of R.; judgment was recovered by R. against B., and a garnishee order obtained by R. attaching M.'s debt to B.; and B. subsequently assigned his mortgage debt, "and all securities for the same," to Chatterton, and Chatterton had notice of the garnishee order; and other creditors also obtained judgment against B., and garnishee orders attaching M.'s debt to B.; W., the first mortgagee, sold the mortgaged premises under his powers of sale; and a garnishee order was obtained by a creditor attaching debts due from W. to B., and W., out of the proceeds of sale, paid off his own debt and that of V., the second mortgagee, and was then ordered to pay the surplus into court; on a summons to settle the priority of the various creditors, and the effect of these garnishee orders, it was held that the surplus sale moneys were not "debts" within the meaning of Order XLV., rr. 2, 3, and the Common Law Procedure Act, 1854, ss. 61, 62, and that the garnishee order had no operation upon the surplus money in W.'s hands, neither was the surplus affected by the judgment obtained against B., and consequently that Chatterton, as the assignee of B.'s mortgage debt and "the securities for the same," was entitled to be paid in priority to the other creditors: (*Chatterton v. Watney*, 70 L. T. 205; W. N., 1881, p. 8.)

Where a judgment creditor has issued a judgment summons, and obtained an order for payment of the debt by instalments, he will not be allowed to harass the debtor, in absence of default in payment, by garnishee proceedings: (*Hayton v. Beall*, W. N., 1881, p. 12; 29 W. R. 333.)

P. 363.—*At end of line 28 add*:—L. Rep. 14 Ch. Div. 152; 28 W. R. 582.)

P. 363.—*Between lines 11 and 12 from bottom insert*:—Per Bacon, V.C.: A defendant must be personally served with notice of motion of an attachment, and service on his solicitor in the cause will not be sufficient, unless in a case where personal service cannot be obtained: (*Mann v. Perry*, 70 L. T. 186.)

P. 363.—*At end of line 10 from bottom add*:—L. Rep. 14 Ch. Div. 152; 28 W. R. 582.)

P. 363.—*Between lines 6 and 7 from bottom insert*:—Where leave has been obtained to issue a writ of attachment, an order of committal will not be issued instead, unless a fresh notice of motion is served for an order of committal: (*Buist v. Bridge*, W. N., 1880, p. 176; 43 L. T. Rep. N. S. 432; 29 W. R. 117.)

P. 367.—*At line 6 from bottom del.* "Div."

P. 368.—*Between lines 9 and 10 insert*:—Where the defendant was committed upon an affidavit by the plaintiff that the defendant was residing in a large, well-furnished house, keeping horses, carriages, a groom, and other servants, and living in the style of a country gentleman of means; that he had been seen on several occasions at different times and places with his horse and carriage, and always appeared to have money at his command; and that the plaintiff was informed and believed that he had ample means to pay the debt and costs in the action. The order of

commitment was affirmed, although the defendant swore that all the furniture, horses, carriages, and effects at the house above mentioned belonged to his wife, and were bought and maintained by her separate money and estate; that the groom and other servants were the servants of his wife, and maintained at her sole expense; that he had no horse or carriage or any other property of his own, nor had he money at his command that would enable him to attend court to answer the application, and his wife declined to supply him with any; and that he was unable to pay the debt and costs in the action: (*Harper v. Scrimgeour*, L. Rep. 5 C. P. Div. 306; 29 W. R. 264.)

P. 373.—At line 5, for 1876 read 1880.

P. 392.—At end of line 3 from bottom, add :—L. Rep. 15 Ch. Div. 223.

P. 397.—Between lines 13 and 14 insert :—For form of declaration as to title deeds in decrees for sale in action by equitable mortgagee, see Seton, 1126, No. 3; and *Parker v. Sidney*, W. N. 1879, p. 135.

P. 397.—At end of line 6 from bottom add :—L. Rep. 15 Ch. Div. 93.

P. 398.—Line 4, for 4 Ch. Div. read 14 Ch. Div.

P. 398.—Line 12, for presented read prosecuted.

P. 409.—At end of line 18 add :—And see *Re Rees*; *Rees v. George*, L. Rep. 15 Ch. Div. 490.

P. 420.—At line 26, for 119 read 113.

P. 424.—Between lines 24 and 25 insert :—It is only the original application that must be made by the mother, by petition. Subsequent applications should be by motion, to the judge who made the order: (*Re Holt*, L. Rep. 16 Ch. Div. 115.)

P. 424.—Between lines 10 and 11 from bottom, insert :—If after the order is made there are circumstances which render it unfit that the mother should have the custody of the child, the father may move the judge who made the order to vary it: (*Re Holt*, L. Rep. 16 Ch. Div. 115.)

P. 426.—Between lines 17 and 18 insert :—Leave will not be given to issue attachment against a person who has been ordered to execute a settlement under sects. 19, 23, of the Infant Marriage Act, and refuses, until the settlement has been tendered personally for execution after service of decree: (*Attorney-General v. Waring*, 28 W. R. 623.)

P. 426.—At line 22 :—

For VI. MAINTENANCE, read 2. MAINTENANCE.

P. 430.—Between lines 13 and 14 from bottom insert :—Jessel, M.R. recently directed the draft settlement to be prepared by the infant's counsel: (*Re King*, 27th Nov. 1880.)

P. 433.—At end of line 9 add :—L. Rep. 15 Ch. Div. 864.

P. 433.—Between lines 22 and 23, insert :—In order to obtain an injunction in such a case it is sufficient for the plaintiff to show that the libel is calculated to injure his trade; it is not necessary that he should prove actual damage: (*Thomas v. Williams*, *sup.*)

P. 433.—Between lines 26 and 27 insert :—Where a statute creates a new offence and imposes a penalty, the ancillary remedy by injunction may still be claimed: (*Cooper v. Whittingham*, L. Rep. 15 Ch. Div. 501; 43 L. T. Rep. N. S. 16.)

P. 433.—At line 29, for 492 read 498.

P. 433.—Between lines 30 and 31 insert :—Jessel, M.R. has granted an injunction restraining the mayor and corporation from avoiding or declaring the office of alderman held by the plaintiff (an alderman) void, and from appointing or electing any successor to him, and from interfering with him in the exercise of his rights and privileges as an alderman;

where the plaintiff had not, as alleged, compounded with his creditors so as to disqualify him under the 52nd section of the Municipal Corporations Act 1835, as extended by the 21st section of the Debtors Act 1869, from continuing to hold the office of alderman: (*Aslatt v. Mayor and Corporation of Southampton*, L. Rep. 16 Ch. Div. 143; 50 L. J. 31, Ch.; 70 L. T. 24; 29 W. R. 117.)

- P. 433.—*Between* lines 5 and 6 from bottom *insert*:—Per Malins, V.C.: The court may at the hearing of the action either order the defendants to pull down so much of their building as will interfere with the plaintiff's light, or, if it should think fit, order the defendants to pay any sum of money by way of compensation for the damage the plaintiff may have sustained: (*Lawes v. Carter*, W. N. 1880, p. 203; 70 L. T. 153-4.)

As to the costs where the plaintiff seeks that buildings may be pulled down, and does not move for an injunction before hearing, see *Baker v. Wood*, W. N., 1881, p. 7.

- P. 433.—*At end of page add*:—"When a foreigner has appeared to an action in an English court, he gives jurisdiction to the English court to restrain him from proceeding to litigate the same subject-matter in the courts of his own country. But it is a matter of discretion, and the court ought only to exercise this jurisdiction to prevent double vexation: (*Dawkins v. Simonetti*, 29 W. R. 228.)

- P. 434.—*At end of page add*:—"And an interim injunction has been granted before writ issued: (*Young v. Brassey*, L. Rep. 1 Ch. Div. 277.)

- P. 435.—*Between* lines 6 and 7 *insert*:—"Although any decision on an application [for an interlocutory injunction] is not deciding the rights of the parties, yet, when we are asked to interfere with the exercise of a legal right, we must be satisfied that the plaintiff has made out a *prima facie* case so as to justify the court in interfering with the rights of the defendant until the trial of the action: (per Cotton, L.J., *Carter v. Salmon*, 43 L. T. Rep. N. S. 490, 492.)

Courts of equity did grant interlocutory injunctions without the evidence which would justify them in making a decree; that is to say, if it were necessary to interfere for the preservation of property until the hearing of a suit, they acted on hearsay evidence where a person pledged his belief of certain facts which, if they were established at the hearing, would justify the making of a decree. . . . But the court never [acted] upon the mere suggestion of a possibility that if an injunction were granted some case would be made out; it did so only where a person swore to his belief that facts existed which would justify the court in interfering with the legal right of the defendants: (per Cotton, L.J., *Ex parte Bayly*; *Re Hart*, L. Rep. 15 Ch. Div. 227.)

- P. 435.—*Between* lines 16 and 17 from bottom *insert*:—"Courts of equity are always very unwilling to interfere with the legal rights of mortgagees, and hardly ever do so without requiring the money due or the security to be paid into court, or other ample security to be given to the person who is seeking to exercise his rights as mortgagee: (per Cotton, L.J., *Ex parte Bayly*; *Re Hart*, L. Rep. 15 Ch. Div. 223, 227.)

A court of equity will never interfere with the legal right of distraint by the owner of the reversion for the rent accruing due to him under the contract of tenancy, although the distraint is for too much: (per James, L.J., *Carter v. Salmon*, 43 L. T. Rep. N. S. 490.)

- P. 438.—Line 25, from bottom for XXIII. read XXXIII.

- P. 438.—*Between* lines 25 and 26 *insert*:—"Fry, J., on directing an inquiry in chambers as to damages, has reserved the question of costs so that the judge in whose chambers the proceedings on the inquiry must take place might have full control over the costs: (*Slack v. Midland Railway*

Company, L. Rep. 16 Ch. Div. 81; 43 L. T. Rep. N. S. 434; 29 W. R. 302.)

Unless irreparable injury would otherwise be caused, an order for an inquiry will not be stayed pending an appeal: (*Hyam v. Terry*, 70 L. T. 25; 29 W. R. 32.)

- P. 440.—*Between* lines 6 and 7 from bottom *insert*:—Per Baggallay, L.J.: It is quite clear that an interlocutory order may be made either before or at or after the hearing; and if the word “interlocutory” has this more extended meaning as to injunction, so it has also as to *mandamus* and the appointment of a receiver: (*Smith v. Cowell*, L. Rep. 6 Q. B. Div. 75; 43 L. T. Rep. N. S. 528; 29 W. R. 227.)

Per Brett, L.J.: An interlocutory order is any order other than the judgment or decree in the action: (*Id.*)

- P. 440.—*Between* lines 2 and 3 from bottom *insert*:—For the principles on which the court interferes on an interlocutory application with a legal right, and the evidence required, see *Carter v. Salmon*, 43 L. T. Rep. N. S. 490; *Ex parte Bayly*; *Re Hart*, L. Rep. 15 Ch. Div. 223; 43 L. T. Rep. N. S. 181; 29 W. R. 28.

- P. 444.—*Between* lines 23 and 24 from bottom *insert*:—An interpleader issue is not an action; the provisions of Order XXXVI., r. 3, do not apply to it; all the procedure in interpleader issues is kept alive by Order I., r. 2; and in the absence of an express order there is no power either in the parties or in the presiding judge to dispense with a jury on the trial of such an issue. Query, whether there is any power to direct an interpleader issue to be tried before a judge without a jury: (*Hamlyn v. Betteley*, L. Rep. 6 Q. B. Div. 63; 70 L. T. 24; 50 L. J. 1, Q. B.; 29 W. R. 275.)

- P. 445.—*Between* lines 9 and 10 *insert*:—Where a plaintiff is liable to pay costs to a defendant in an action, and, in interpleader proceedings arising out of the same action, the plaintiff is entitled to receive costs from such defendant, the costs cannot be set off on taxation: (*Barker v. Hemming*, L. Rep. 5 Q. B. Div. 609; 43 L. T. Rep. N. S. 678.)

- P. 465.—*Between* lines 6 and 7 *insert*:—The term relief is not limited to its old technical meaning of a plaintiff's remedy in Chancery, but means relief in its ordinary sense, such as for instance the relief from liability incurred by being a defendant in an action: (*Pascoe v. Richards*, 70 L. T. 240-1.)

- P. 465.—*Between* lines 6 and 7 from bottom *insert*:—A defendant who has put in a rejoinder but not counter-claimed is entitled to move to have the action dismissed on the ground that, on the admissions in the pleadings, the plaintiff is not entitled to the relief claimed: (*Pascoe v. Richards*, 70 L. T. 240-1; 29 W. R. 330.)

- P. 465.—*At* line 10, *for* 378 *read* 398.

- P. 465.—*At* line 23, *for* 719 *read* 724.

- P. 465.—*At* line 8 from bottom, *for* 415 *read* 514.

- P. 470.—*Between* lines 22 and 23 *insert*:—The court has power to enter judgment for the defendant upon motion for judgment for the plaintiff: (*Ruel v. Tatnell*, 70 L. T. 44.)

- P. 471.—*Between* lines 41 and 42 *insert*:—Filing is unnecessary where no appearance has been entered and the statement of claim has been served personally with the writ: (*Renshaw v. Renshaw*, 42 L. T. Rep. N. S. 353; 49 L. J. 127, Ch.; 28 W. R. 409.)

- P. 473.—*At* line 17 and 26 from bottom, *for* Pr. C. O. *read* Ch. Reg. March 15, 1860.

- P. 477.—*Between* lines 5 and 6 from bottom *insert*:—And see *Lovesy v. Smith*, L. Rep. 15 Ch. Div. 655; 43 L. T. Rep. N. S. 240; 28 W. R. 980.

- P. 480.—*Between* lines 19 and 20 *insert*:—Where it is desired, on further

consideration, to obtain an order, on persons served, for payment of money personally, they should be served with notice of the action having been set down for further consideration, even though they have obtained an order for leave to attend proceedings: (*Re Rees; Rees v. George*, L. Rep. 15 Ch. Div. 490.)

- P. 484.—*To Yetts v. Foster add*:—L. Rep. 3 C. P. Div. 437.
- P. 484.—*To Hamilton v. Johnson and Co. add*:—L. Rep. 5 Q. B. Div. 263; 49 L. J. 155, Q. B.; 28 W. R. 879.
- P. 486.—*At end of line 8 add*:—*Ex parte Dale*, 43 L. T. Rep. N. S. 534; varied on appeal 70 L. T. 204.
- P. 489.—*At line 10, between "and" and "everything" dele "that."*
- P. 489.—*Between lines 16 and 17 insert*:—As to the value of a foreign judgment in favour of a claim in an administration action, see *Re Boyes; Crofton v. Crofton*, L. Rep. 15 Ch. Div. 591.
- P. 502.—*Between lines 23 and 24 insert*:—The official trustee of charity funds is a person absolutely entitled: (*Re Bishop Monk's Horfield Trust*, 70 L. T. 241.)
- P. 506.—*At end of line 8 from bottom add*:—And see *Re John Wilkes' Estate*, W. N., 1880, p. 176.
- P. 507.—*Between lines 22 and 23 from bottom insert*:—Where the plaintiffs contracted to sell land to the defendants, but failed to make any title to a small portion thereof, and thereupon the defendants paid the purchase money of the whole land (after making certain deductions therefrom in accordance with the contract) into court under sect. 76, and executed a deed-poll under sect. 77 purporting to vest the whole of the land in themselves, it was held that the plaintiffs were not "owners" of the strip of land within the meaning of sects. 76 and 77, and that under the circumstances the defendants could not acquire the land under those sections: (*Wells v. Chelmsford Local Board*, L. Rep. 15 Ch. Div. 108; 43 L. T. Rep. N. S. 378.)
- P. 507.—*At end of page add*:—And see *Wells v. Chelmsford Local Board*, *sup.*
- P. 514.—*Between lines 19 and 20 from bottom insert*:—Where land belonging to a charity was taken by a corporation under the Act, and the purchase money paid into court, and the Charity Commissioners approved a scheme for the purchase of lands on behalf of the charity, and directed that the fund in court, when paid out to the official trustee of charity funds, should be applied in or towards the proposed purchase, it was held that the transfer to the official trustee was payment to a person absolutely entitled, and the corporation were not liable to pay costs of re-investment or any further costs: (*Re Bishop Monk's Horfield Trust*, W. N., 1881, p. 16; 70 L. T. 241.)
- P. 515.—*At line 2 for 9 Ch. App. 684 read 6 Ch. App. 887.*
- P. 535.—*At line 17 from bottom, after 91, add*:—*Shipway v. Ball*, W. N., 1881, p. 11; 29 W. R. 302.
- P. 539.—*At end of page add*:—The former decisions as to jurisdiction are considerably affected by the recent decision in *Williamson v. Cotterill*, 70 L. T. 24.
- P. 549.—*Between lines 21 and 22 insert*:—A chief clerk has no power in vacation to give special leave to serve notice of motion. Applications for such leave must be made to the vacation judge: (*Conacher v. Conacher*, 70 L. T. 186.)
- P. 551.—*At end of page add*:—On a motion day a motion to discharge a prisoner from custody is entitled to priority over other motions: (*Ashton v. Shorrock*, W. N., 1880, p. 184; 43 L. T. Rep. N. S. 530; 29 W. R. 117.)

- P. 559.—*Between* lines 16 and 17 *insert*:—Where an action is tried by a jury at the assizes, and the judge reserves for further consideration the question for which party judgment should be entered, a motion for a new trial on the ground that the verdict is against the weight of evidence must be made within the first four days of the sittings following the discharge of the jury: within four days after the judgment on further consideration will not be in time: (*Edwards v. Midland Railway Company*, 70 L. T. 132.)
- P. 560.—*Between* lines 8 and 9 *insert*:—As to whether “misdirection” applies to a nonsuit, see *Hall v. Jupe*, 43 L. T. Rep. N. S. 411.)
- P. 560.—*At end* of line 8 from bottom, *add*:—*Hamilton v. Johnson*, L. Rep. 5 Q. B. Div. 263; 41 L. T. Rep. N. S. 461; 49 L. J. 155, Q. B.; 28 W. R. 879.
- P. 567.—*Between* lines 19 and 20 from bottom *insert*:—One of several joint owners of a patent may sue for an injunction or an account alone: (*Sheehan v. Great Eastern Railway Company*, L. Rep. 16 Ch. Div. 59; 43 L. T. Rep. N. S. 432; 29 W. R. 69.)
As to when and how objection is to be taken that all proper persons are not joined as plaintiffs, see *Sheehan v. Great Eastern Railway Company* (*sup.*)
- P. 568.—*At end* of line 27 from bottom *add*:—Affirmed 43 L. T. Rep. N. S. 481; 50 L. J. 140, Ch. It was held that the committee, and the corporation as their successors, were in the position of trustees for all persons with whom an underwriting member had entered into engagements as an underwriter, and were therefore entitled to maintain an action on the guarantee given by him to the committee.
- P. 569.—*At end* of line 20 *add*:—L. Rep. 15 Ch. Div. 169.
- P. 572.—*At end* of line 19 *add*:—And see *Lovesy v. Smith*, L. Rep. 15, Ch. Div. 655; 43 L. T. Rep. N. S. 240; 28 W. R. 980.
- P. 572.—*Between* lines 26 and 27 *insert*:—The effect of the refusal of the court to stay an action on the defendant’s application, is to give leave to the plaintiff to sue alone without her husband, in exercise of the authority given to a court or judge by Order XVI., r. 8, and which may be so exercised after action brought: (*Kingsman v. Kingsman*, L. Rep. 6 Q. B. Div. 122; 50 L. J. 81, Q. B.; 29 W. R. 207.)
- P. 573.—*Between* lines 27 and 28 *insert*:—It seems to be necessary to join the husband, though he is an infant: (*Kingsman v. Kingsman*, L. Rep. 6 Q. B. Div. 122; 50 L. J. 81, Q. B.; 29 W. R. 207.)
- P. 573.—*At end* of page *add*:—A writ issued by the next friend of a married woman on her behalf without the employment of a solicitor will be, together with all subsequent proceedings, set aside, with costs against the person issuing such writ: (*Swann v. Swann*, 43 L. T. Rep. N. S. 530.)
- P. 585.—*At end* of line 16 from bottom *insert*:—L. Rep. 15 Ch. Div. 665.
- P. 590.—*At end* of line 5 from bottom *add*:—L. Rep. 5 P. Div. 197.
- P. 593.—*At end* of line 8 *add*:—49 L. J. 262, Ch.
- P. 593.—*Between* lines 20 and 21 from bottom *insert*:—An objection that all proper persons have not been joined as plaintiffs should be made generally by interlocutory motion, and not at the hearing: (*Sheehan v. Great Eastern Railway Company*, L. Rep. 16 Ch. Div. 59; 43 L. T. Rep. N. S. 432; 29 W. R. 69.)
- P. 597.—*Between* lines 19 and 20 from bottom *insert*:—As to the liability of a committee of a lunatic for costs, after the death of the lunatic, and the substitution of the lunatic’s personal representative, see *Harland v. Garbutt*, W. N., 1881, p. 8.
- P. 599.—*At end* of line 22 *add*:—L. Rep. 15 Ch. Div. 426.

- P. 600.—*At end of page add*:—Where an action has abated as against a defendant before judgment, and the plaintiff has refused or neglected to make his successors in interest parties to the action, the old practice still prevails, and the proper course is for the defendant's successors to apply for an order against the plaintiff that he obtain an order to prosecute the proceedings against them within a limited time, or that in default the action may stand dismissed as against them, without costs: (*Motion v. King*, 29 W. R. 73.)
- P. 600.—*At end of page add*:—Where in action commenced by S., a trustee in bankruptcy, after issuing the writ, but before the delivery of the statement of claim, S. assigned to C. all his estate and interest as trustee of the bankrupt's estate for 2000*l.*, and C. obtained an order of course giving him liberty to carry out and prosecute the action of S. v. L., and proceedings therein, in like manner as the same might have been carried on by the original plaintiff S. if he had not assigned his interest, a statement of claim afterwards delivered, containing, with the exception of the formal note stating that it was delivered by C. solicitor, in person, who, by order, had liberty to carry on and prosecute the action, no further reference to the fact that C. was now prosecuting the action as plaintiff in place of S., it was held by the Court of Appeal (reversing the decision of Bacon, V.C.), that the order obtained by C. was the same as a supplemental order under the old practice, which had not been altered, and that C. ought to have amended the title of the action by adding a new title in which his name would appear as plaintiff; and to have amended the statement of claim by adding such averments as would show his title as assignee: (*Seear v. Lawson*, L. Rep. 16 Ch. Div. 121; 43 L. T. Rep. N. S. 717; 50 L. J. 139, Ch.; 29 W. R. 109.)
- P. 607.—*At end of line 15 add*:—Per Jessel, M.R.: The request for sale by a married woman under the Partition Act, 1876, s. 6, must be made by some person specially authorised to act on her behalf in the action, and the request of counsel is not a sufficient request under the Act: (*Wallace v. Greenwood*, 43 L. T. Rep. N. S. 720.)
- P. 608.—*Between lines 4 and 5 from bottom insert*:—Where in a partition action asking for sale all the parties interested are not before the court, the judgment or order should not be prefaced with an opinion of the court that a sale is more beneficial for the persons interested than a division of the property: (*Re Hardiman; Pragnell v. Batten*, 43 L. T. Rep. N. S. 749.)
- P. 616.—*Between lines 10 and 11 insert*:—If the married woman's authority is insufficiently evidenced, the purchase money is still liable to be laid out in the purchase of other realty, unless she elects to take it as personalty and she exercises her election by her separate examination. But when the fund is under 200*l.* the court will dispense with her separate examination in order to save expense, and order the money to be paid out to the married woman on her separate receipt, and an affidavit of no settlement being filed: (per Jessel, M.R., 43 L. T. Rep. N. S. 720.)
- P. 619.—*At end of page add*:—Where a partnership had been dissolved, and a deed of partnership, dividing the property of the partnership on the assumption that the partnership accounts were settled down to a particular date, had been executed, and one of the former copartners subsequently brought an action for the purpose of having the partnership accounts opened without disturbing the deed of partition, it was held that the partnership accounts could not be opened without setting aside the deed of partition, and that the deed of partition could not be set aside because some of the property comprised in it had been subsequently sold: (*Sharp v. Pickett*, 70 L. T. 78.)
- P. 623.—*Between lines 23 and 24 from bottom insert*:—One of several joint owners of a patent can sue for an injunction and even for an account,

- without joining the other joint owners: (*Sheehan v. Great Eastern Railway Company*, L. Rep. 16 Ch. Div. 59; 43 L. T. Rep. N. S. 432; 29 W. R. 69.)
- P. 623.—*At end of line 11 from bottom add*:—And see *Halsey v. Brotherhood*, 29 W. R. 9.
- P. 661.—*Between lines 2 and 3 from bottom insert*:—Where a widow, aged fifty-two, applied to trustees to pay over the trust fund, it was held, on petition for the advice of the court, that they were justified in doing so: (*Re Taylor's Settlement Trust*, 70 L. T. 241.)
- P. 675.—*At end of line 8 from bottom add*:—43 L. T. Rep. N. S. 557.
- P. 677.—*At end of line 24 add*:—43 L. T. Rep. N. S. 557.
- P. 688.—*At end of line 20 from bottom add*:—L. Rep. 16 Ch. Div. 121; 43 L. T. Rep. N. S. 716; 29 W. R. 109.
- P. 691.—*After line 5 add*:—The time for delivering . . . any pleading may be enlarged by consent in writing, without application to the court or a judge: (O. LVII., r. 6a, April, 1880.)
- P. 691.—*Between lines 9 and 10 insert*:—Filing is unnecessary where no appearance has been entered, and the statement of claim has been served personally with the writ: (*Renshaw v. Renshaw*, 42 L. T. Rep. N. S. 353; 49 L. J. 127, Ch.; 28 W. R. 409.)
- P. 691.—*Between lines 11 and 12 from bottom*:—Amendment of pleadings will not be allowed at the hearing if it will change the whole nature of the action: (*Laird v. Briggs*, W. N., 1880, p. 205; 43 L. T. Rep. N. S. 632; 29 W. R. 197; *Blenkhorn v. Penrose*, 29 W. R. 238.)
- P. 692.—*After line 6 add*:—The time for . . . amending any pleading may be enlarged by consent in writing, without application to the court or a judge: (O. LVII., r. 6a, April, 1880.)
- P. 693.—*At end of line 2 add*:—L. Rep. 16 Ch. Div. 13; 43 L. T. Rep. N. S. 458.)
- P. 693.—*After line 18 add*:—Forms of orders are given in Schedules H. 10 and H. 11 to the Rules of April, 1880.)
- P. 699.—*Line 9 from bottom for Morris read Marris*.
- P. 700.—*At end of line 5 add*:—*Millington v. Loring*, W. N., 1880, p. 202; 43 L. T. Rep. N. S. 657; 29 W. R. 207.
- P. 704.—*At bottom of page add*:—A statement of defence which admitted that the plaintiff was in possession of lands in dispute, subject only to a qualified assertion of certain rights of the defendant, was not allowed to be amended at the hearing by inserting an unqualified denial of the plaintiff's possession: (*Laird v. Briggs*, W. N., 1880, p. 205; 43 L. T. Rep. N. S. 632; 29 W. R. 197.)
- P. 707.—*Between lines 24 and 25 insert*:—As to a counter-claim in respect of an act done by a deceased person, with regard to the estate of whom plaintiffs are suing, see *Mudge v. Adams*, 29 W. R. 307.
- P. 709.—*Between lines 9 and 10 insert*:—As to a counter-claim in the alternative, see *Mudge v. Adams*, 29 W. R. 307.
- P. 717.—*At end of line 7 add*:—43 L. T. Rep. N. S. 715; 29 W. R. 120, 177.
- P. 717.—*After line 16 add*:—A form of order is given Schedule H. 21 to the Rules of April, 1880.
- P. 719.—*Between lines 19 and 20 insert*:—Where the plaintiff alleged that certain nail rods supplied to him by the defendant were of inferior quality, and Fanwels, the manufacturer of the nail rods, was, by leave of a judge, served with a third party notice, and with the statement of claim, upon an application for directions as to the mode of trial, it was objected that the plaintiff's evidence at the trial would include a letter written by the defendant, and relied upon as an admission by him that the iron was

of an inferior quality, which letter would not be evidence as against Panwels, it was held that, as injustice might be done by trying the question between the plaintiff and the defendant and the question between the defendant and Panwels at the same time, no directions should be given: (*Schneider v. Batt*, 70 L. T. 132.)

- P. 721.—*At end of line 24 add* :—*Shardlow v. Cotterill*, W. N. 1881, p. 2.
- P. 722.—*Between lines 6 and 7 from bottom insert* :—On the question whether a demurrer shall be allowed, the pleading must be taken in the sense least favourable to the pleader: (*The Sir Charles Napier*, L. Rep. 5 P. Div. 73, 76; 42 L. T. Rep. N. S. 167; 28 W. R. 718.)
- P. 722.—*After line 15 add* :—A form is given in Sched. B. 18 to the Rules of April, 1880.
- P. 731.—Line 7, for *Streley* read *Strelley*.
- P. 743.—*Between lines 9 and 10 from bottom insert* :—Where the chief clerk confirmed W.'s contract for 18,000*l.*, and before the chief clerk's order was passed and entered, an offer was received to purchase the estate for 20,000*l.*, and a summons was taken out to vary the chief clerk's order, and for a declaration that the offer of 20,000*l.* should be accepted, it was held that the principles of the Act 30 & 31 Vict. c. 48, as to opening biddings at an auction, apply to a sale by private contract with the sanction of the court, and the chief clerk's certificate confirming W.'s contract was affirmed: (*Re Bartlett*; *Newman v. Hook*, 70 L. T. 132; W. N. 1880, p. 203; 29 W. R. 279.)
- P. 748.—*Between lines 11 and 13 insert* :
3. HOW MADE.
- P. 748.—*At end of line 10 from bottom add* :—43 L. T. Rep. N. S. 682; *Smith v. Cowell*, L. Rep. 6 Q. B. Div. 75; 43 L. T. Rep. N. S. 528; 50 L. J. 38, Q. B.; 29 W. R. 227.)
- P. 752.—*Between lines 23 and 24 from bottom insert* :—If a petition in bankruptcy has been presented against the defendant, and before the receiver in the action is appointed a receiver has been appointed in the bankruptcy proceedings, the bankruptcy receiver's title will prevail over that of the receiver in the action: (*Salt v. Cooper*, W. N., 1880, p. 203; 43 L. T. Rep. N. S. 682.)
- P. 765.—*At end of line 19 from bottom add* :—L. Rep. 16 Ch. Div. 53; 50 L. J. 74, Ch.; 29 W. R. 209.
- P. 784.—*Correct numbering of page.*
- P. 802.—*At line 15 for App. read Div.*
- P. 813.—*Between lines 25 and 26 from bottom insert* :—Where a solicitor had lent himself to a proceeding which amounted to the concoction of a debt and judgment to deprive a man of his property, and in order to carry out this scheme he had used his professional skill and position, he was ordered to pay all the costs and to be suspended from practice for a year: (*Anon*, 70 L. T. 207.)
- P. 815.—*At end of line 16 from bottom add* :—43 L. T. Rep. N. S. 434; 29 W. R. 45.
- P. 816.—*At end of line 24 add* :—But see *Smith v. Dale*, 29 W. R. 331.
- P. 825.—*Between lines 8 and 9 insert* :—Fry, J., may make an order in an action transferred to him for trial: (*Porter v. West*, 43 L. T. Rep. N. S. 569; 29 W. R. 236.)
- P. 827.—*Between lines 22 and 23 from bottom insert* :—Where a solicitor, in preparing a mortgage to himself from one of his clients, inserts a power of sale without any proviso requiring notice to the mortgagor previous to its exercise, the burden is on him of proving that he had given the mortgagor an adequate explanation of the effect of the mortgage before execution. Where a solicitor sold a house mortgaged to him by one of

his clients under such a power of sale without previous notice, the usual proviso for notice to be given having been omitted without explanation, but the price for which the house was sold was not proved to have been inadequate: Held, that the solicitor must pay damages, calculated to include (1) the costs to which the plaintiff had been put by the wrongful sale; (2) the costs to which the plaintiff would be put in making a new investment equivalent to the old one; (3) the difference between the plaintiff's costs of the action as between party and party (which alone he could have awarded to him as costs), and his costs of the action as between solicitor and client; (4) a reasonable sum for probable increase in value of the house sold: (*Cockburn v. Edwards*, 43 L. T. Rep. N. S. 755; 29 W. R. 136.)

- P. 834.—*Between* lines 2 and 3 from bottom *insert*:—Where a person who had undertaken to edit a guide book to London, refused to deliver up his manuscript (for which he had received the agreed price) unless his employer consented to abandon his intention of stating on the title-page that the work was “edited” by a person who had taken no part in the preparation of the work, “assisted” by the true editor, it was held that the editor could not be compelled to carry out his agreement under circumstances which involved the committal of a fraud upon the public: (*Post v. Marsh*, 43 L. T. Rep. N. S. 628; 29 W. R. 198.)
- P. 836.—*Between* lines 6 and 7 from bottom *insert*:—Where a plaintiff sought specific performance of a certain agreement as modified by two subsequent agreements, or damages for breach, but failed to produce evidence as to the second of the three agreements, it was held that neither specific performance nor damages could be granted: (*Post v. Marsh*, 43 L. T. Rep. N. S. 628; 29 W. R. 198.)
- P. 851.—*Between* lines 13 and 14 from bottom *insert*:—A stop order may be granted upon a fund of a specified amount not actually in court but to be paid into the credit of an action under an order of the court: (*Shaw v. Hudson*, 48 L. J. 689, Ch.)
- P. 851.—*Between* lines 7 and 8 from the bottom *insert*:—A judgment creditor may obtain a stop order on a fund in court in the Chancery Division without obtaining a charging order in the division in which judgment was recovered: (*Shaw v. Hudson*, 48 L. J. 689, Ch.)
- P. 856.—*At end* of line 21 *add*:—L. Rep. 6 Q. B. Div. 116; 50 L. J. 4, Q. B.
- P. 868.—*Between* lines 5 and 6 from bottom *insert*:—On an adjourned summons in an action, originally tried before Fry, J., being called on before Bacon, V.C., the Vice-Chancellor declined to hear it, and wished it to be understood that on all future occasions, whenever an action was transferred from his cause list to Fry, J., for the purpose of trial, all subsequent proceedings and applications relating to such action and arising after judgment, which required to be heard by a judge in open court, would be re-transferred from the Vice-Chancellor's chambers to Fry, J., for his decision: (*Shaw v. Brown*, 70 L. T. 277.)
- P. 877.—*At end* of line 11 *add*:—L. Rep. 6 Q. B. Div. 63; 50 L. J. 1 C. P.
- P. 886.—*At end* of line 10 *add*:—*Petar v. Lailey*, W. N. 1881, p. 23.
- P. 922.—*At* line 8 from bottom, *after* 155, *add*:—49 L. J. 619, Ch.
- P. 922.—*At* line 7 from bottom, *after* 184, *add*:—29 W. R. 134.
- P. 970.—*At end* of line 3 *add*:—43 L. T. Rep. N. S. 753; *Re Kit Hill Tunnel*, W. N. 1881, p. 21; 70 L. T. 277.
- P. 979.—*Between* lines 8 and 9 from bottom *insert*:—Where a petition for continuing under supervision the voluntary winding-up of a company, was advertised in the *Gazette* on Friday, the 14th Jan., 1881, and was not advertised in the *Standard* until Saturday, the 15th, and not in the *Times* until Monday, the 17th Jan., the petition being in the paper for hearing on

Saturday, the 22nd Jan., and there being no opposition, the court, on the authority of *Re City and County Bank* (L. Rep. 10 Ch. App. 470), and *Re Land and Sea Telegraph Construction Company* (Malins, V.C., July 22, 1870), declared the advertisements sufficient, and made the order: (*Re McLean and Co.*, W. N. 1881, p. 8.)

- P. 984.—*Between* lines 10 and 11 from bottom *insert*:—The position of a liquidator making a claim against directors under the section for mis-application of moneys in improperly paying a dividend otherwise than out of profits, is, with regard to the duty of promptitude, the same as that of an ordinary claimant: (*Re Mammoth Copperopolis of Utah*, W. N. 1880, p. 177; 43 L. T. Rep. N. S. 754; 50 L. J. 11, Ch.)

Where the improper dividend was declared and paid in 1872, and the winding-up commenced in 1876, an application in 1879 was dismissed as a stale demand: (*Id.*)

PART I.

CHANCERY DIVISION.

ABSTRACT OF TITLE.

- I. SALES UNDER ORDERS OF COURT.
 1. PREPARATION OF ABSTRACT.
 2. SUBMITTING ABSTRACTS TO COUNSEL.
 3. COMPELLING DELIVERY OF ABSTRACT.
 - II. PURCHASES OR INVESTMENTS UNDER ORDER OF COURT.
 1. EXAMINATION OF ABSTRACT.
 2. VERIFICATION OF ABSTRACT.
 3. SUBMITTING ABSTRACTS TO COUNSEL.
 - III. ORDERS UNDER VENDORS AND PURCHASERS ACT, 1874.
-

I. SALES UNDER ORDERS OF COURT.

1. PREPARATION OF ABSTRACT.

In the case of a sale under a judgment or order of the court the abstract is prepared by the solicitor of the party conducting the sale: (Dart. V. & P. 1197.)

2. SUBMITTING ABSTRACTS TO COUNSEL.

Before any estate or interest shall be put up for sale under a decree or order of the [Chancery Division], an abstract of the title thereto shall, with the approbation of the court, be laid before some conveyancing counsel to be approved by the court, for the opinion of such counsel thereon, to the intent that the said court may be better enabled to give such directions as may be necessary respecting the conditions of sale of such estate or interest, and other matters connected with the sale thereof: (15 & 16 Vict. c. 86, s. 56.)

The court has a discretion whether it will refer the abstract to the conveyancing counsel of the court: (*Chamberlain v. Chamberlain*, 1 Sm. & G. App. xxviii.; *Gibson v. Woollard*, 5 De G. M. & G. 835; 24 L. T. Rep. O. S. 137; *Re Jones*, 25 L. T. Rep. O. S. 223; 3 W. R. 564; *Re Jones*, 5 Jur. N. S. 138; 7 W. R. 171; *Kelph v. Horton*, 19 W. R. 220.)

The abstract is usually laid before one of the six conveyancing counsel of the court: (Dart. V. & P. 1208.)

[See CONVEYANCING COUNSEL.]

Where the abstract is to be laid before the counsel of the court the abstract, with particulars of the property, is brought into chambers by the solicitor conducting the sale: (Dan. 1176.)

The abstract having been brought into chambers is initialed by the chief clerk (Dan. 1176.), and with a copy of the particulars settled, and a draft of the ordinary conditions of sale, and a memorandum to the conveyanc-

ing counsel named, instructing him to advise on the title, and what special or other conditions are necessary, is delivered to such counsel : (Dart. V. & P. 1197 ; Dan. 1170.)

3. COMPELLING DELIVERY OF ABSTRACTS.

If the abstract is not delivered within the time specified in the conditions of sale, an order may be obtained by the purchaser, on summons, for delivery by the vendor within a limited time : (Dan. 1178.)

II. PURCHASES OR INVESTMENTS UNDER ORDERS OF COURT.

1. EXAMINATION OF ABSTRACT.

Where a fund under the control of the court is ordered to be laid out in the purchase, or advance upon the security of an estate, after the investment has been approved, the abstract must be examined with the title deeds by the solicitor having the carriage of the proceeding, or by some other qualified person employed by him : (Dan. 1135.)

2. VERIFICATION OF ABSTRACT.

An affidavit of the examination of the abstract, and that it is true and correct is made by the person who made the examination, and if such person is not a solicitor, or the affidavit does not show that he is a solicitor, the solicitor having the carriage of the proceedings must join in the affidavit, and state that the examination was made by a competent person : (Dan. 1135.)

3. SUBMITTING ABSTRACTS TO COUNSEL.

The abstract and affidavit are carried into chambers, and, with a memorandum instructing the proper conveyancing counsel of the court to advise on the title and if a good title is shown to prepare the necessary draft, is delivered to such counsel : (Dan. 1135.)

The court has a discretion whether it will refer the abstract to the conveyancing counsel of the court : (*Re Jones*, 25 L. T. Rep. O. S. 223 ; 3 W. R. 564.)

III. ORDERS AS TO, UNDER VENDOR AND PURCHASER ACT, 1874.

[See VENDOR AND PURCHASER ACT.]

ABUSE OF PROCESS.

To bring an action or take proceedings which are absolutely groundless is a frivolous and vexatious proceeding, and an abuse of the process of the court : (*Castro v. Murray*, L. Rep. 10 Ex. 213 ; 32 L. T. Rep. N. S. 675 ; 44 L. J. 104, Ex. ; 23 W. R. 596 ; *Dawkins v. Prince Edward of Saxe Weimar*, L. Rep. 1 Q. B. Div. 499 ; 35 L. T. Rep. N. S. 323 ; 45 L. J. 567, Q. B. ; 24 W. R. 670 ; *Cobbett v. Field*, W. N. 1877, p. 8 ; *Vale v. Oppert*, L. Rep. 5 Ch. Div. 969 ; *Edmunds v. The Attorney-General*, 38 L. T. Rep. N. S. 213 ; 47 L. J. 345, Ch. ; 26 W. R. 550 ; W. N. 1878, p. 64.)

ILLUSTRATIONS.

(a) An action against a clerk of the Petty Bag Office, whose duty was to seal a writ of error only after the Attorney-General had issued his fiat, and who in the absence of a fiat refused to seal such a writ, for such refusal : (*Castro v. Murray*, *sup.*)

(b) Actions brought charging defendants with conspiring to make and

making false statements respecting the plaintiff, an officer in the army, to the Commander-in-Chief, the precise point having been decided against the plaintiff by the House of Lords, in an action brought by him against other persons : (*Dawkins v. Prince Edward of Saxe Weimar, sup.*)

(c) An action against a judge of the High Court for denying a writ of *habeas corpus* of a person detained under a sentence of penal servitude : (*Cobbett v. Field, sup.*)

(d) An appeal by a certificated bankrupt who had no *locus standi* : (*Vale v. Oppert, sup.*)

(e) An action against the Attorney-General for payment of sums from pensions, where the Commissioners of the Treasury were the only persons who could award such pensions, and their award was final, and had been made against the plaintiff : (*Edmunds v. The Attorney-General, sup.*)

An order staying proceedings will be made on summons in chambers, or motion in court, on notice. The application must be supported by an affidavit as to the facts : (*Castro v. Murray, Dawkins v. Prince Edward of Saxe Weimar, and Vale v. Oppert, sup.*)

ACCOUNT.

- I. JURISDICTION.
- II. ORDINARY ACCOUNT CLAIMED BY WRIT.
 1. INDORSEMENT OF CLAIM.
 2. FORMS OF INDORSEMENT.
 3. ORDER FOR ACCOUNT CLAIMED.
 4. AFFIDAVIT OF SERVICE OF WRIT.
 5. APPLICATION.
 6. TIME.
- III. STATEMENT OF CLAIM IN ACTION FOR ACCOUNT.
- IV. DIRECTION FOR ACCOUNTS NECESSARY AT ANY STAGE
 1. BY THE COURT OR A JUDGE.
 2. BY DISTRICT REGISTRARS.
 3. HOW APPLICATION MADE.
 - (a) Generally.
 - (b) Upon Admissions on Pleadings.
- V. BEFORE WHOM ACCOUNTS MAY BE TAKEN.
- VI. SCIENTIFIC ASSISTANCE.
- VII. ORDER DIRECTING ACCOUNTS.
 1. NUMBERING DIRECTIONS.
 2. FORM OF ORDER.
 3. SPECIAL DIRECTIONS.
 4. JUST ALLOWANCES.
- VIII. TAKING ACCOUNTS BEFORE DISTRICT REGISTRARS.
- IX. TAKING ACCOUNTS BEFORE CHIEF CLERKS.
 1. DIRECTIONS TO TAKE ACCOUNTS.
 2. WHAT ACCOUNTS MAY BE DIRECTED TO BE TAKEN.
 3. NUMBERING DIRECTIONS IN ORDERS.
 4. BRINGING ORDER FOR ACCOUNT INTO CHAMBERS.
 5. DEFAULT IN BRINGING ORDER INTO CHAMBERS.
 6. SUMMONS TO PROCEED AND DIRECTIONS THEREON.
 7. TIME FOR BRINGING IN ACCOUNT.
 8. PREPARATION AND VERIFICATION OF ACCOUNT.
 9. CARRYING ACCOUNT INTO CHAMBERS.
 10. NOTICE OF CARRYING IN ACCOUNTS AND AFFIDAVITS.
 11. DEFAULT IN CARRYING IN ACCOUNT.

12. INSUFFICIENT ACCOUNT.
 13. DISCHARGE OF PERSON ATTACHED FOR DEFAULT IN BRINGING IN, OR INSUFFICIENT, ACCOUNT.
 14. COPIES OF ACCOUNTS.
 15. JUDGE'S DIRECTIONS AS TO PRINCIPLE OF TAKING ACCOUNTS.
 16. SPECIAL DIRECTIONS.
 17. VOUCHING ACCOUNT.
 - (a) *General Rule.*
 - (b) *Exceptions to General Rule.*
 - (c) *Queried Items.*
 18. DEFAULT IN PROCEEDING WITH ACCOUNT.
 19. SURCHARGING.
 20. CROSS-EXAMINING ACCOUNTING PARTY, &c.
 - (a) *Before Examiner.*
 - (b) *Before Chief Clerk.*
 21. GENERAL POWERS AS TO EVIDENCE, &c.
 22. CHIEF CLERK'S CERTIFICATE.
 23. FILING ACCOUNTS AND CERTIFICATES.
 24. COPIES OF FILED ACCOUNTS.
- X. TAKING ACCOUNTS BEFORE REFEREES.
- XI. TAKING ACCOUNTS BEFORE ARBITRATORS OR OFFICERS OF THE COURT.
 1. POWER TO REFER.
 2. WHAT MAY BE REFERRED.
 3. DISPUTED QUESTION OF LAW.
- XII. FURTHER ACCOUNTS.
- XIII. GENERAL POWER TO ORDER EXAMINATION.

I. JURISDICTION.

"The taking of partnership or other accounts," and certain causes and matters which involve the taking of accounts, *e.g.*, those for administration of the estates of deceased persons, the redemption or foreclosure of mortgages, and the execution of trusts, are expressly assigned to the Chancery Division: (J. A., 1873, s. 34.)

The jurisdiction of the Chancery Division with regard to account is absolutely universal: (Story, Eq., Jur. s. 454; *Corporation of Carlisle v. Wilson*, 13 Ves. 276.)

II. ORDINARY ACCOUNT CLAIMED BY WRIT.

1. INDORSEMENT OF CLAIM.

In all cases of ordinary account, as, for instance, in the case of a partnership or executorship or ordinary trust account, where the plaintiff, in the first instance, desires to have an account taken, the writ of summons shall be indorsed with a claim that such account be taken: (O. III., r. 8.)

2. FORMS OF INDORSEMENT.

Partnership Action.

The plaintiff's claim is to have an account taken of the partnership dealings between the plaintiff and defendant [under articles of partnership dated the day of], and to have the affairs of the partnership wound-up.

Action of Foreclosure.

The plaintiff's claim is to have an account taken of what is due to him for principal, interest, and costs on a mortgage dated the day of made between [or by deposit of title deeds], and that the mortgage may be enforced by foreclosure or sale.

Action for Redemption.

The plaintiff's claim is to have an account taken of what, if anything, is due on a mortgage dated _____ and made between [parties], and to redeem the property comprised therein : (J. A., 1875, App. A., p. II., s. 1.)

3. ORDER FOR ACCOUNT CLAIMED.

An order for the account claimed [by the writ], with all directions usual in the Court of Chancery in similar cases, shall be forthwith made :

(a) In case of default of appearance.

(b) After appearance, unless the defendant satisfies the court or a judge that there is some preliminary question to be tried : (O. XV., r. 1. See *post*, VII., IX., and *Gatti v. Webster*, L. Rep. 12 Ch. Div. 771 ; 48 L. J. 763, Ch. ; 41 L. T. Rep. N. S. 18.)

4. AFFIDAVIT OF SERVICE OF WRIT.

A plaintiff, desirous of proceeding upon default of appearance, shall, before taking such proceeding upon default, file an affidavit of service, or of notice in lieu of service, as the case may be : (O. XIII., r. 2.)

An order in case of default may be made in an action proceeding in a district registry : (O. XXXV., r. 1a, June, 1876.)

5. APPLICATION.

An application for such order shall be made by summons, and be supported by an affidavit filed on behalf of the plaintiff, stating concisely the grounds of his claim to an account : (O. XV., r. 2.)

6. TIME.

The application may be made at any time after the time for entering an appearance has expired : (O. XV., r. 2.)

III. STATEMENT OF CLAIM IN ACTION FOR ACCOUNT.

[See Rules of 1875, Appendix C. 2, 3, 4, and 14.]

IV. DIRECTION FOR ACCOUNTS NECESSARY AT ANY STAGE.

1. BY THE COURT OR A JUDGE.

The court or a judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner : (O. XXXIII.)

As to defendant's application, see *Rolfe v. Maclaren* (L. Rep. 3 Ch. Div. 106 ; 24 W. R. 816).

The additional judge (Fry, J.) appointed under 40 & 41 Viet. c. 9, may, at the hearing of a cause transferred to him, make an order directing accounts (*Butler v. Butler*, W. N. 1877, p. 114) : but unless otherwise ordered any accounts directed by him will be taken as if the cause had never been transferred, before the judge to whom it was assigned at the time of transfer, unless the additional judge directs that any such accounts shall be taken before himself or an official or special referee : (O. LI., r. 1a, June, 1877.)

2. BY DISTRICT REGISTRARS.

[See *post*, VIII.]

3. HOW APPLICATION MADE.

(a) Generally—

The application is made in court on motion : (O. LIII r. 1.)

Or at chambers by summons : (O. LIV., r. 1.)

(b) *Upon admissions in pleadings.*

[The plaintiff] may at any stage [of the action] apply to the court or a judge for [an order for accounts to which he is entitled] upon any admissions of fact in the pleadings . . . without waiting for the determination of any other question between the parties. [The] application may be made by motion [of which notice must be given] so soon as the right of the party applying to the relief claimed has appeared from the pleadings. The court or a judge may [make the order], subject to such terms, if any, as [may be thought fit]: (O. XL., r. 11; *Turquand v. Wilson*, L. Rep. 1 Ch. Div. 85; 45 L. J. 104, Ch.; 24 W. R. 56; *Bennett v. Moore*, L. Rep. 1 Ch. Div. 692; 45 L. J. 275, Ch.; 24 W. R. 690; *Gilbert v. Smith*, L. Rep. 2 Ch. Div. 686; 35 L. T. Rep. N. S. 43; 45 L. J. 514, Ch.; 24 W. R. 568; *Burnell v. Burnell*, L. Rep. 11 Ch. Div. 213; 48 L. J. 412, Ch.; 27 W. R. 749.)

The action or motion need not be set down: (Reg. Notice, W. N. 1877, p. 58; *Re Parker's Estate*, L. Rep. 10 Ch. Div. 162; 48 L. J. 171, Ch.)

The court has an absolute discretion to grant or refuse the order (*Mellor v. Sidebottom*, L. Rep. 5 Ch. Div. 342; 37 L. T. Rep. N. S. 7; 46 L. J. 398, Ch.; 25 W. R. 401), and if, on the motion being made, it appears that there must be a discussion or argument, may order it to go into the general paper, subject to any order for its being advanced: (Reg. Not., *sup.*).

V. BEFORE WHOM ACCOUNTS MAY BE TAKEN.

Accounts may be ordered to be taken—

Before the District Registrar [see *post*, VIII.]

Before the Chief Clerk [see *post*, IX.]

Before an Official or Special Referee [see *post*, X.]

Before an Arbitrator or Officer of the Court [see *post*, XI.]

VI. SCIENTIFIC ASSISTANCE.

The court, or any judge thereof, in such way as they may think fit [may] obtain the assistance of accountants, actuaries, and other scientific persons, the better to enable such court or judge to determine any matter at issue in any cause or proceeding, and [may] act upon the certificate of such persons: (15 & 16 Vict. c. 80, s. 42.)

The judge cannot delegate this power: (*Mildmay v. Lord Methuen*, 1 Drew. 216; 20 L. T. Rep. O. S. 63.)

The person to assist may be appointed in the absence of the parties: (*Re the London and Birmingham and Buckinghamshire Railway Company*, 6 W. R. 141.)

Written instructions to the assisting accountant are usually transmitted to him by the chief clerk or other official, with directions to furnish his report to the latter: (Dan. 1048.)

The person assisting cannot examine witnesses and administer oaths: (*Morris v. Llanelly Railway and Dock Company*, W. N. 1868, p. 46.)

The report of the person assisting is not an award, but only material for the guidance of the court (*Ford v. Tynte*, 2 De G. J. & S. 12; 10 L. T. Rep. N. S. 209; 12 W. R. 613), and affidavits in reply may be received: (*Id.*)

VII. ORDER DIRECTING ACCOUNTS.

1. NUMBERING DIRECTIONS.

Where by any judgment or order, whether made in court or in chambers, any accounts are directed to be taken or inquiries made, each direction shall be numbered, so that, as far as may be, each distinct account and inquiry may be designated by a number, and such decree or

order may be in the form in Schedule D, with such variations as the circumstances of the case may require: (C. O. 23, r. 15.)

2. FORM OF ORDER.

A form of order directing accounts is given in Schedule D. to the Consolidated Orders: (see also Seton, 4th ed. 841, &c.)

3. SPECIAL DIRECTIONS.

The court [may, by the decree or order directing any account required to be taken] give such special directions (if any) as it may think fit with respect to the mode in which the account should be taken or vouched when it appears to the court that the circumstances of the case are such as to require such special directions; and particularly the court [may] in cases when it shall think fit so to do, direct that in taking the account the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take "such objections as they may be advised: (15 & 16 Vict. c. 86, s. 54.)

Directions as to settled accounts are always given at the hearing (Seton, 778), but in other cases special directions will not in general be given at the hearing, but subsequently [see *post*, IX., 16]: (Dan. 1132; Seton, 778.)

4. JUST ALLOWANCES.

In taking any account directed by any decree or order, all just allowances shall be made without any direction for that purpose in such decree or order: (C. O. 23, r. 16.)

It is not the ordinary course for the court to say, in the first instance, what is a just allowance: (*Brown v. De Tastet*, Jac. 284, 294.)

What are just allowances depends on the circumstances of each case: (Dan. 1132.) The claims must be immediately connected with the transactions in respect of which the account is decreed (Dan. 1136), *e.g.*, whatever a trustee or personal representative has expended in the fair execution of his trust, as charges and expenses, by reasonably and properly taking opinions and procuring directions necessary to the due execution of the trust (*Fearn v. Young*, 10 Ves. 184; Dan. 1133; Lewin on Trusts, c. 23, s. 2.); charges and expenses of a next friend (*Fearn v. Young*, *sup.*; *Nelson v. Duncombe*, 9 Beav. 211); expenses of a sale (*Crump v. Baker*, 18 Ves. 285); dower arrears out of rents receivable by a widow trustee (*Graham v. Graham*, 1 Ves. Sen. 262); expenses of managing and carrying on a partnership business (*Brown v. De Tastet*, *sup.*; *Cook v. Collingridge*, Jac. 607, 621); legal proceedings by mortgagee relating to mortgaged property (*Ellison v. Wright*, 3 Russ. 458; *Blackford v. Davis*, L. Rep. 4 Ch. App. 304; 20 L. T. Rep. N. S. 199; 17 W. R. 337); repairs by mortgagee (*Tipton Green Colliery Company v. Tipton Moat Colliery Company*, L. Rep. 7 Ch. Div. 192; 47 L. J. Ch. 152; 26 W. R. 348; Fisher on Mortgages, 3rd edit. 952); expenses of mortgagees taking, holding possession of, advertising for sale, and effecting insurance on mortgaged ship: (*Wilkes v. Sawmion*, L. Rep. 7 Ch. Div. 188; 47 L. J. Ch. 150.)

VIII. TAKING ACCOUNTS BEFORE DISTRICT REGISTRAR.

It shall be lawful for the Court, or any judge, if it shall be thought fit, to order that any accounts [be] taken or inquiries made in the office of or by any district registrar; and in any such case the district registrar shall proceed to carry all such directions into effect in the manner prescribed; and in any case in which any such accounts or inquiries shall have been directed to be taken or made by any district registrar, the report in writing of such district registrar as to the result of such accounts or inquiries

may be acted upon by the Court, as to the Court shall seem fit: (J. A. 1873, s. 66.)

Amounts receivable by legatees have been ordered to be apportioned by the district registrar: (*Day v. Whittaker*, L. Rep. 6 Ch. Div. 734; 36 L. T. Rep. N. S. 683; 46 L. J. Ch. 680; 25 W. R. 767.)

A district registrar cannot order accounts to be taken: (*Irlam v. Irlam*, L. Rep. 2 Ch. Div. 608; 24 W. R. 292); except by reason of the default of the defendant or by consent: (O. XXXV., r. 1a, June, 1876.)

He has no power to take accounts directed by the judge in actions commenced in the district registries, unless specially directed so to do by the judgment: (*Re Smith, Hutchinson v. Ward*, L. Rep. 6 Ch. Div. 692; 36 L. T. Rep. N. S. 178; 25 W. R. 452.)

Every order for an account by reason of the default of the defendant or by consent shall be entered in the district registry in the proper book, in the same manner as a like judgment or order in an action proceeding in London would be entered in London: (O. XXXV., r. 1a., June, 1876.)

IX. TAKING ACCOUNTS BEFORE CHIEF CLERKS.

1. DIRECTIONS TO TAKE ACCOUNTS.

The judge may direct the chief clerk to take accounts, the judge giving such aid and direction in every or any such account as he may think proper: (15 & 16 Vict. c. 80, s. 29, and see CHAMBERS.)

2. WHAT ACCOUNTS MAY BE DIRECTED TO BE TAKEN.

The accounts which may be directed to be taken at chambers include those of agents, executors, administrators, guardians of infants' estates, mortgagees, partners, receivers, managers, consignees, and trustees: (Dan. 1121.)

3. NUMBERING DIRECTIONS IN ORDERS.

In drawing up decrees and orders to be left at chambers, the solicitors are to take care that every account, inquiry, sale, direction to appoint receiver, and other direction to be answered at chambers, is numbered consecutively according to the form set forth in the schedule D. to the Consolidated Orders; and that the other directions are not numbered: (Ch. Reg. Aug. 1857, r. 4.)

4. BRINGING ORDER FOR ACCOUNT INTO CHAMBERS.

The party prosecuting the decree or order must leave a copy thereof at the judge's chambers, and certify the same to be a true copy thereof as passed and entered: (C. O. 35, r. 15.)

Every decree or order directing accounts . . . to be taken . . . shall be brought into the judge's chambers by the party entitled to prosecute the same, within ten days after the same shall have been passed and entered: (C. O. 35, r. 22.)

A note stating the names of the solicitors for all parties, and showing for which of the parties such solicitors are concerned, is to be left at chambers with every decree or order: (Chanc. Reg. 8th Aug. 1857, r. 6.)

5. DEFAULT IN BRINGING ORDER INTO CHAMBERS.

If default be made in bringing the decree or order into chambers by the person prosecuting the same, any other party to the cause or matter [may] bring in the same, and such party shall have the prosecution of such decree or order, unless the judge shall otherwise direct: (C. O. 35, r. 22.)

6. SUMMONS TO PROCEED AND DIRECTIONS THEREON.

Upon a copy of the decree or order being left, a summons shall be issued to proceed with the accounts or inquiries directed; and upon the return of such summons, the judge, if satisfied by proper evidence that all necessary parties have been served with notice of the decree or

order, shall thereupon give directions as to the manner in which each of the accounts and inquiries is to be prosecuted, the evidence to be adduced in support thereof, the parties who are to attend on the several accounts and inquiries, and the time within which each proceeding is to be taken; and a day or days may be appointed for the further attendance of the parties, and all such directions may afterwards be varied or added to as may be found necessary: (C. O. 35, r. 16.)

Evidence that proper parties have been served is dispensed with in fixing the times for bringing in accounts: (Dan. 1086.)

7. TIME FOR BRINGING IN ACCOUNT.

The court or a judge has power to enlarge or abridge the time for bringing in the account, upon such terms (if any) as the justice of the case may require, even although the application is made after expiration of the time appointed: (Order LVII., r. 6.)

8. PREPARATION AND VERIFICATION OF ACCOUNT.

The accounting party, unless the judge shall otherwise direct, shall make out his account and verify the same by affidavit: (C. O. 35, r. 33.)

Accounts . . . referred to by affidavit are not to be annexed to the affidavit, or referred to in the affidavits as annexed, but are to be referred to as exhibits: (C. O. 35, r. 33; Chan. Reg., 8th Aug. 1857, r. 11.)

All accounts . . . left at chambers are to be written upon foolscap paper bookwise: (Chan. Reg. 8th Aug. 1857, r. 17.)

The items on each side of an account shall be numbered consecutively in chronological order: (C. O. 35, r. 33.)

The numbers of the debit items must form a distinct series from the numbers of the credit items: (Dan. 1126.)

Every alteration in an account verified by affidavit to be left at chambers is to be marked with the initials of the commissioner or officer before whom the affidavit is sworn, and such alterations are not to be made by erasures with the knife or other instrument: (Chan. Reg. 8th Aug. 1857, r. 10.)

9. CARRYING ACCOUNT INTO CHAMBERS.

The original account, after being verified, must be carried into chambers by the accounting party: (C. O. 35, r. 33; Ayck. 506.)

10. NOTICE OF CARRYING IN ACCOUNT AND AFFIDAVITS.

Notice of the account having been carried into chambers must, on the same day, be given to such of the other parties as are entitled to attend on the account: (Dan. 1127.)

Notice of the affidavit, verifying the account, should be given to such of the other parties as are entitled to attend on the account: (Dan. 1127; Cox, 137.)

The party intending to use any affidavit on any proceedings in chambers shall give notice to the other parties concerned of his intention in that behalf: (C. O. 35, r. 27.)

[See CHAMBERS.]

11. DEFAULT IN CARRYING IN ACCOUNT.

The party conducting the proceedings may, at the first meeting or any adjournment thereof, without taking out a summons, obtain a direction from the chief clerk to the Registrar for an order on the accounting party to leave his account duly verified within a time limited: (Dan. 1121; Seton, 3rd edit. 1232.)

If disobeyed, after personal service, the order may be enforced by attachment or other process: (Dan. Ch. P. 1121.)

[See ARREST; EXECUTION.]

If no direction has been obtained, the order must be obtained on summons : (Dan. 1121.)

12. INSUFFICIENT ACCOUNT.

The procedure, in case of the accounts being insufficient is the same as in the case of default in bringing them in.

[See *sup.* 11.]

It is irregular to apply for an attachment before a decision has been given that the accounts brought in are insufficient : (*Goucher v. Clayton*, 14 L. T. Rep. N. S. 494.)

13. DISCHARGE OF PERSON ATTACHED FOR DEFAULT IN BRINGING IN OR INSUFFICIENT ACCOUNT.

The person arrested is entitled to his discharge on having the account verified by affidavit, and paying the costs : (Dan. 1126.)

The application is by motion or petition of course, supported by the chief clerk's certificate of the account having been left, or an affidavit to that effect : (*Id.* 1126, 431; *Cox*. 144, 145.)

14. COPIES OF ACCOUNTS.

When directed, copies, abstracts, or extracts, of or from accounts and concise statements shall be supplied for the use of the judge and his chief clerks : (C. O. 35, r. 26.)

When so directed copies [of the accounts] shall be handed over to the other parties : (C. O. 35, r. 26.)

It is usual in practice for the accounting party, without any express direction being given, to hand a copy of the accounts when left to the opposite parties, without payment by them; his costs of such copies being deemed to be costs in the cause : (Dan. 1127.)

15. JUDGE'S DIRECTIONS AS TO PRINCIPLE OF TAKING ACCOUNT.

The opinion of the judge as to the principle on which the account ought to be taken for the guidance of the chief clerk may be obtained by adjournment to him in chambers (15 & 16 Vict. c. 80, s. 33); or by motion in court : (*Robertson v. Norris*, 1 Giff. 428; 1 L. T. Rep. N. S. 123.)

16. SPECIAL DIRECTIONS.

The court [may, by any order or orders subsequent to the decree or order directing the accounts] give such special directions (if any) as it may think fit with respect to the mode in which the account should be taken or vouched, ... when it appears that the circumstances of the case are such as to require such special directions; and particularly the court [may], in cases when it shall think fit so to do, ... direct that in taking the account the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections as they may be advised : (15 & 16 Vict. c. 86, s. 54.)

The application for special directions may be made by motion (*Ewart v. Williams*, 3 Drew. 21; *Hardwick v. Wright*, 15 W. R., 953; L. Rep. 12 Eq. 586); or (which is the general way), by summons, or by petition : (*Browne v. Collis*; *Hardwick v. Wright*, *sup.*)

The court must be satisfied, before giving any special directions, that they are necessary; and they will generally be given only where, from the loss of vouchers, or any other cause, the accounts cannot be taken in the ordinary way, and not when the ordinary evidence can be had, or merely to save expense : (Dan. 1132; *Seton*, 778; *Lodge v. Prichard*, 3 De G. M. & G. 906; *Ewart v. Williams*, 7 De G. M. & G. 68; 25 L. T. Rep. O. S. 4.)

No substantial variation of a decree previously made must be made by

the order as to special directions : (*Nelson v. Booth*, 3 De G. & J. 119 ; 32 L. T. Rep. O. S. 45 ; 26 L. J. 782, Ch.)

17. VOUCHING ACCOUNTS.

(a) *General Rule.*

In the absence of any special directions in the decree or order directing the account or made by subsequent order, the account is vouched, as to sums under forty shillings, by the production of the vouchers, such as receipts ; or the items may be substantiated by the oath of the accounting party, if, in his account, he mentions to whom, for what, and when, the amounts were paid : (Dan. 1128.)

Every item of disbursement amounting to 40s. and upwards must, as a general rule, be substantiated by a proper voucher such as a receipt, which, when produced and allowed, is initialed by the chief clerk or his junior clerk as evidence of such inspection and allowance : (Dan. 1128.)

The vouchers are admitted as evidence of payment, unless some reasonable ground for impeaching the voucher is shown by the opposite party, in which case the affidavit or oral evidence of the person who received the money is required ; and if this is not obtainable, the signature to the voucher must be proved : (Dan. 1128.)

(b) *Exceptions to General Rule.*

The rule as to vouchers being produced for all sums of 40s. or upwards is not invariable. The court sometimes allows a party to discharge himself by other means : (Dan. 1129.)

E.g., a paper produced by another party as evidence to charge the accounting party, is evidence as to payments therein stated to have been made by the latter (Dan. 1129) ; and, where an account is of long standing, and vouchers are lost, an accounting party is permitted to discharge himself upon oath or by other means : (Dan. 1130.)

(c) *Queried Items.*

If any item cannot at the moment be satisfactorily explained, or the voucher for it produced, it is marked as a queried item, and if not supported within the time allowed, it will be disallowed : (Dan. 1128.)

18. DEFAULT IN PROCEEDING WITH ACCOUNTS.

If any . . . proceeding pending at . . . chambers is not prosecuted with due diligence, the parties, or any of them, may be required to attend at chambers at a time to be appointed for that purpose, to show cause why such . . . proceeding has not been prosecuted ; and thereupon such directions may be given at chambers or by adjournment in open court as shall be proper to insure the prosecution thereof by some person interested therein . . . and for payment of the costs incurred by any neglect or default ; or a certificate by the chief clerk of such neglect or default as aforesaid, or of any abandonment or abatement of the proceedings or otherwise, according to the facts, may be made and filed without any fee being payable thereon ; and after such certificate shall have been so made, unless the same shall be discharged, none of the parties shall be at liberty to further prosecute the proceeding at chambers, unless and until the court or judge shall upon application make an order directing the same to be prosecuted ; and upon such certificate becoming binding, any party may apply to the court, and the court may make such order relative to costs, and to relieve any party from the effect of any decree or order before made or proceeding taken which shall not have been duly prosecuted or otherwise, as may be thought proper. And for the purposes aforesaid, any party, or the solicitor [of the Supreme Court], may be directed to summon the persons whose attendance is required, and to

conduct any proceedings, and to carry out any directions which may be given: (C. O. 35, r. 23.)

[See CHAMBERS.]

19. SURCHARGING.

Any party seeking to charge any accounting party beyond what he has by his account admitted to have received, shall give notice thereof to the accounting party, stating, so far as he is able, the amount sought to be charged, and the particulars thereof, in a short and succinct manner: (C. O. 35, r. 34.)

The surcharge must be left at chambers.

The notice must be in the form of a surcharge, and a copy must be served on the accounting party's solicitor: (Ayck. 507; Cox, 146-148.)

20. CROSS-EXAMINATION OF ACCOUNTING PARTY, &c.

(a) Before Examiner.

Liability to Cross-examination.

Any party, having made an affidavit to be used or which shall be used on any claim . . . or other proceeding before the court, shall be bound, on being served with [a writ of *subpœna ad testificandum*, or *duces tecum*] to attend before an examiner, for the purpose of being cross-examined: (15 & 16 Vict. c. 86, s. 40.)

When Cross-examination takes place.

The cross-examination may be had either before or after the accounts are vouched: (*Wormsley v. Sturt*, 22 Beav. 398; *Meacham v. Cooper*, L. Rep. 16 Eq. 102.)

The cross-examination should take place before the chief clerk has come to his decision: (*Glover v. Ellison*, 26 L. T. Rep. N. S. 234; 41 L. J. 288, Ch.; 20 W. R. 409.)

No Order Necessary.

No special order is necessary, and cross-examination before the examiner is the proper method unless there is a special direction to the chief clerk to take it: (*Stebbing v. Atlee*, 28 L. T. Rep. O. S. 172.)

Subpœna.

If it is probable that the party to be cross-examined will not attend on mere notice, and it is desired that he may be attached for non-attendance, the party requiring the cross-examination should serve the party or witness to be examined with a *subpœna ad testificandum* or *duces tecum*: (see 15 & 16 Vict. c. 86, s. 40; *Venables v. Schweitzer*, L. Rep. 16 Eq. 76.)

Where a subpœna is required for the attendance of a witness for the purpose of proceeding in chambers, such subpœna shall be issued from the [Central Office] upon a note from the judge: (C. O. 35, r. 29.)

Notice to Party.

Any party in any cause or matter requiring the attendance of any witness, whether a party or not, . . . before . . . the examiner of the court, or a special examiner, for the purpose of being examined or cross-examined, shall give to the opposite party forty-eight hours' notice, at least, of the intention to examine or cross-examine such witness, such notice to contain the name and description of the witness, and the time and place of such examination or cross-examination, unless the court shall in any case think fit to dispense with such notice: (Chan. Ord., Feb. 1861, r. 22.)

The power which the Court has of dispensing with the forty-eight hours' notice is an universal and general power to be exercised according to sound discretion : (*De Brito v. Hillel*, L. Rep. 15 Eq. 213 ; 28 L. T. Rep. N. S. 59.)

Notice to Witness to Attend.

The notice to the witness need not be forty-eight hours' notice ; he must attend after reasonable notice, according to the distance at which he resides : (*Re North Weal Exmouth Mining Company*, 31 Beav. 628 ; 7 L. T. Rep. N. S. 306.)

Notice of Points to be Cross-examined on.

The party cross-examining must give notice to the accounting party of the points as to which he is to be cross-examined (*Wormsley v. Sturt*, 22 Beav. 398 ; *Re Lord*, L. Rep. 2 Eq. 605 ; *Glover v. Ellison*, 20 W. R. 408 ; *Bates v. Eley*, L. Rep. 1 Ch. Div. 473) ; and the points must be specified in the notice : (*M'Arthur v. Dudgeon*, L. Rep. 15 Eq. 102.)

If the examination extends to the whole account the notice must so state : (*Woods v. Oliver*, W. N. 1880, p. 51.)

It is not the practice of the examiner of the court to take the whole account. The examiner will take only such of the items of the account as have been certified by the chief clerk.

Production of Documents.

A person served with a *subpoena duces tecum* must produce documents notwithstanding an order has been made for their production at the examiner's office : (*Wormsley v. Sturt*, 22 Beav. 398.)

Court's Control over Evidence.

The court [has, notwithstanding,] a discretionary power of acting upon such evidence as may be before it at the time, and of making such interim order as may be necessary to meet the circumstances of the case : (15 & 16 Vict. c. 86, s. 40.)

(b) Before Chief Clerk.

Each chief clerk shall, for the purpose of any proceedings directed to be taken before him, have full power to summon parties and witnesses and, when so directed by the judge to whose court he is attached, to examine parties and witnesses either upon interrogatories or *vivâ voce* as such judge shall direct : (15 & 16 Vict. c. 80, s. 30.)

Parties should be *subpoenaed* first to attend before the examiner, but any party is at liberty to attempt to bring them into chambers : (*Stebbing v. Atlee*, 28 L. T. Rep. O. S. 172 ; 2 Jur. N. S. 1161.)

The party examining must give notice to the accounting party or witness to be examined of the points as to which he is to be examined (*Wormsley v. Sturt*, 22 Beav. 398), and the points must be specified in the notice (*M'Arthur v. Dudgeon*, L. Rep. 15 Eq. 102.)

If the accounting party is a prisoner and his presence is necessary at the taking of accounts, the court will issue a writ of *habeas corpus* that he may attend in chambers, in the custody of the officer, *de die in diem* : (*Buckeridge v. Whalley*, 6 W. R. 180.)

When a chief clerk is directed by the judge to examine any witness, the practice and mode of proceeding shall be the same as in the case of the examination of witnesses before an examiner, subject to any special directions which may be given in any particular case : (C. O. 35, r. 30.)

The original examinations and depositions of parties and witnesses taken by or before the chief clerk, authenticated by his signature, shall be transmitted by him to the [Central] Office, to be there filed ; and any party

to the suit or proceeding may have a copy thereof, or of any part or portion thereof, upon payment of the proper fee : (C. O. 35, r. 31.)

An examination [begun in chambers] may be carried before the examiner without any special order, the service of a *subpoena* being sufficient : (*Stebbing v. Atlee*, 28 L. T. Rep. O. S. 172 ; 2 Jur. N. S. 1161.)

21. GENERAL POWERS AS TO EVIDENCE, &c.

The court has, notwithstanding, a discretionary power of acting upon such evidence as may be before it at the time, and of making such interim orders as may be necessary to meet the circumstances of the case : (15 & 16 Vict. c. 86, s. 40.)

And see CHAMBERS ; EVIDENCE.

22. CHIEF CLERK'S CERTIFICATE.

Where an account is directed the certificate shall state the result of such account, and not set the same out by way of schedule, but shall refer to the account verified by the affidavit filed, and shall specify, by the numbers attached to the items in the account, which, if any, of such items have been allowed or varied, and shall state what additions, if any, have been made by way of surcharge : (C. O. 35, r. 46.)

Where the account verified by the affidavit has been so altered that it is necessary to have a fair transcript of the account as altered, such transcript may be required to be made by the party prosecuting the decree or order, and shall then be referred to by the certificate : (*Id.*)

Where scientific assistance has been obtained, the report of the person so assisting must not be filed as part of the certificate : (*Hill v. King*, 3 De G. J. & S. 418 ; 8 L. T. Rep. N. S. 220.)

23. FILING ACCOUNTS AND CERTIFICATES.

The accounts, and the transcripts (if any), referred to by certificates, shall be filed therewith : (C. O. 35, r. 46.)

24. COPIES OF FILED ACCOUNTS.

No copies of the accounts or transcripts shall be required to be taken by any party : (C. O. 35, r. 46.)

X. TAKING ACCOUNTS BEFORE REFEREES.

Subject to any rules of court and to such right as may now exist to have particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice or before the Court of Appeal, may be referred by the court or by any divisional court or judge before whom such cause or matter may be pending, for inquiry and report to any official or special referee, and the report of any such referee may be adopted wholly or partially by the court, and may (if so adopted) be enforced as a judgment by the court : (J. A., 1873, s. 56.)

In any cause or matter (other than a criminal proceeding by the Crown) . . . in which all parties interested who are under no disability consent thereto, and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the court or a judge, conveniently be made before a jury, or conducted by the court through its other ordinary officers, the court or a judge may at any time, on such terms as may be thought proper, order any question or issue of fact or any question of account arising therein, to be tried either before an official referee . . . or before a special referee to be agreed on between the parties : (J. A., 1873, s. 57.)

[See REFEREES.]

XI. TAKING ACCOUNTS BEFORE ARBITRATORS OR OFFICERS OF THE COURT.

1. POWER TO REFER.

If it be made to appear, at any time after the issuing of the writ, to the satisfaction of the court or a judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account, which cannot conveniently be tried in the ordinary way, it shall be lawful for such court or judge, upon such application, if they or he shall think fit . . . to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the court, upon such terms as to costs and otherwise as the court or judge shall think reasonable: (C. L. P. Act, 1854, s. 3.)

2. WHAT MAY BE REFERRED.

When the matter in dispute is only partly a matter of account, that part only can be compulsorily referred: (*Clow v. Harper*, L. Rep. 3 Ex. Div. 198; 38 L. T. Rep. N. S. 269; 47 L. J. 393, Ex.; 26 W. R. 364.)

The application must be made before trial. (*Robson v. Lees*, 6 H. & N. 258; 30 L. J. 235, Ex.)

3. DISPUTED QUESTION OF LAW.

If it shall appear to the court or a judge that the allowance or disallowance of any particular item or items in the account depends upon a question of law fit to be decided by the court, or upon a question of fact fit to be decided by a jury, or by a judge upon the consent of both parties . . . it shall be lawful for such court or judge to direct a case to be stated, or an issue or issues to be tried; and the decision of the court upon such case, and the finding of the jury or judge upon such issue or issues, shall be taken and acted upon by the arbitrator as conclusive: (C. L. P. A. 1854, s. 4.)

[See ARBITRATION.]

XII. FURTHER ACCOUNTS.

Where, in the prosecution of the decree or order, it appears to the judge that it would be expedient that further accounts should be taken or further inquiries made, he may order the same to be taken or made accordingly, or, if desired by any party, may direct the same to be considered in open court: (C. O. 35, r. 19.)

As to the effect of lapse of time, see *Barber v. Mackrell* (L. Rep. 12 Ch. Div. 534.)

XIII. GENERAL POWER TO ORDER EXAMINATION.

The court or a judge may, in [*sic*] cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the court, or any other person or persons, and at any place, of any witness or person, and may order any deposition so taken to be filed in the court, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the court or a judge may direct: (O. XXXVII., r. 4, and see EVIDENCE.)

ACKNOWLEDGMENTS.

All acknowledgments required for the purposes of inrolling any deed or other document in Chancery may be made before the Clerk of Inrolments, or before any Master of the Supreme Court, as occasion may require: (C. O. 1, r. 40; J. A., 1879, s. 12.)

Each chief clerk [has] for the purpose of any proceedings directed . . . to be taken before him . . . full power . . . to take . . . acknowledgments, other than acknowledgments by married women: (15 & 16 Vict. c. 80, s. 30.)

Masters of the Supreme Court and district registrars have no jurisdiction to take acknowledgments of married women: (O. XXXV., r. 4; O. LIV., r. 2.)

ACTION.

I. DEFINITIONS.

II. ACTIONS EXPRESSLY ASSIGNED TO THE CHANCERY DIVISION.

III. COMMENCEMENT OF ACTIONS IN THE SEVERAL DIVISIONS.

I. DEFINITIONS.

Unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned shall have or include the meanings following :

“Action” shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court, and shall not include a criminal proceeding by the Crown ;

“Cause” shall include any action, suit, or other original proceeding between a plaintiff or defendant, and any criminal proceedings by the Crown ;

“Matter” shall include every proceeding in the Court, not in a cause ;

“Suit” shall include action : (J. A., 1873, s. 100 ; O. LXIII.)

II. ACTIONS EXPRESSLY ASSIGNED TO THE CHANCERY DIVISION.

All causes and matters . . . commenced in, or . . . transferred . . . to, the High Court of Justice, shall be distributed among the several divisions and judges of the said High Court, in such manner as may from time to time be determined by any rules of court or orders of transfer . . . ; and in the meantime, and subject thereto, all such causes and matters shall be assigned to the said divisions respectively, in the manner . . . provided : (J. A., 1873, s. 33.)

[It is provided that] there . . . be assigned (subject as aforesaid) to the Chancery Division . . .

(1.) All causes and matters pending in the Court of Chancery at the commencement of [the Supreme Court of Judicature Act, 1873, viz., the 1st Nov. 1875] :

(2.) All causes and matters to be [afterwards] commenced . . . under any Act of Parliament by which exclusive jurisdiction, in respect to such causes or matters, has been given to the Court of Chancery, or to any judges or judge thereof respectively, except Appeals from County Courts :

(3.) All causes and matters for any of the following purposes :

The administration of the estates of deceased persons ;

The dissolution of partnerships or the taking of partnership or other accounts ;

The redemption or foreclosure of mortgages ;

The raising of portions, or other charges on land ;

The sale and distribution of the proceeds of property subject to any lien or charge ;

The execution of trusts, charitable or private;
 The rectification, or setting aside, or cancellation of deeds or other written instruments;
 The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases;
 The partition or sale of real estates;
 The wardship of infants and the care of infants' estates: (J. A., 1873, s. 34.)

The matters expressly assigned are not co-extensive with the jurisdiction of the Court of Chancery (*per* Jessel, M.R., *Rogers v. Jones*, L. Rep. 7 Ch. Div. 345; 38 L. T. Rep. N. S. 17), and an action for damages or compensation is not included: (*Id.*)

There is no jurisdiction to set aside a will obtained by fraud (*Melhuish v. Milton*, L. Rep. 3 Ch. Div. 27; 45 L. J. 836, Ch.; 35 L. T. Rep. N. S. 82; 24 W. R. 892), and as long as letters of administration remain in force they are conclusive evidence: (*Re Ivory*, L. Rep. 10 Ch. Div. 372; 39 L. T. Rep. N. S. 285; 27 W. R. 20.)

Before any relief is obtained upon a will it must be admitted to probate, or probate must be admitted by the defendant; and the Chancery Division, although it may, will not grant probate: (*Pinney v. Hunt*, L. Rep. 6 Ch. Div. 98; 26 W. R. 69.)

A claim for the creation of a trust is not within the matters expressly assigned: (Anon. W. N. 1876, p. 106.)

Where a counter-claim raises an equity within the matters expressly assigned, a transfer to the Chancery Division will not be ordered (*Mostyn v. The West Mostyn Coal and Iron Company*, L. Rep. 1 C. P. Div. 145; 34 L. T. Rep. N. S. 325; 45 L. J. 401, C. P.; 24 W. R. 401; *Warne v. Dell*, W. N. 1875, p. 259), unless the machinery of the Chancery Division is more convenient: (*Hillman v. Mayhew*, L. Rep. 1 Ex. Div. 132; 34 L. T. Rep. N. S. 256; 45 L. J. 334, Ex.; 24 W. R. 435.)

The jurisdiction with respect to a ward of court remains, notwithstanding he becomes of unsound mind: (*Re Edwards*, L. Rep. 10 Ch. Div. 605; 40 L. T. Rep. N. S. 113; 48 L. J. 233, Ch.; 27 W. R. 611.)

A writ of *mandamus* may only be issued in a pending cause or matter: (*Re Paris Skating Rink Company*, L. Rep. 6 Ch. Div. 731; 46 L. J. 831, Ch.; 25 W. R. 767, and see *MANDAMUS*.)

III. COMMENCEMENT OF ACTIONS IN THE SEVERAL DIVISIONS.

Subject to any rules of court, and to the provisions of the [Supreme Court of Judicature Acts, 1873 and 1875], and to the power of transfer, every person by whom any cause or matter may be commenced . . . shall assign such cause or matter to one of the divisions of the High Court as he may think fit: (J. A., 1875, s. 11.)

If the plaintiff or petitioner . . . assign his cause or matter to any division to which . . . the same ought not to be assigned, the court or any judge of such division . . . may . . . at any stage of the cause or matter direct the same to be transferred to the division . . . to which . . . the same ought to have been assigned . . . or retain the same in the division in which the same was commenced: (J. A., 1875, s. 11.)

[Notwithstanding a cause or matter has been assigned to the wrong division] all steps and proceedings whatsoever taken . . . in any such cause or matter, and all orders made therein . . . before any such transfer . . . [are] valid: (J. A., 1875, s. 11.)

All actions which have [formerly] been commenced by writ in the

Superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits which have . . . [formerly] been commenced by bill or information in the High Court of Chancery, or by a cause *in rem* or *in personam* in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action : (O. I., r. 1.)

Every action in the High Court shall be commenced by writ of summons : (O. II., r. 1.)

All interdictory and other steps and proceedings in or before the . . . High Court in any cause or matter subsequent to the commencement thereof, shall be taken (subject to any rules of court, and to the power of transfer) in the division of the said High Court to which such cause or matter is for the time being attached : (J. A. 1875, s. 11.)

ADDING TO JUDGMENT.

[See JUDGMENT.]

ADMINISTRATION ACTION.

I. JURISDICTION.

II. PARTIES.

1. PERSONAL REPRESENTATIVE.
2. CREDITORS.
3. RESIDUARY LEGATEES AND NEXT OF KIN.
4. PERSONS INTERESTED IN LEGACIES CHARGED ON REALTY.
5. RESIDUARY DEVISEE AND HEIR.
6. EXECUTORS, ADMINISTRATORS, AND TRUSTEES.
7. POWER TO ADD PARTIES.
8. UNASCERTAINED HEIRS, NEXT OF KIN, AND CLASSES.

III. WRIT OF SUMMONS.

1. JOINDER OF CAUSES OF ACTION.
2. TITLE.
3. INDORSEMENT.

IV. PRELIMINARY ORDER FOR ACCOUNTS.

V. PLEADINGS.

VI. EVIDENCE.

VII. ORDER FOR ACCOUNTS ON ADMISSIONS IN PLEADINGS.

VIII. JUDGMENT.

IX. CONSOLIDATION.

X. STAYING PROCEEDINGS.

1. TWO ADMINISTRATION ACTIONS IN CHANCERY DIVISION.
2. ACTIONS IN OTHER DIVISIONS.

XI. TRANSFER.

XII. ACCOUNTS AND ANSWERS TO INQUIRIES.

1. AFFIDAVIT OF PERSONAL REPRESENTATIVE.
2. ACCOUNTS.
3. SETTLED ACCOUNTS.
4. PERSONS ENTITLED TO ATTEND.
5. FURTHER ACCOUNTS.

XIII. PAYMENT OF BALANCES INTO COURT.

XIV. ADVERTISEMENTS.

1. FOR CLAIMANTS OTHER THAN CREDITORS.
2. FOR CREDITORS.
3. PREPARATION.
4. PUBLICATION.
5. PRODUCTION OF "GAZETTE," &c.

XV. CLAIMS.

1. FAILURE TO CLAIM.
 - (a) *By Persons other than Creditors.*
 - (b) *By Creditors.*
2. ENTRY OF CLAIMS BY PERSONS OTHER THAN CREDITORS.
3. AFFIDAVIT IN SUPPORT OF CLAIMS OTHER THAN THOSE OF CREDITORS.
4. CROSS-EXAMINATION.
5. CLAIMS BY CREDITORS.
6. PRODUCTION OF CREDITOR'S SECURITY AND DOCUMENTS.
7. FAILURE BY CREDITOR TO PRODUCE SECURITY OR DOCUMENTS.
8. EXAMINATION OF CREDITOR'S CLAIMS.
9. AFFIDAVIT OF INVESTIGATION.
10. ADJUDICATION ON CLAIMS.
11. ADJOURNMENT OF ADJUDICATION.
12. NOTICE AS TO CREDITOR'S CLAIMS.
13. CLAIMS SUBSEQUENT TO TIME ADVERTISED.
 - (a) *By Claimants other than Creditors.*
 - (b) *By Creditors.*
14. SPECIAL LEAVE TO CLAIM.
15. MARKING ENTRY OF ALLOWANCE OF CLAIM.
16. LIST OF ALLOWED CLAIMS.
17. APPLICATION BY CLAIMANTS TO VARY CERTIFICATE.
18. INTEREST.
 - (a) *Debts.*
 - (b) *Legacies.*
 - (c) *Subsequent Interest.*
19. NOTICE AS TO PAYMASTER-GENERAL'S CHEQUES.

XVI. LISTS OF LEGACIES AND ANNUITIES.

XVII. DEFAULT.

XVIII. SANCTION FOR PROCEEDINGS TO GET IN ESTATE.

XIX. SALE.

XX. ALLOWING INCOME OF PROPERTY [See PROPERTY].

XXI. COSTS.

1. HIGHER OR LOWER SCALE.
2. DIFFERENT ESTATES.
3. CONVICT'S ESTATE.
4. COSTS OUT OF THE ESTATE.
 - (a) *General Rules.*
 - (b) *Personalty primarily liable.*
 - (c) *Lapse.*
 - (d) *Particular Fund Severed*
 - (e) *Partial Distribution before Action.*
 - (f) *Difficulty as to Construction.*
5. ATTENDANCE AT CHAMBERS.
6. PERSONAL REPRESENTATIVE.
 - (a) *General Rule.*
 - (b) *In Action by one Creditor.*
 - (c) *Severance.*
 - (d) *When Refused or Made to pay Costs.*
7. PLAINTIFF.
8. CREDITOR.

9. HEIR.
10. NEXT OF KIN AND MEMBERS OF CLASS.
11. LEGATEE.
12. INCUMBERED SHARES.
13. BANKRUPT LEGATEE.
14. SETTLED SHARE.
15. HUSBAND AND WIFE.
16. INQUIRIES AS TO PERSONS ENTITLED TO RESIDUE.
17. MORTGAGEE.

I. JURISDICTION.

Causes and matters for the administration of the estates of deceased persons are assigned to the Chancery Division: (J. A., 1873, s. 34.)

The administration of the estates of two different persons should only be sought in one action where the same parties claim the benefit of both estates, and they are so connected that the account of one cannot be taken without the other: (Dan. 284.)

Where the Probate Division has granted a general probate of the will of a testator domiciled in Scotland, the Chancery Division will make the ordinary decree for the administration of the personal estate of the testator, without limiting it to the English assets, and notwithstanding the opposition of a majority of the executors: (*Stirling-Maxwell v. Cartwright*, L. Rep. 11 Ch. Div. 522; 40 L. T. Rep. N. S. 669.)

II. PARTIES.

1. PERSONAL REPRESENTATIVE.

For a general administration of an intestate's estate, a general administrator, and not merely an administrator *ad litem* appointed by the Probate Division, is necessary: (*Dowdeswell v. Dowdeswell*, L. Rep. 9 Ch. Div. 294; 38 L. T. Rep. N. S. 828; 48 L. J. 23, Ch.; 27 W. R. 241.)

As to intervening when the executor's interest as such is in conflict with his beneficial interest, see *Samuel v. Samuel*: (L. Rep. 12 Ch. Div. 152.)

An administrator *ad litem* is allowed to represent the estate for the purpose of having a particular question determined, so as to bind the estate in the hands of a general administrator when appointed: (*Id.*)

A person will not be appointed under 15 & 16 Vict. c. 86, s. 44, to represent the estate in a general administration: (Dan. 182.) [See PARTIES.]

An executor who has not proved is a proper party if he has inter-meddled: (*Vickers v. Bell*, 4 De G. J. & S. 274; 10 L. T. Rep. N. S. 77; 12 W. R. 589; *Re Lovett*, L. Rep. 3 Ch. Div. 204; 35 L. T. Rep. N. S. 93; 45 L. J. 768, Ch.; 24 W. R. 982.)

A general personal representative is a necessary party to an action against an executor *de son tort*: (Dan. 180; *Russell v. Morris*, L. Rep. 17 Eq. 20; 29 L. T. Rep. 446; 43 L. J. Ch. 97; 22 W. R. 67; and compare *Re Lovett, sup.*)

2. CREDITORS.

All the creditors of a deceased debtor may be joined as co-plaintiffs in an action to administer his estate: (Dan. 207.)

One creditor may sue for his debts against the personal estate without bringing the other creditors before the court, or suing on their behalf: (Dan. 207, 208; O. XVI., r. 9; and see PARTIES.)

In such a case no advertisement for creditors is ordered: (Seton, 4th edit. 807.)

In a creditors' action for administration of the real estate of a deceased person (who has not devised it upon trust for sale with power to give receipts) the plaintiff must entitle the writ "on behalf of himself and all

other the creditors": (*Worraker v. Pryer*, L. Rep. 2 Ch. Div. 109; 45 L. J. 273, Ch.; 24 W. R. 269; *Fryer v. Royle*, L. Rep. 5 Ch. Div. 540; 36 L. T. Rep. N. S. 441; 25 W. R. 528; *Re Vincent*, W. N. 1877, p. 249; 26 W. R. 94.)

Where the creditor sues on behalf of himself and others, the defendant may, before judgment, have the action dismissed, on payment of the debt and all costs of the action: (Dan. 208.)

If the debt be admitted or proved, and the personal representative admit assets, the plaintiff is entitled at the hearing to an immediate judgment for payment, not merely for account: (*Id.*)

In a creditor's action for administration of personalty, the plaintiff need not sue on behalf of all the creditors in order to obtain a general account of debts: (*Naylor v. Blount*, 27 W. R. 865.)

The judgment in an action by a creditor on behalf of himself, &c., does not conclusively establish the plaintiff's debt, and fresh evidence may be gone into in chambers: (*Cardell v. Hawke*, L. Rep. 6 Eq. 464; 19 L. T. Rep. N. S. 47.)

3. RESIDUARY LEGATEES AND NEXT OF KIN.

Any residuary legatee or next of kin may, without serving the remaining residuary legatees or next of kin, have a decree for the administration of the personal estate of a deceased person: (15 & 16 Vict. c. 86, s. 42, r. 1; O. XVI., r. 11.)

The legatee of an annuity charged upon residue is entitled to administration: (*Wollaston v. Wollaston*, L. Rep. 7 Ch. Div. 58; 37 L. T. Rep. N. S. 631; 47 L. J. 117, Ch.; 26 W. R. 77.)

Notice of judgment must be served on the persons who were formerly necessary parties.

4. PERSONS INTERESTED IN LEGACIES CHARGED ON PROCEEDS OF REALTY.

Any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold, may, without serving any other legatee or person interested in the proceeds of the estate, have a judgment for the administration of the estate of a deceased person: (15 & 16 Vict. c. 86, s. 42, r. 2; O. XVI., r. 11.)

Notice of judgment must be served on the persons who were formerly necessary parties.

5. RESIDUARY DEVISEE AND HEIR.

Any residuary devisee or heir may, without serving any co-residuary devisee or co-heir, have the like decree: (15 & 16 Vict. c. 86, s. 42, r. 2; O. XVI., r. 11.)

A *cestui que trust* is not entitled as of right to administration under sect. 42: (*M^r Wade v. Broadhurst*, 34 L. T. Rep. N. S. 924; 24 W. R. 232.)

Notice of judgment must be served on the persons who were formerly necessary parties.

6. EXECUTORS, ADMINISTRATORS, AND TRUSTEES.

Any executor, administrator, or trustee may obtain a decree against any one legatee, next of kin, or *cestui que trust* for the administration of the estate: (15 & 16 Vict. c. 86, s. 42, r. 6; O. XVI., r. 11.)

Where there are more than one personal representative they must all be made parties, though they need not be all plaintiffs or all defendants: (Dan. 200; *Latch v. Latch*, L. Rep. 10 Ch. App. 464; 45 L. J. 445, Ch.; 23 W. R. 686.)

When one executor only has proved, he may sue without making the others parties, although they have not renounced: (Dan. 200.)

Notice of judgment must be served on the persons who were formerly necessary parties.

7. POWER TO ADD PARTIES.

In all the above cases [*sup.* 3, 4, 5, 6] the Court, if it shall see fit, may require any other person or persons to be made a party or parties to the suit give the conduct of the suit to such person as it may deem proper, and make such order in any particular case as it may deem just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question: (15 & 16 Vict. c. 86, s. 42, r. 7; O. XVI., r. 11.)

8. UNASCERTAINED HEIRS, NEXT OF KIN AND CLASSES.

In any case in which the right of an heir-at-law or the next of kin or a class shall depend upon the construction which the Court may put upon an instrument, and it shall not be known or be difficult to ascertain who is or are such heir-at-law or next of kin or class; and the Court shall consider that in order to save expense, or for some other reason, it will be convenient to have the question or questions of construction determined before such heir-at-law, next of kin, or class shall have been ascertained by means of inquiry or otherwise, the Court may appoint some one or more person or persons to represent such heir-at-law, next of kin, or class, and the judgment of the Court in the presence of such person or persons shall be binding upon the party or parties or class so represented: (O. XVI., r. 9a, June, 1876.)

Where questions arose in an administration action upon the construction of a will, there was a difficulty in finding the heir and a doubt whether he would be entitled, the judgment, before the question of construction came on for decision, directed that persons should be appointed at chambers to represent, for the purpose of obtaining judgment on the construction, (1) the heir-at-law; (2) the next of kin; (3) children of the heir who had died before the period of distribution; (4) children of the heir living at that period; and that inquiries should be made to ascertain whether there were any (5) children living at that period of next of kin then dead, and whether any (6) children of next of kin, after surviving their parents, had died before the period of distribution; that if it should appear that there were any children of the former class who had since died, or any of the latter class, the same order was made for their representation; the certificate to be directed, in the first instance, to the above matters separately: (*Re Peppitt's Estate*, L. Rep. 4 Ch. Div. 230; 35 L. T. Rep. N. S. 902; 46 L. J. 95, Ch.; 25 W. R. 211.)

III. WRIT OF SUMMONS.

1. JOINDER OF CAUSES OF ACTION.

As to obtaining leave when the title to real estate is involved, see *Whetstone v. Dewis*, L. Rep. 1 Ch. Div. 99; 33 L. T. Rep. N. S. 501; 45 L. J. 504, Ch.; 24 W. R. 93.

2. TITLE.

Solicitors are requested in all actions for administration to intitule the writ in the form—

“In the matter of the estate of *A.B.*,

Between *G.H.*, ... Plaintiff

and

R.S., ... Defendant.”

So that the action may be indexed in the cause book under the name of the estate to be administered: (Notice in Central Office.)

3. INDORSEMENT.

Creditor to administer estate.—“The plaintiff’s claim is as a creditor of

X.Y., of deceased, to have the [real and] personal estate of the said X.Y. administered. The defendant C.D. is sued as the administrator of the said X.Y. [and the defendants E.F. and G.H. as his co-heirs-at-law]."

Legatee to administer Estate.—The plaintiff's claim is as a legatee under the will dated the day of 18, of X.Y. deceased, to have the [real and] personal estate of the said X.Y. administered. The defendant C.D. is sued as the executor of the said X.Y. [and the defendants E.F. and G.H. as his devisees]. (App. A, part II., s. 1.)

Where the action is instituted by an executor or administrator in his capacity of personal representative, the indorsement must show it. [See WRIT OF SUMMONS.]

IV. PRELIMINARY ORDER FOR ACCOUNTS.

When the writ is endorsed with a claim for an account in default of appearance, or after appearance, unless the defendant satisfies the court or judge that there is a preliminary question to be tried, an order will be forthwith made for an account with all proper directions: (Order XV., r. 1, and see Account and post, VIII.)

If an order is made for preliminary accounts and inquiries, the hearing must not be brought on until the chief clerk has made his certificate in answer, or a postponement will be ordered at the costs of the party bringing on the hearing: (*Re Bell's Estate*, 39 L. T. Rep. N. S. 422.)

V. PLEADINGS.

Forms of pleadings in administration actions are given in Appendix C (Numbers 2, 3, 4) to the Rules of 1875.

VI. EVIDENCE.

Production of the probate is sufficient evidence of allegations in the statement of claim of the proof of the will and appointment of executors: (Dan. 753 n.)

VII. ORDER FOR ACCOUNTS ON ADMISSION IN PLEADINGS.

An order for the usual administration accounts, and inquiries may be obtained on a ordinary motion where there is a sufficient admission in the pleadings, and the cause need not be set down: (*Re Barker's Estate*, L. Rep. 10 Ch. Div. 162; 48 L. J. 171, Ch.; 27 W. R. 393), and further consideration may be reserved by such an order: (*Bennet v. Moore*, L. Rep. 1 Ch. Div. 692; 45 L. J. 275, Ch.; 24 W. R. 690; *Burnell v. Burnell*, L. Rep. 11 Ch. Div. 213; 48 L. J. 412, Ch.; 27 W. R. 749.)

VIII. JUDGMENT.

Every [judgment] or order for an account of the personal estate of a testator or intestate shall contain a direction for an inquiry what parts (if any) of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct: (C. O. 23, r. 14.)

The directions ordinarily given are for

Accounts of

The Personal Estate,

Debts,

Funeral Expenses,

Legacies and annuities bequeathed;

Inquiry as to

Personal estate outstanding or undisposed of:

And, if the real estate is administered

Inquiries:

What real estate the deceased died seised or possessed of,

As to the incumbrances thereon, and
(sometimes) an account

Of the rents and profits received by the trustee: (Dan. 1123;
Seton, 4th edit., 801, *et seq.*)

Separate accounts should be ordered of receipts of executors and of trustees, and court fees are payable on the gross receipts of each: (*Armitage v. Ellsworth*, L. Rep. 13 Ch. Div. 91; 41 L. T. Rep. N. S. 608; 28 W. R. 283.)

As to carrying judgment into chambers and proceedings thereon, see CHAMBERS.

After judgment, but before further consideration, an immediate order was made on a petition by a married woman, who was absolutely entitled to a share of a fund in court representing the residuary estate, to enforce her equity to a settlement, although the fund was not actually distributable until after further consideration and the amount of the share was not ascertained: (*Re Robinson*, L. Rep. 12 Ch. Div. 188.)

IX. CONSOLIDATION.

Where several actions are brought by the same plaintiff an order of consolidation may be granted. [See CONSOLIDATION.]

X. STAYING PROCEEDINGS.

1. WHERE TWO ADMINISTRATION ACTIONS IN CHANCERY DIVISION.

When two administration actions are instituted in the Chancery Division the proceedings in one of them may be stayed after a judgment is obtained in the other, and it is immaterial which suit was first instituted; and whether by writ or summons, if a judgment, or order having the effect of a judgment, has been made: (Dan. 698; Jarm. 940.)

If the proceedings to be stayed seek anything that cannot be attained in the other proceedings, that will be a reason for allowing the former to go on, so far as they relate to the additional relief claimed: (*Re Aird*, W. N. 1878, p. 24; 26 W. R. 441.)

But in this case a transfer will sometimes be ordered: (Dan. 698. [See TRANSFER.]

Where an administration judgment or order has been made in both proceedings, those proceedings which are in the most advanced state will be allowed to proceed: (*Littlewood v. Collins*, 8 L. T. Rep. N. S. 265; 11 W. R. 387; *Colman v. Turner*, L. Rep. 10 Eq. 230; 22 L. T. Rep. N. S. 836; 39 L. J. 776, Ch.; 18 W. R. 963.)

Where two suits came on to be heard together, the court made one decree in both suits, and left it to be determined in chambers who should have the conduct of the proceedings: (Ayck. 342.)

The order must have been fairly obtained: (Dan. 701; Ayck. 342; *Rhodes v. Barret*, L. Rep. 12 Eq. 479; 24 L. T. Rep. N. S. 654; 19 W. R. 871.)

An action may be partially stayed: (*Re Aird*, W. N. 1878, p. 24; 26 W. R. 441.)

The order to stay is obtained on motion, or, if the proceedings are in chambers, on summons, notice being in each case given to all parties in each suit: (Dan. 700.)

Under ordinary circumstances the conduct of the proceedings will be given to the plaintiff in the first suit in point of time: (Dan. 702; Ayck. 342.)

Preference will be given to a residuary legatee rather than a creditor: (*Id.*)

The usual order is that the costs of all parties to the second suit who

are parties to the first suit up to notice of the judgment, shall be costs in the first suit, and the costs of persons not parties thereto shall be paid by the executor and added to his own, if he admit assets; if not that such party shall add his costs to his claim and prove for them in the first suit: (Dan. 700; Ayck. 342.)

[And see INFANT, PARTIES, STAYING PROCEEDINGS.]

Where the suits are in different branches of the Chancery Division the cause in which no judgment or administration order has been made must be transferred to the judge who has made such a judgment or order, and application made for an order in both suits to stay proceedings in that which is least advanced: (Dan. 698; Ayck. 342; and see TRANSFER.)

It is the duty of the personal representative to apply as soon as the judgment or order is made; but on his neglect, plaintiff in the suit in which it has been made, or any party interested, though not a party to the suit to be stayed, may apply: (Dan. 699.)

2. ACTIONS IN OTHER DIVISIONS.

As, after a decree for administration, the Court of Chancery formerly granted an injunction restraining a creditor not a party to the suit from proceeding against the estate at law (Dan. 1463), so an action commenced in another division may, prior to any transfer to the Chancery Division, be stayed: (J. A., 1873, s. 24, sub-s. 5; *Walker v. Banagher Distillery Company*, L. Rep. 1 Q. B. Div. 129; 33 L. T. Rep. N. S. 502; 45 L. J. 135, Q. B.)

The order cannot be made by a judge of the Chancery Division, but must be obtained from the division in which the creditor's action is pending: (*Re The People's Garden Company*, L. Rep. 1 Ch. Div. 44; 45 L. J. 129, Ch.; 24 W. R. 40; *Re South of France Pottery Works Syndicate*, W. N. 1877, p. 205; 37 L. T. Rep. N. S. 260; 25 W. R. 870.)

Proceedings taken by a mortgagee of the testator or his personal representative in another division, to enforce or protect his security, will not be stayed because an administration action has been commenced: (*Crowle v. Russell*, L. Rep. 4 C. P. Div. 186; 39 L. T. Rep. N. S. 320; 48 L. J. 76, C. P.; 27 W. R. 84.)

The right of a creditor, whose action is stayed, to costs depends upon whether his debt is allowed: (Ayck. 515.)

XI. TRANSFER.

When an order has been made by any judge of the Chancery Division . . . for the administration of the assets of any testator or intestate, the judge in whose court such . . . administration shall be pending shall have power, without any further consent, to order the transfer to such judge of any action pending in any other division brought or continued . . . by or against the executors or administrators of the testator or intestate whose assets are being so administered: (O. LI., r. 2a, June, 1876.)

The plaintiffs in the action transferred are at liberty only to prove for their claim and costs in the administration, and obtain no priority, even when they have obtained an order *nisi* to sign judgment: (*Re Stubbs's Estate*, L. Rep. 8 Ch. Div. 154; 47 L. J. 671, Ch.; 26 W. R. 736.)

The application should be made *ex parte*: (*Field v. Field*, W. N., 1877, p. 98; *Whitaker v. Robinson*, W. N., 1877, p. 201.)

Any action transferred to the Chancery Division shall, by the order directing the transfer, be directed to be assigned to one of the judges of such division to be named in the order: (O. LI., r. 3.)

The action must have been brought in another division against the executor or administrator, *quâ* executor or administrator: (*Chapman v.*

Mason, W. N., 1879, p. 93; 40 L. T. Rep. N. S. 678); but it may be transferred, notwithstanding it is brought against him personally, if in that character, *e.g.*, for a *devastavit*: (*Re Timms*, W. N., 1878, p. 141; 38 L. T. Rep. N. S. 679; 47 L. J. 831, Ch.; 26 W. R. 692.)

XII. ACCOUNTS AND ANSWERS TO INQUIRIES.

1. AFFIDAVIT OF PERSONAL REPRESENTATIVE.

The executor or administrator makes an affidavit setting forth in schedules the state of the assets of the deceased at the respective times of his death, and the swearing of the affidavits: (Dan. 1123-5.)

The trustee of the real estate must make an affidavit scheduling thereto the short particulars of the testator's real estate, whether in possession or otherwise; and, in a separate schedule, the incumbrances and parts of the estates respectively affected thereby: (Dan. 1125.)

A form of affidavit, to be varied only so far as may be necessary to meet the circumstances of the case, is given in schedule 6 to the Chancery Regulations of August, 1857.

2. ACCOUNTS.

The accounts must be exhibited, and not annexed to the affidavit. [See ACCOUNTS.]

Forms of accounts of personal estate and of rents and profits are given in schedules 4 and 5 to the Chancery Regulations of August, 1857.

3. SETTLED ACCOUNTS.

Settled accounts may be allowed in administration actions without any express directions: (Dan. 1137.)

4. PERSONS ENTITLED TO ATTEND.

Persons served with notice of decree, who have obtained an order of course giving them leave to attend, must, after judgment and before the accounts and inquiries are taken, attend before the chief clerk, that he may select which of them shall attend the taking of the accounts at the expense of the estate. Those who afterwards attend without such special order have to pay their own costs, and costs occasioned by their attendance: (*Sharp v. Lush*, L. Rep. 10 Ch. Div. 468; 48 L. J. Ch. 231; 27 W. R. 528.)

As to proceedings on leaving account at chambers, surcharging, vouching, directions, see ACCOUNT.

5. FURTHER ACCOUNTS.

After an ordinary administration decree, when fraud has been charged by a partner of the deceased testator, and ordinary partnership accounts have been added by consent and fraud found, an additional account of the items of fraud, together with interest can be ordered without an action for such account: (*Barber v. Mackrell*, L. Rep. 12 Ch. Div. 534; 41 L. T. Rep. N. S. 201; 27 W. R. 894.)

XIII. PAYMENT OF BALANCES INTO COURT.

Except in the case of a creditor suing for his own debt only, an order will be made on summons that so much of the trust estate as the personal representative or trustee admits to be in his hands, be paid into court, without proof of breach of trust or of danger to the property (Dan. 1620); and so when a balance is admitted to be due to the estate: (Dan. 1137.)

XIV. ADVERTISEMENTS.

1. FOR CLAIMANTS OTHER THAN CREDITORS.

Advertisements for claimants [other than creditors] shall fix a time for the claimants to come in and prove their claims, and shall appoint a

day for the hearing and adjudication thereon : (C. O. 35, r. 37 ; Ch. O. May, 1865, r. 11.)

A form of advertisement for claimants [other than creditors] subject to such variation as circumstances may require, is given in schedule L. to the Consolidated Orders of the Court of Chancery.

2. FOR CREDITORS.

Every advertisement for creditors affecting the estate of a deceased person, which shall be issued pursuant to any [judgment] or order, shall direct every creditor, by a time to be thereby limited, to send to the executor or administrator of the deceased, or to such other party as the judge shall direct, or to his solicitor, to be named and described in such advertisement, the name and address of such creditor, and the full particulars of his claim, and a statement of his account, and the nature of the security (if any) held by him : (Chan. O. May, 1865, r. 1.)

A form (to be used with such variations as circumstances may require) is given in the schedule to the same order.

3. PREPARATION.

The advertisement must be prepared by the party prosecuting the judgment or order, and approved and signed by the chief clerk : (C. O. 35, r. 36.)

Only one advertisement is issued, unless for special reasons it is thought necessary (*Id.*, r. 35), and it may be repeated : (*Id.*)

4. PUBLICATION.

[The signature of the chief clerk] is sufficient authority to the printer of the *Gazette* to insert the same : (C. O. 35, r. 36.)

The advertisement may be directed to be in such other papers as are thought necessary : (C. O. 35, r. 35.)

If the testator died in the country or a colony, insertions in provincial or colonial papers are generally directed : (Dan. 1092, Ayck. 510.)

5. PRODUCTION OF GAZETTE, &c.

The party prosecuting the judgment should procure copies of the *Gazette* and other papers containing the advertisements, and produce them as evidence : (Dan. 1092.)

XV. CLAIMS.

1. FAILURE TO CLAIM.

(a) *By persons other than Creditors.*

Where a [judgment] or order is made, whether in court or in chambers, directing an account of debts, claims, or liabilities, or an inquiry for heirs, next of kin, or other unascertained persons, unless otherwise ordered, all persons other than creditors who do not come in and prove their claims within the time which may be fixed for that purpose by advertisement, shall be excluded from the benefit of the decree or order : (C. O. 35, r. 12.)

(b) *By Creditors.*

After the time fixed by the advertisement, no claim shall be received (except . . . in case of an adjournment) unless the judge shall think fit to give special leave upon application made by summons, and then upon such terms and conditions as to costs and otherwise as the judge shall direct : (Ch. O., May, 1865, r. 10.)

A creditor may come in as long as there are assets undistributed : (*Re Metcalfe*, L. Rep. 13 Ch. Div. 236 ; 41 L. T. Rep. N. S. 572.)

2. ENTRY OF CLAIMS BY PERSONS OTHER THAN CREDITORS, AND NOTICE THEREOF.

Claimants [other than creditors] coming in pursuant to advertisement

shall enter their claims at the chambers of the judge in the "Claims Book," for the day appointed for hearing by the advertisement, and shall give notice thereof and of the affidavit filed to the solicitors in the cause, within the time specified in the advertisement for bringing in claims: (C. O. 35, r. 38; Ch. O., May, 1865, r. 11.)

Upon the notice of a claim having been entered at chambers . . . served upon the solicitors in the cause the number of the entry of the claim is to be stated: (Ch. Reg. Aug. 1857, r. 9.)

3. AFFIDAVIT IN SUPPORT OF CLAIMS OTHER THAN THOSE OF CREDITORS.

The affidavit in support must state the nature and particulars of the claim: (Dan. 1093.)

The claimants filing affidavits shall not be required to take office copies; but the party prosecuting the cause or matter shall take office copies, and produce the same at the hearing, unless the judge shall otherwise direct: (C. O. 35, r. 39.)

4. CROSS-EXAMINATION.

The claimant may be cross-examined on his affidavit.

5. CLAIMS BY CREDITORS.

No creditor need make any affidavit or attend in support of his claim (except to produce his security) unless he is served with a notice requiring him to do so, as hereinafter provided: (Ch. O. May, 1865, r. 2, and see *post*, 12.)

The word "creditor" includes a person claiming any debt or liability affecting the personal estate of a deceased person under any order made pursuant to 13 & 14 Vict. c. 35: (Ch. O. May, 1865, r. 16.)

A creditor proving a debt may be cross-examined before an examiner: (Ayck. 513.)

A creditor may compel the personal representative to produce upon oath all documents which may enable him to make out his case: (Ayck. 513.)

6. PRODUCTION OF CREDITORS' SECURITY AND DOCUMENTS.

Every creditor shall produce the security (if any) held by him, before the judge, at such times as shall be specified in the advertisement for that purpose, being the time appointed for adjudicating on the claims, and every creditor shall, if required by notice in writing, to be given by the executor and administrator of the deceased, or by such other party as the judge shall direct, produce all other deeds and documents necessary to substantiate his claim before the judge, at his chambers, at such time as shall be specified in such notice: (Ch. O. May, 1865, r. 3.)

A form of notice to produce documents is given in the schedule to the same order.

Every notice . . . shall, unless the judge shall otherwise direct, be deemed sufficiently given and served if transmitted by the post prepaid, to the creditor to be served, according to the address given by such creditor in the claim sent in by him pursuant to the advertisement, or, in case such creditor shall have employed a solicitor, to such solicitor according to the address given by him: (Ch. O. May, 1865, r. 13.)

7. FAILURE BY CREDITOR TO PRODUCE SECURITY OR DOCUMENTS.

In case any creditor shall neglect or refuse [so to do], he [will] not be allowed any costs of proving his claim, unless the judge . . . otherwise directs: (Ch. O. May, 1865, r. 4.)

8. EXAMINATION OF CREDITORS' CLAIMS.

The executor or administrator of the deceased or such other party as

the judge shall direct, shall examine the claims sent in pursuant to the advertisement, and shall ascertain, so far as he is able, to which of such claims the estate of the deceased is justly liable: (Ch. O. May, 1865, r. 5.)

9. AFFIDAVIT OF INVESTIGATION.

The executor or administrator must, seven clear days at least prior to the day of adjudication, file an affidavit, to be made by such executor or administrator, or one of the executors or administrators, or such other party, either alone or jointly with his solicitor, or other competent person, or otherwise as the judge shall direct, verifying a list of the claims the particulars of which have been sent in pursuant to the advertisement, and stating to which of such claims, or parts thereof respectively, the estate of the deceased is, in the opinion of the deponent, justly liable, and his belief that such claims, or parts thereof respectively, are justly due and proper to be allowed, and the reasons for such belief: (Ch. O. May, 1865, r. 5.)

A form of affidavit (to be varied according to circumstances, if necessary) is given in the schedule to the same order.

In case the judge shall think fit so to direct, the making of the affidavit . . . shall be postponed till after the day appointed for adjudication, and shall then be subject to such directions as the judge may give: (Ch. O. May, 1865, r. 6.)

Postponement is generally considered when advertisements are directed: (Dan. 1095.)

10. ADJUDICATION ON CLAIMS.

In any cause for the administration of the estate of a deceased person, no party to the cause other than the executor or administrator shall, unless by leave of the judge, be entitled to appear either in court or in chambers on the claim of any person not a party to the cause against the estate of the deceased in respect of any debt or liability. The judge may direct any other party to the cause to appear, either in addition to or in the place of the executor or administrator, upon such terms as to costs or otherwise as he shall think fit: (O. XVI., r. 12b., April, 1880.)

At the time appointed for adjudicating upon the claims, or at any adjournment thereof, the judge may, in his discretion, allow any of the claims, or any part thereof respectively, without proof by the creditors, and direct such investigation of all or any of the claims not allowed, and require such further particulars, information, or evidence relating thereto, as he may think fit, and may, if he so think fit, require any creditor to attend and prove his claim, or any part thereof: (Ch. O. May, 1865, r. 7.)

11. ADJOURNMENT OF ADJUDICATION.

Where, on the day appointed for hearing the claims, any of them remain undisposed of, an adjournment day for hearing such claims shall be fixed; and where further evidence is to be adduced, a time may be named within which the evidence on both sides is to be closed; and directions may be given as to the mode in which such evidence is to be adduced: (C. O. 35, r. 40.)

The adjudication on such claims [of creditors] as are not . . . allowed [at the adjudication] shall be adjourned to a time to be then fixed: (Ch. O. May, 1865, r. 7.)

12. NOTICES AS TO CREDITORS' CLAIMS.

Notice shall be given by the executor or administrator, or such other party as the judge shall direct, to every creditor whose claim, or any part thereof, has been allowed without proof by the creditor, of such allowance, and to every such creditor as the judge shall direct, to attend and prove his claim, or such part thereof as is not allowed, by a time to be named in

such notice, not being less than seven days after such notice, and to attend at a time to be therein named, being the time to which the adjudication thereon shall have been adjourned; and in case any creditor shall not comply with such notice, his claim, or such part thereof as aforesaid, shall be disallowed: (Ch. O. May, 1865, r. 8.)

Forms of notices are given in the schedule to the same order.

13. CLAIMS SUBSEQUENT TO TIME ADVERTISED.

(a.) *By Claimants other than Creditors.*

Any claimant [other than a creditor] who has not before entered his claim, may be heard on such adjournment day, provided he has entered his claim and filed his affidavit four clear days prior to such day, and no certificate of debts or claims has been made in the mean time: (C. O. 35, r. 41; Ch. O. May, 1865, r. 11.)

(b.) *By creditor.*

Any creditor who has not before sent in the particulars of his claim pursuant to the advertisement may do so four clear days previous to any day to which the adjudication is adjourned: (Ch. O., May, 1865, r. 9.)

14. SPECIAL LEAVE TO CLAIM.

After the time fixed by the advertisement, no claims shall be received (except, as before provided, in case of an adjournment), unless the judge at chambers shall think fit to give special leave, upon application made by summons, and then upon such terms and conditions as to costs and otherwise as the judge shall think fit: (C. O. 35, r. 43; abrogated, as to creditors, by Ch. O., May, 1865, r. 11. As to creditors, see *ante*, (b).)

After the time limited by the advertisement and the chief clerk's certificate, the application may be by petition, motion, or summons: (Dan. 1097; Seton, 4th edit. 831.)

In general the right to come in on terms only lasts until the distribution of the fund: (Seton, 832.)

If part only remains in court a proportion of debt only can be proved for: (*Id.*)

A special case must be made out: (*Id.*)

The applicant is generally ordered to pay the costs: (Dan. 1097.)

If a claim sent in after the proper time is allowed after the hearing on further consideration there will be a direction for payment: (Seton, 4th edit. 828.)

15. MAKING ENTRY OF ALLOWANCE OF CLAIM.

The chief clerk makes the entry of allowed claims which form items in his certificate: (Dan. 1100.)

16. LIST OF ALLOWED CLAIMS.

A list of all claims allowed shall, when required by the judge, be made out and left in the judge's chambers by the party prosecuting the decree or order: (C. O. 35, r. 44.)

A form of list is given in the schedule to the Chancery Regulations of Aug. 1857.

17. APPLICATION BY CLAIMANT TO VARY CERTIFICATE.

A person whose claim is disallowed wholly or in part may apply to vary the chief clerk's certificate by having his claim inserted therein; or he may go to the judge in person, when, if the decision is adverse, he may obtain a separate certificate at his own expense, and then apply to vary it: (Dan. 1102; and see CHAMBERS and APPEAL.)

18. INTEREST.

(a.) *Debts.*

Where a [judgment] or order is made directing an account of the debts

of a deceased person, unless otherwise ordered, interest shall be computed on such debts, as to such of them as carry interest, after the rate they respectively carry, and as to all others, after the rate of 4 per cent. per annum, from the date of the decree or order: (C. O. 42, r. 9.)

In an action for the administration of the estate of a person who has died insolvent since the commencement of the Judicature Act, 1875, a creditor on the estate, whose debt bears interest is not entitled to interest up to the day of payment, but only to the date of the judgment for administration: (*Re Summers*; *Boswell v. Gurney*, L. Rep. 13 Ch. Div. 136.)

A creditor, whose debt does not carry interest, who comes in and establishes the same before the judge in chambers, under a [judgment] or order of the court or of the judge in chambers, shall be entitled to interest upon his debt, at the rate of 4 per cent. per annum from the date of the [judgment] or order out of any assets which may remain after satisfying the costs of the suit, the debts established, and the interest of such debts as by law carry interest: (C. O. 42, r. 10.)

(b) Legacies.

Where a decree or order is made directing an account of legacies, interest shall be computed on such legacies after the rate of 4 per cent. per annum, from the end of one year after the testator's death, unless otherwise ordered, or unless any other time of payment or rate of interest is directed by the will, and in that case according to the will: (C. O. 42, r. 11.)

In the administration, in an English court, of property bequeathed by a testator domiciled in France, the interest payable on legacies given by the will is governed by the law of the country in which the estate is being administered: (*Hamilton v. Dallas*, 38 L. T. Rep. N. S. 215.)

Interest under a judgment is calculated up to the date of the certificate: (Dan. 1107.)

(c) Subsequent Interest.

The order on further consideration generally directs that subsequent interest shall be computed in chambers; but sometimes it is allowed to be verified by affidavit: (*Id.*)

19. NOTICE AS TO PAYMASTER-GENERAL'S CHEQUES.

Where any [judgment] or order is made for payment by the [Paymaster-General] to creditors, the party whose duty it is to prosecute such [judgment] or order shall send to each such creditor, or his solicitor (if any), a notice that the cheques may be received from the Paymaster-General, and such party shall, when required, produce such [judgment] or order, and any other papers necessary to enable such creditors to receive their cheques and get them passed: (Ch. O., May, 1865, r. 12.)

XVI. LISTS OF LEGACIES AND ANNUITIES.

Lists of legacies unpaid, and of the annuities and the arrears due are ordinarily required to be supplied to the judge and chief clerk: (Dan. 1110.)

Forms of lists are given in Schedules 10, 11, and 12 to the Chancery Regulations of August, 1857.

XVII. DEFAULT.

It is not necessary to direct an inquiry previous to charging defendant executors as for wilful neglect and default: (*De Cordova v. De Cordova*, L. Rep. 4 App. Cas. 692; 41 L. T. Rep. N. S. 43.)

If, after the ordinary accounts have been directed, part of the estate cannot be traced, an application to charge the personal representative with

it will not be entertained, unless it is proved that he received the estate : (Dan. 1127.)

Where a plaintiff has obtained a common administration judgment against a defendant, he must obtain the leave of the court before he can maintain a subsequent action against the same defendant charging him with wilful default in the administration of the same estate : (*Laming v. Gee*, L. Rep. 10 Ch. Div. 715 ; 40 L. T. Rep. N. S. 33 ; 48 L. J. 196, Ch. ; 27 W. R. 226.)

XVIII. SANCTION FOR PROCEEDINGS TO GET IN ESTATE.

Where an administration action is pending the sanction of the court must be obtained before proceedings are instituted to get in the estate. The application is by summons supported by affidavit and by counsel's opinion : (Dan. 263-4.)

XIX. SALE.

Leave to sell or convert outstanding estate directed to be got in with the direction of the judge, or to accept a composition in respect thereof, must be obtained on summons : (Dan. 1141.)

When the trusts of any will . . . are being administered, and a sale is ordered of any property vested in the trustees of such will . . . upon trust for sale, or with power of sale by such trustees, the conduct of such sale shall be given to such trustees unless the judge shall otherwise direct : (O. LII., March, 1879.)

XX. ALLOWING INCOME OF PROPERTY [*see* PROPERTY].

XXI. COSTS.

1. HIGHER OR LOWER SCALE.

Solicitors are . . . allowed . . . fees on the lower scale . . . in causes and matters by creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs-at-law or next of kin, in which the personal or real or personal and real estate for or against or in respect of which or for an account or administration of which the demand may be made, shall be under the amount or value of 1000*l.* : (Add. R., August, 1875, O. VI., r. 1.)

In other cases they are allowed fees on the higher scale : (*Id.*, r. 2.)

When the gross value of the estate administered amounts to 1000*l.* at the commencement of the action, the higher scale applies, and though the estate turns out insolvent the same scale applies as if a large residue existed ; but where an estate, originally exceeding 1000*l.*, has, before commencement of the action, been reduced by proper payments by the personal representative to less than 1000*l.* the lower scale applies : (*Re Reece*, L. Rep. 2 Eq. 609 ; 14 L. T. Rep. N. S. 881 ; 35 L. J. 794, Ch. ; 14 W. R. 1008.)

In estimating the value of a mortgaged estate, the equity of redemption only must be regarded, and, although its value, as assessed, together with the rest of the estate, amounts to 1000*l.*, if it turns out on sale that the proceeds, together with the rest of the estate, amount to less than 1000*l.*, the lower scale applies : (*Re Sanderson*, L. Rep. 7 Ch. Div. 176 ; 38 L. T. Rep. N. S. 379 ; 26 W. R. 309.)

2. DIFFERENT ESTATES.

Where different funds or estates are the subject of distribution or discussion, the costs are generally apportioned *pro rata* : (Dan. 1296.)

3. CONVICT'S ESTATE.

The costs as between solicitor and client of every action or suit brought

against the administrator of a convict's property, and all charges and expenses properly incurred with reference thereto, are to be a first charge upon and paid out of such property, unless the court orders otherwise : (33 & 34 Vict. c. 23, s. 20.)

4. COSTS OUT OF THE ESTATE.

(a) *General Rules.*

The rule that costs shall be in the discretion of the court does not deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules [formerly] acted upon in Courts of Equity : (O. L.V., r. 1.)

Generally the costs of all necessary and proper parties to the proceedings are a first charge ; to be paid thereout before claims of persons beneficially entitled : (Dan. 1271.)

The rule as to personal representatives only applies as between them and their beneficiaries : (*Id.* 1284.) *

Only the costs of proceedings originally properly directed for the benefit of the estate are ordered to be thus paid : (*Id.* 1271 ; Morg. & Dav. 114.)

Where an administration action is also for other purposes the costs are divided : (*Id.* 116.)

The costs in administration proceedings in the Chancery Division have priority over those of litigation in the Probate Division : (Dan. 1272.)

Where there is a sufficient fund and it is necessary to come to the court to establish a demand upon the property of persons deceased, the costs of proceedings must be borne out of the assets, *e.g.*, if an action is commenced by a creditor for his debt ; by a legatee for his legacy ; or by residuary legatees, or next of kin, for an account and distribution of an estate : (Dan. 1288 ; Morg. & Dav. 109.)

The circumstance that the defendant has offered to the plaintiff a full inspection of his account makes no difference : (*Id.*)

(b) *Personalty primarily liable.*

The residuary personal estate is primarily the fund for payment of administration costs : (*Jones v. Caless*, L. Rep. 10 Ch. Div. 40 ; 39 L. T. Rep. N. S. 287 ; 27 W. R. 108.)

Where the particular fund occasioning litigation is not part of the residue, generally the residuary estate bears the costs of administering, and no distinction exists between cases in which the residue is disposed of, and where it is not ; and where there are specific bequests and pecuniary legacies, which exhaust the whole estate so that there is no residue, the costs occasioned by the specific bequests will be thrown upon the general fund out of which the pecuniary legacies are payable : (Dan. 1292.)

Where property intended to be disposed of has, in the result, been declared undisposed of, the costs will be thrown upon the general estate : (*Id.* 1293.)

Where two suits were instituted to obtain a decision on the construction of a will, one as to the realty, and the other as the personalty, the costs of both were thrown on the personalty : (*Pickford v. Brown*, 2 K. & J. 426.)

(c) *Lapse.*

Where a legacy has lapsed, the costs are payable out of residue : (*Trethewy v. Helyar*, L. Rep. 4 Ch. Div. 53 ; 46 L. J. 125, Ch. ; *Fenton v. Wills*, L. Rep. 7 Ch. Div. 33 ; 37 L. T. Rep. N. S. 373 ; 47 L. J. 19, Ch. ; 26 W. R. 139 ; *Blann v. Bell*, L. Rep. 7 Ch. Div. 382 ; 47 L. J. 120, Ch. ; 26 W. R. 165 ; *Re Jones*, L. Rep. 10 Ch. Div. 40 ; 39 L. T. Rep. N. S. 287 ; 27 W. R. 108.)

Lapsed real estate must bear costs before general estate : (*Scott v. Cumberland*, L. Rep. 18 Eq. 578 ; 31 L. T. Rep. N. S. 26 ; 22 W. R. 840.)

Whether the property undisposed of (whether from lapse or from any other cause) was given as a specific or pecuniary bequest, or as a share of the residue, the costs will not fall on the undisposed-of share, but on all the shares: (Dan. 1293; Morg. & Dav. 110.)

(d) *Particular Fund Severed.*

If the particular fund has been severed from the residue, and the question is merely between the persons claiming it, it must bear the costs (Dan. 1294; Morg. & Dav. 112.)

(e) *Partial Distribution before Action.*

Where executors have made a proper distribution *pro tanto*, and been ready to account to the unpaid residuary legatees, if they commence an administration action, and the account turn out substantially correct, the plaintiffs must pay the costs: (*Hilliard v. Fulford*, L. Rep. 4 Ch. Div. 389; 35 L. T. Rep. N. S. 750; 46 L. J. 43, Ch.; 25 W. R. 161.)

But where the executors have wrongly distributed the residue by overpaying to some residuary legatee, the costs will be thrown on the entire residue, so as to charge the executors with the costs attributable to the distributed shares: (*Id.*)

Where executors distributed three-fourths properly, but neglected persistently to furnish accounts to the persons entitled to the other fourth for life, they were made to pay the costs including those of the hearing, but excepting those of the accounts and inquiries, and the remainder of the costs were thrown on the residuary estate, the proportion in respect of the distributed shares being thrown on the executors personally: (*Re Bell*, 39 L. T. Rep. N. S. 422.)

(f) *Difficulty as to Construction.*

(1) *Of Will.*

If a difficulty arises upon the construction of a will, the costs occasioned by such difficulty must be defrayed out of the assets: (Dan. Ch. Pr. 1289; *Singleton v. Tomlinson*, L. Rep. 3 App. Cas. 420; 38 L. T. Rep. N. S. 653; 26 W. R. 722; and see *post*, 11.)

(2) *Of Bequest or Devise.*

Where any doubt or ambiguity arises under the will as to a bequest or devise, rendering an application to the court necessary, the costs are to be paid, not out of the property with respect to which the doubt arises, but out of the general assets not otherwise disposed of: (Dan. 1290.)

5. ATTENDANCES AT CHAMBERS.

A person interested in an administration action attending proceedings in chambers under the decree, without special leave, may be ordered to pay, in addition to his own costs, the extra costs occasioned by his attendance: (*Sharp v. Lush*, L. Rep. 10 Ch. Div. 468; 48 L. J. 231, Ch.; 27 W. R. 528; and see *sup.* XV., 10.)

6. PERSONAL REPRESENTATIVES.

(a) *General Rule.*

Personal representatives and trustees, whether plaintiffs or defendants accounting fairly and paying their money into court, are entitled to their costs as between solicitor and client, together with any costs, charges, and expenses, properly incurred by them: (Dan. 1272; Morg. & Dav. 119.)

Where the personal representatives have commenced proceedings, where they might safely have acted without, but not vexatiously, they will have their costs out of the estate: (Dan. 1273.)

(b) *In Action by one Creditor.*

In suits by a creditor against a personal representative for his own debt only, if he succeeds, no order with regard to the payment of the represen

tative's costs is made, but only an order directing the creditor's costs and claim to be paid out of the estate. Where the proceedings, either by creditors or by legatees, are for general administration, the costs of the personal representatives are always provided for; and where there is a deficiency of assets to pay the whole of the testator's debts, the costs are the first charge upon the fund arising from the personal estate. But this right may be defeated by collusion, &c.: (Dan. 1285.)

(c) *Severance.*

If trustees or personal representatives sever in commencing or defending proceedings, they will be allowed one set of costs only between them, unless there is a special reason justifying the severance: (Dan. 1274.)

If an executor refuses to join his co-executor as a plaintiff, in a proper case, and is therefore made a defendant, he will be refused his costs: (M. & D. 120.)

(d) *When Refused or made to pay Costs.*

The court will visit executors, &c., with costs in case of simple non-feasance where it has been productive of mischief to the estate: (Dan. 1280.)

An executor denying assets will be liable for costs if the contrary is proved: (Dan. 1280.)

An executor misconducting himself will only be made to pay costs so far as the proceedings have been occasioned by his misconduct: (Dan. 1283.)

In some cases of mistake or slight neglect, the personal representative's costs will only be disallowed: (*Id.*) Sometimes the costs are not even disallowed: (Morg. & Dav. 121.)

If executors refuse to account, they have to pay personally the costs up to and including the hearing, but not subsequently if they account fairly: (Morg. & Dav. 122; *Re Bell*, 39 L. T. Rep. N. S. 422.)

7. PLAINTIFF.

When a suit has been fairly instituted for the administration of assets, the first payment, after the payment of the costs of the executor who has not disentitled himself to costs, is of the costs incurred by the plaintiff in the suit, even if the estate is insufficient: (Dan. 1285-6; *Fane v. Fane*, L. Rep. 13 Ch. Div. 228; 41 L. T. Rep. N. S. 551.)

Plaintiff is ordinarily only allowed costs as between party and party, where the funds are sufficient; if deficient, usually as between solicitor and client: (Seton, 4th ed. 846.)

8. CREDITOR.

A creditor commencing proceedings knowing that the estate has been wholly exhausted, or that there are no assets available for his claim, or who is correctly informed before or after commencement of the proceedings by the executor or creditors having prior claims, will have to pay all the costs; or the costs after information received, or be disallowed all his costs, or his costs after such notice: (Dan. 1287.)

In actions by puisne incumbrancers or general creditors, persons having prior specific charges, may, if parties, insist on having the action as against them dismissed with costs, or adopt the suit and consent to a sale, and to receive payment of their principal and interest out of the proceeds; in which case, although the decree is for the payment of all parties, according to their priorities, the costs of all parties must, in the first instance, come out of the fund: (Dan. 1287.)

A creditor who has come in and established his debt in the Judge's Chambers [is] entitled to the costs of so establishing his debt; and the sum to be allowed for such costs [is] fixed by the Judge, unless he thinks

fit to direct the taxation thereof; and the amount of such costs or the sum allowed in respect thereof [is] added to the debt so established: (C. O. 40, r. 24.)

A creditor failing to establish his claim has been made to pay the costs: (Ayck. 515.)

The order to pay costs may be had on summons: (Dan. 1109.)

The costs of a plaintiff creditor are not added to his debt, but form part of the costs in the action: (Dan. 1108; and see *ante*, XV., 7.)

9. HEIR.

An heir-at-law made a party for the purpose of establishing a claim against real estate generally gets his costs whatever the result, if the claim will wholly exhaust the estate, as between solicitor and client; in other cases, as between party and party: (Dan. 1245; Morg. & Dav. 135, 247-8.)

Where the heir-at-law is a necessary party, and the court has decided in his favour, although such decision is reversed on appeal, he is entitled to his costs of supporting the decision in the court below: (*Singleton v. Tomlinson*, L. Rep. 3 App. Cas. 420; 38 L. T. Rep. N. S. 653; 26 W. R. 722.)

Where the heir-at-law is made a party for the purpose of proving a will against him he is entitled to his costs: (Dan. 1245.)

The costs of the inquiry for heir-at-law have been given to him as between solicitor and client out of the real estate: (*Bland v. Daniell*, W. N. 1867, p. 169.)

10. NEXT OF KIN AND MEMBERS OF A CLASS.

Where next of kin, or persons claiming as a class under the will establish their title under an administration judgment, they are generally allowed their costs incurred in chambers, and generally of the proceedings, whether they are made parties, or whether the fund is administered, without formally bringing them before the court upon the record. If the residuary estate has ultimately to be divided amongst different classes of persons, the costs of all the claimants are paid out of the general estate before any apportionment is made, even though the effect is to diminish the fund of one class of claimants to an extent materially greater than the amount of costs due to that particular class: (Dan. Ch. Pr. 1291-2.)

The costs of ascertaining the members of a class entitled to a residue, or the next of kin, are part of the general costs of the action: (Morg. & Dav. 124.)

11. LEGATEE.

A legatee will be entitled to his costs out the estate, only when he is successful. If his action be dismissed, he will not be entitled to his costs out of the testator's estate, notwithstanding there is an ambiguity in the will, which renders it necessary to apply to the court for its construction; but if the case involves considerable difficulties, occasioned by conflicting decisions and the acts of the testator, the court orders the dismissal to be without costs; so also, where the plaintiff has a fair ground for making his claim against the estate of a deceased person: (Dan. Ch. Pr. 1289.)

If a contingent legacy fails during action, the legatee cannot have his costs: (Morg. & Dav. 112.)

The costs of inquiries for the legatee's benefit come out of the legacy: (*Id.*)

12. INCUMBERED SHARES.

Where a legacy or share is incumbered, the additional expense is thrown on the legacy or share, and only one set of costs allowed to the party

entitled and the incumbrancers: (Dan. 1295; Morg. & Dav. 125; Seton, 4th ed. 879.)

13. BANKRUPT LEGATEE.

One set of costs, only, is allowed between a bankrupt legatee and his trustee: (Dan. 1295.)

14. SETTLED SHARE.

One set of costs, only, is allowed between the trustee and his *cestui que trust*: (*Id.*)

15. HUSBAND AND WIFE.

One set of costs, only, is allowed between a husband and wife living apart, and improperly severing in their defence: (Dan. 1295.)

16. INQUIRIES AS TO PERSONS ENTITLED TO RESIDUE.

The costs are payable out of residue: (*Re Reeve's Trusts*, L. Rep. 4 Ch. Div. 841; 36 L. T. Rep. N. S. 906; 46 L. J. 412, Ch.; 25 W. R. 628.)

17. MORTGAGEE.

If a mortgagee sues as a creditor to administer, his costs are those of a plaintiff in an ordinary administration action, and if he institutes or adopts such proceedings, and the estate proves deficient, the costs of executors and all parties must be first paid out of the proceeds of sale of the mortgaged property: (Seton, 4th edit., 826.)

A mortgagee, whether a party or not, does not postpone his claim by consenting to a sale: (*Id.* 827.)

ADMINISTRATION ON SUMMONS.

(UNDER 15 & 16 VICT. c. 86.)

I. WHO MAY APPLY.

1. AS TO PERSONAL ESTATE.

2. AS TO REAL ESTATE ON TRUST FOR SALE.

II. JURISDICTION.

III. SUMMONS.

1. FORM.

2. PREPARATION.

3. INDORSEMENT.

4. SEALING.

5. COPY AT JUDGE'S CHAMBERS.

6. FILING DUPLICATE.

7. SERVICE.

(a) *Stamped Copies.*

(b) *Closed Times.*

(c) *How effected.*

IV. APPEARANCE.

V. ORDER.

1. WHAT ORDER MADE.

2. DISCRETION TO REFUSE.

3. SPECIAL DIRECTIONS.

4. EFFECT.

VI. ACCOUNTS, INQUIRIES, AND PROCEEDINGS AT CHAMBERS.

VII. FURTHER CONSIDERATION.

VIII. COSTS.

I. WHO MAY APPLY.

1. AS TO PERSONAL ESTATE.

Any person claiming to be a creditor, or a specific pecuniary or residuary

legatee, or the next of kin, or some or one of the next of kin, of a deceased person, may obtain as of course, without any preliminary proceedings, a summons requiring the executor or administrator, as the case may be, of such deceased person, to attend before him at chambers, for the purpose of showing cause why an order for the administration of the personal estate of the deceased should not be granted: (15 & 16 Vict. c. 86, s. 45.)

2. AS TO REAL ESTATE ON TRUST FOR SALE.

Any person claiming to be a creditor of any deceased person, or interested under his will [may in like manner], obtain an order for the administration of the real estate of a deceased person, where the whole of such real estate is by devise vested in trustees, who are by the will empowered to sell such real estate, and authorised to give receipts for the rents and profits thereof, and for the produce of the sale of such real estate: (15 & 16 Vict. c. 86, s. 47.)

Not only the person named in the Act, but those claiming the interest of such person, may apply: (*Turner v. Rennoldson*, L. Rep. 16 Eq. 37; 28 L. T. Rep. N. S. 330; 42 L. J. 510, Ch.; 21 W. R. 558.)

An administration suit against the Crown may be instituted by summons, making the solicitor to the Crown, administrator, defendant: (*Polini v. Gray*, W. N. 1874, p. 3; 22 W. R. 255.)

II. JURISDICTION.

The jurisdiction is exercisable only in simple cases: (*Morg. & Chute*, 193.)

When difficult questions are likely to arise the judge may decline to make an order, leaving the parties to their remedy by action: (*Ayek*, 551.)

III. SUMMONS.

1. FORM.

The summons may be in the form in schedule K, No. 2, to the Consolidated Orders, with such variations as the circumstances of the case may require: (C. O. 35, r. 2.)

2. PREPARATION.

The summons must be prepared by the parties: (C. O. 35, r. 5.)

3. INDORSEMENT.

Every solicitor of a party suing . . . by a solicitor [must] cause to be written or printed upon [the] summons his name or firm, and place of business, and also, if his place of business shall be more than three miles from the [Central Office] another proper place (to be called his address for service) . . . not . . . more than three miles from the said office, where . . . documents and written communications may be left for him. And where any such solicitor [is] only the agent of any other solicitor, he [must] add to his own name or firm and place of business, the name or firm and place of business of the principal solicitor: (C. O. 3, r. 2.)

Every party suing . . . in person [must] cause to be written or printed upon [the summons] his name and place of residence, and also (if his place of residence [is] more than three miles from the [Central Office]), another proper place (to be called his address for service), not more than three miles from the said office, where . . . documents . . . and written communications may be left for him: (C. O. 3, r. 5.)

4. SEALING.

A præcipe must be left when the copy summons is presented for sealing: (*Dan*, 1051.)

[The summons will be] sealed by one of the clerks, at the chambers of

the judge from whose chambers [it is] issued, with a seal provided for those chambers : (C. O. 35, r. 5.)

5. COPY AT JUDGE'S CHAMBERS.

A copy of the summons must be left at the judge's chambers by the party obtaining such summons : (C. O. 35, r. 5.)

As to altering after sealing, see CHAMBERS.

6. FILING DUPLICATE.

A duplicate or copy of the summons [must], previously to the service thereof, be filed in [the Central Office] : (15 & 16 Vict. c. 86, s. 46 ; J. A., 1879.)

If the summons is filed without the authority of a next friend an application to take it off the file or to stay proceedings must be by motion : (Dan. 1051.)

7. SERVICE.

(a) *Stamped Copies.*

The copies to be served upon any executor or administrator, and in all cases where service is required, must be stamped with a stamp of the office indicating the filing : (15 & 16 Vict. c. 86, s. 46 ; C. O. 35, r. 6.)

(b) *Time.*

The summons must be served seven clear days before the return thereof : (C. O. 35, r. 7.)

Where from any cause the summons may not have been served upon any party seven clear days before the return thereof, an indorsement may be made upon the summons, and upon a copy thereof stamped for service, appointing a new time for the parties not before served to attend at the chambers of the judge ; and such indorsements shall be sealed at the judge's chambers ; and the service of the copy so indorsed and sealed shall have the same force and effect as the service of an original summons ; and where any party has been served before such indorsement, the hearing thereof may, upon the return of the summons, be adjourned to the new time so appointed : (Co. O. 35, r. 8.)

(c) *How effected.*

By analogy to the old practice, service is effected in the same manner as in case of a writ : (Dan. 1054.)

Substituted service or service out of the jurisdiction may be ordered : (*Id.* Ayck. 552.)

A form of affidavit of service is given in schedule I. to the Chancery Regulations of August, 1857.)

IV. APPEARANCE.

The parties served [must], before they are heard in chambers, enter appearances in the [Central] Office, and give notice thereof : (C. O. 35, r. 9.)

The appearance is entered in the same manner as to a writ. [See APPEARANCE.]

V. ORDER.

1. WHAT ORDER MADE.

Upon proof by affidavit of the due service of [the] summons, or on the appearance in person or by his solicitor or counsel of [the] executor or administrator, and upon proof by affidavit of such other matters, if any, as [the] judge shall require . . . such judge [may], if in his discretion he thinks fit so to do . . . make the usual order for the administration of the estate of the deceased, with such variations, if any, as the circumstances of the case may require : (15 & 16 Vict. c. 86, s. 45.)

The usual administration order only will generally be made : (Morg. & Chut. 194; Ayck. 553.)

The judge cannot charge the defendant with wilful default, or upon an admission of assets : (*Id.*)

2. DISCRETION TO REFUSE.

The judge has full discretionary power to grant or refuse the order for administration : (15 & 16 Vict. c. 86, s. 45.)

3. SPECIAL DIRECTIONS.

The judge [has] full discretionary power. . . . to give any special directions touching the carriage or execution of the order, and in the case of applications for any such order by two or more different persons or classes of persons, to grant the same to such one or more of the claimants or of the classes of claimants as he may think fit ; and if the judge [thinks] proper, the carriage of the order may subsequently be given to such party interested, and upon such terms as the judge directs : (15 & 16 Vict. c. 86, s. 45.)

4. EFFECT.

The order has the force and effect of a decree to the like effect made on the hearing of a cause or claim between the same parties : (15 & 16 Vict. c. 86, s. 45.) [See ADMINISTRATION ACTION.]

Where under the order the same relief can be obtained as in an action for administration subsequently commenced, the latter proceedings will be stayed : (Dan. 1076.)

VI. ACCOUNTS, INQUIRIES, AND PROCEEDINGS IN CHAMBERS.

The accounts and inquiries are taken as in an administration action : (Ayck. 553.) [See ADMINISTRATION ACTION.]

If a dispute arises before the chief clerk's certificate is made, and argument by counsel is desired, the summons must be adjourned into court : (Ayck. 553.)

VII. FURTHER CONSIDERATION.

Where [the] cause . . . [has] at the original or any subsequent hearing thereof been adjourned for further consideration, such cause may, after the expiration of eight days, and within fourteen days from the filing of the certificate of the chief clerk . . . be brought on for further consideration by a summons to be taken out by the plaintiff or party having the conduct of the cause, and after the expiration of such fourteen days, by a summons to be taken out by any other party. And such summons is to be in the [ordinary form] (see CHAMBERS); and the object of the application may be stated as follows :—"That this cause, the further consideration whereof was adjourned by the order of the day of , 18 , may be further considered."

This summons is to be served six clear days before the return : (Ch. Reg. Ang. 1857, r. 18.)

A dispute arising on the chief clerk's certificate should be heard on the further consideration : (Ayck. 553.)

The further consideration may be adjourned into court : (*Id.* 554.)

VIII. COSTS.

An executor may be deprived of his costs for misconduct, without commencing an action : (*Re King*, 34 Beav. 574; 12 L. T. Rep. N. S. 818; 13 W. R. 1012.)

ADMINISTRATION UNDER SIR GEORGE TURNER'S ACT.

- I. POWER TO ORDER ACCOUNT ON APPLICATION OF EXECUTOR OR ADMINISTRATOR.
- II. WHEN ORDER MADE.
- III. HOW APPLICATION MADE.
- IV. EVIDENCE.
- V. ORDER.
- VI. PROCEEDINGS STAYED IF ADMINISTRATION ORDER MADE.
- VII. PROCEEDINGS IN CHAMBERS.
- VIII. CREDITOR'S APPEAL FROM DISALLOWANCE OF CLAIM.
- IX. PAYMENT OF CLAIMS AND PROVISION FOR LIABILITIES.
- X. PROVISION FOR CONTINGENT LIABILITIES.
- XI. STAYING OTHER PROCEEDINGS AGAINST EXECUTOR OR ADMINISTRATOR.
 1. AFTER ORDER—UNTIL ACCOUNT TAKEN,
 2. AFTER CERTIFICATE FILED—ABSOLUTELY.
- XII. EFFECT OF PROCEEDINGS.

I. POWER TO ORDER ACCOUNT ON APPLICATION OF EXECUTOR OR ADMINISTRATOR.

The court, upon the application of the executors or administrators of any deceased person [may order to be taken in chambers] an account of the debts and liabilities affecting the personal estate of such deceased person: (13 & 14 Vict. c. 35, s. 19.)

The Act does not apply to real estate: (*Re Moore*, 22 L. T. Rep. O. S. 211; 23 L. J. 153, Ch.; 2 W. R. 85.)

No order shall be made pending any proceedings to administer the estate: (13 & 14 Vict. c. 35, s. 19.)

II. WHEN ORDER MADE.

The order may be made immediately, or at any time after probate or letters of administration shall have been granted: (23 & 24 Vict. c. 38, s. 14.)

III. HOW APPLICATION MADE.

The application is to the court by motion or petition of course, or to a judge at chambers, by summons in the form used for originating proceedings in chambers: (23 & 24 Vict. c. 38, s. 14.)

When the application is by motion or petition no service is requisite, but the motion or petition must be mentioned to the court, who will judge of the sufficiency of the affidavits: (*Re Harrold*, 16 L. T. Rep. O. S. 503; 20 L. J. 168, Ch.)

The order cannot be obtained at the Order of Course Office: (*Re Hood*, 23 Beav. 17.)

The petition must be regularly set down: (*Re Dixon*, 6 L. T. Rep. N. S. 643.)

Every petition or motion paper for a reference, under the 13 & 14 Vict. c. 35, s. 19, shall be marked at or near the top or upper part thereof in the same manner as [a statement of claim] with the name of the court, division, and judge: (C. O. 6, r. 6.)

If the application is by summons, the summons will be prepared, issued, and filed in the same manner as other original summonses. [See CHAMBERS.]

It may be made returnable at any time after it is issued : (Dan. Ch. Pr. 1077.)

IV. EVIDENCE.

The application must be supported by production of the probate or letters of administration, and by an affidavit by one of the executors or administrators that no proceedings are pending to administer the estate : (Dan. Ch. Pr. 1078 ; Ayck. Ch. Pr. 547.)

V. ORDER.

(Form.)

Instead of the form of order given in the schedule to 13 & 14 Vict. c. 35, the form in Seton (4th edit. 846) is now used : (Dan. Ch. Pr. 1078.)

The order must be marked in the same manner as the petition or motion paper : (C. O. 6, r. 6 ; see *ante*, III.)

The order is drawn up by the Registrars, passed, and entered ; and a certified copy is left at chambers : (C. O. 35, r. 15 ; Dan. Ch. Pr. 1078.) [See ACCOUNT.]

After order made, the matter is considered as attached to the court of the judge whose name is thereon marked, and may be transferred : (C. O. 6, r. 6.) [See TRANSFER.]

VI. PROCEEDINGS STAYED IF ADMINISTRATION ORDER MADE.

In case at any time after the making of [the] order any decree or order for administering the estate of such deceased person [is] made, the court [may] by such decree or order stay or suspend the proceedings under such order of course on such terms and conditions, if any, as to the court shall seem just : (13 & 14 Vict. c. 35, s. 19.)

VII. PROCEEDINGS IN CHAMBERS.

1. *Summons to Proceed.*

A summons to proceed on the order is taken out (C. O. 35, r. 16) ; but is not served : (Dan. Ch. Pr. 1078.)

2. *Claims.*

Advertisements for creditors are issued, and the claims sent in are examined, proved, and adjudicated on as in an action for administration : (*Id.*, Ayck. 547.) [See ADMINISTRATION ACTION.]

The judge, in taking an account of debts and liabilities pursuant to any such order [may], on the application of the executors or administrators, direct that the particulars only of any claim or claims which may be brought in pursuant to any such order, shall be certified by his chief clerk without any adjudication thereon : (23 & 24 Vict. c. 38, s. 14.)

VIII. CREDITOR'S APPEAL FROM DISALLOWANCE OF CLAIM.

Any person who may have come in under any such order, and claimed to be a creditor upon the estate of the deceased person, or to have any demand upon such estate by reason of any liability, and whose debt or claim may not have been wholly allowed, [may] apply to have such claim allowed either wholly or partially ; and the executors or administrators, and any creditor of the deceased person who may be authorised by special leave of the court so to do, [may] apply to the said court to have any debt or claim allowed, disallowed by the court, either wholly or partially : (13 & 14 Vict. c. 35, s. 20.)

The application must be made by taking the opinion of the judge, within four clear days after the chief clerk's certificate has been signed,

or, after it has been filed by summons or motion to vary : (Dan. Ch. Pr. 1079.) [See APPEAL.]

The court or judge may either dismiss the application or may order the debt or claim to which it relates to be allowed or disallowed, as the case may be, and either wholly or partially, or may direct further inquiry or further proceedings touching such debt or claim, and after such inquiry or proceedings may, upon further application, deal with such debt or claim as seems just; but no new evidence shall be received upon the hearing of any such application, without special leave : (13 & 14 Vict. c. 35, s. 21.)

IX. PAYMENT OF CLAIMS AND PROVISION FOR LIABILITIES.

In case any debt or any certain liability [has] been allowed as aforesaid and [has] not within fourteen days after [the certificate has become binding] as to such debt or liability, or after the same [has] been allowed by the court [or judge] been paid or provided for by appropriation to the satisfaction of the person who has established such liability, the court [may], by order, to be made in case of any debt remaining due, upon the application by motion or petition of the person to whom the debt remains due, and on notice to the executors or administrators, and in case of any certain liability remaining unprovided for by appropriation, upon the application by motion or petition of the person by whom such liability has been established, or of the executors or administrators, and on notice by the party applying to the other of them, order payment of the debts which may have been allowed and remain unpaid, and provide for the certain liabilities which may have been allowed and remain unprovided for, in like manner as the same could or might have been paid or provided for in [an action], or [may direct an account] of the debts and certain liabilities allowed as aforesaid which remain unpaid or unprovided for, and also the usual accounts of the personal estate of the deceased person, with all usual and proper directions; and every such order [has] the same force and effect and [is] prosecuted and carried on in like manner as a [judgment] in a creditor's [action] : (13 & 14 Vict. c. 35, s. 22 ; Dan. Ch. Pr. 1080.)

X. PROVISION FOR CONTINGENT LIABILITIES.

In case any contingent liability shall be allowed by the [certificate] or by the court [or judge], the court [may] by order, to be made upon the application of the executors or administrators, by motion or petition, on notice to the person who may have established such contingent liability, order such sum of money, part of the estate of the deceased person, as to the court shall seem just, to be set apart and appropriated for answering such contingent liability, and give such directions as the said court shall think fit touching the payment of such sum of money into court, and the investment thereof, and the payment, application, or accumulation of the interest or dividends thereof in the meantime and until the same shall be required to answer such liability, and when such liability shall be ascertained or determined give such directions as to the payment of such sums out of court as the court shall deem right ; [but] no order to be made as aforesaid in any manner binds the assets so appropriated as against the persons entitled to the estate of the deceased subject to the contingent liability ; and any person interested in such appropriated assets may apply to the court touching the same as he may be advised : (13 & 14 Vict. c. 35, s. 23.)

When the personal estate is exhausted, the court will not set aside

proceeds of real estate, charged by the testator with his debts and liabilities, to meet contingent liabilities : (Ayck. 549.)

XI. STAYING OTHER PROCEEDINGS AGAINST EXECUTOR OR ADMINISTRATOR.

1. AFTER ORDER—UNTIL ACCOUNT TAKEN.

After the order directing the account has been made, any proceedings against such executors or administrators, by any person having or claiming to have any demand upon the estate of the deceased, by reason of any debt or liability due from the estate of the deceased, may be stayed until the account has been taken : (23 & 24 Vict. c. 38, s. 14; J. A., 1873, s. 24, sub-s. 5.) [See STAYING PROCEEDINGS.]

2. AFTER CERTIFICATE FILED—ABSOLUTELY.

After the filing of [the certificate], upon the application of the executors or administrators of the deceased, any proceedings against them by any person having or claiming to have any demand upon the estate of the deceased by reason of any debt or liability, other than the persons who may have established contingent liabilities under the order, for which no appropriation [has] been made, may be stayed : (13 & 14 Vict. c. 35, s. 24; J. A., 1873, s. 24, sub-s. 5.) [See STAYING PROCEEDINGS.]

XII. EFFECT OF PROCEEDINGS.

In case no debt or liability, or no debt or liability other than a contingent liability, [has] been allowed, or in case any debt or liability other than as aforesaid [has] been allowed, then after the same [has] been paid or provided for by appropriation, all payments made by the executors or administrators, or any of them, on account of the estate of the deceased person, and all dispositions of such assets made by them or any of them on account or such estate [are] as against all persons having or claiming to have any demand upon such estate by reason of any debt or liability, other than persons who may have established under the said order any contingent liability for which no such appropriation may have been made, as good and effectual as if the same had been made under [an administration judgment, but not so as] in any manner to affect or prejudice the rights of any creditor or other person having any demand or claim upon the estate of the deceased against any assets so paid or disposed of, or against the persons to whom such payment or disposition may have been made, or against any assets appropriated, and the appropriation of which, if made under a [judgment or order] in a suit to which he was not a party, would not have been binding upon him : (13 & 14 Vict. c. 35, s. 25.)

After notices for creditors have been published the executor or administrator shall, at the expiration of the time named in the notices or the last of the notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof, as the case may be; but not so as to prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively : (23 & 24 Vict. c. 38, s. 14; 22 & 23 Vict. c. 35, s. 29.)

The executor or administrator obtains the same protection as if he

had administered under a judgment in an administration action: (*Clegg v. Rowland*, L. Rep. 3 Eq. 368; 15 L. T. Rep. N. S. 385; 36 L. J. 137, Ch.; 15 W. R. 251; *Hunter v. Young*, L. Rep. 4 Ex. Div. 256; 41 L. T. Rep. N. S. 142; 27 W. R. 637.)

ADMINISTRATOR.

[See ADMINISTRATION ACTION; PARTIES; TRUSTEES.]

ADMISSIONS.

I. IN PLEADING.

II. OF DOCUMENTS.

I. IN PLEADING. [See PLEADING.]

II. OF DOCUMENTS.

Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the action may be, unless at the hearing or trial the court certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense: (O. XXXII., r. 2.)

The notice is necessary even where the document is not in the possession or under the control of the party giving notice: (*Rutter v. Chapman*, 8 M. & W. 388.)

A notice to admit documents may be in the Form No. 12 in Appendix B. [to the rules of 1875]: (O. XXXII., r. 3.)

An affidavit of the solicitor or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents, and annexed to the affidavit, shall be sufficient evidence of such admissions: (O. XXXII.)

The mere fact that documents are admitted in admissions signed by the solicitor will not make them evidence unless put in at the trial, and every document put in must be marked by the registrar: (*Watson v. Rodwell*, L. Rep. 11 Ch. Div. 150; 48 L. J. 209, Ch.)

AMENDMENT.

Non-compliance with any of [the] rules shall not render the proceedings in any action void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit: (O. LIX., r. 1.)

The court or a judge may at any time and on such terms as to costs or otherwise as to the court or judge may seem just, amend any defect or error in any proceedings; and all such amendments may be made as may be necessary for the purpose of determining the real question or issue

raised by or depending on the proceedings: (O. LIX., r. 2, April, 1880.
[See APPEAL; PARTIES; PLEADING; WRIT OF SUMMONS.]

ANSWER.

[See DISCOVERY.]

APPEAL.

- I. FROM CHIEF CLERK TO JUDGE.
 1. BEFORE CERTIFICATE MADE.
 2. AFTER CERTIFICATE MADE, AND BEFORE SIGNATURE BY JUDGE.
 - (a) *Judge's Opinion taken on Summons.*
 - (b) *Time.*
 - (1) Ordinary Certificate.
 - (2) Certificate to be acted on by Paymaster-General.
 - (3) Certificate on passing Receiver's Accounts.
 - (4) Certificate of Computation of Interest, or Appointment of Fund.
 - (c) *Hearing.*
 3. AFTER CERTIFICATE SIGNED BY JUDGE.
 - (a) *How Application made.*
 - (b) *Time.*
 - (1) Ordinary Certificate.
 - (2) Certificate to be acted on by Paymaster-General.
 - (3) Certificate on Passing Receiver's Accounts.
 - (4) General Rules.
 - (c) *Hearing.*
 - (d) *Evidence.*
 4. AFTER CERTIFICATE HAS BECOME BINDING.
 5. IN CASE OF ORDERS.
- II. FROM DISTRICT REGISTRAR.
- III. FROM REFEREE.
 1. REFERENCE FOR REPORT.
 2. REFERENCE FOR TRIAL.
- IV. FROM TAXING OFFICER TO JUDGE.
 1. IN WHAT CASES.
 2. HOW BROUGHT.
 3. EVIDENCE.
 4. EFFECT OF ORDER—REFUSAL.
- V. FROM JUDGE AT CHAMBERS TO JUDGE IN COURT.
 1. HOW BROUGHT.
 2. TIME.
 - (a) *In Ordinary Cases.*
 - (b) *In Company Cases.*
- VI. FROM CHANCERY DIVISION TO THE COURT OF APPEAL.
 1. CONSTITUTION AND JURISDICTION OF COURT OF APPEAL.
 - (1) *Generally*
 - (2) *Appealable Judgments and Orders.*
 - (3) *Non-appealable Judgments and Orders.*
 - (1) Judgments of Divisional Courts of Appeal.
 - (2) Criminal Matters.
 - (3) Decisions given or joined in by Member of the Appeal Court.
 - (4) Consent Orders
 - (5) Orders as to Costs.
 - (6) Discretionary Orders.
 - (7) Direct from Judge in Chambers

- (8) Interpleader.
- (9) Judgment in Absence below.
- (10) Decisions formerly final.
- 2. INCIDENTAL POWERS.
- 3. INCIDENTAL DIRECTIONS.
- 4. HOW APPEAL BROUGHT.
 - (a) *From Refusal of Ex parte Application.*
 - (b) *In other Cases.*
 - (1) Notice of Appeal.
 - (2) Amendment of Notice.
 - (3) Service.
- 5. TIME FOR APPEALING.
 - (a) *From Interlocutory Order.*
 - (b) *From Winding-up, Bankruptcy, or other Matter not an Action.*
 - (c) *From Final Orders and Judgments.*
 - (d) *How calculated.*
 - (e) *Special Leave enlarging Time.*
- 6. SETTING DOWN APPEAL.
- 7. ABANDONED APPEAL.
- 8. CROSS APPEAL.
 - (a) *Notice by Respondent.*
 - (b) *Effect of Respondent's Omission to give Notice.*
- 9. HEARING.
- 10. EVIDENCE.
 - (a) *How brought before Court.*
 - (b) *Printing.*
 - (c) *Further Evidence.*
 - (1) How taken.
 - (2) Where special leave required.
- 11. JUDGMENT ON APPEAL.
- 12. REHEARING.
- 13. EXECUTION.
- 14. STAYING PROCEEDINGS.
- 15. INCIDENTAL APPLICATIONS.
- 16. COSTS.
 - (a) *Effect of Non-payment Below.*
 - (b) *Shorthand Notes [see post, c.]*
 - (c) *Of Appeal.*
 - (d) *Deposit or Security for Costs.*
 - (1) When ordered.
 - (2) Demand for.
 - (3) Application for.
 - (4) How Security given.
 - (5) Default.
 - (6) Increasing Deposit.

VII. FROM THE COURT OF APPEAL TO THE HOUSE OF LORDS.

- 1. WHERE APPEAL LIES.
- 2. PARTIES.
 - (a) *Who may appeal.*
 - (b) *Paupers.*
 - (c) *Declining to join as Appellants.*
 - (d) *Non-joinder.*
 - (e) *Change of Parties.*
- 3. TIME FOR APPEALING.
- 4. LAW OFFICER'S FIAT.
- 5. NOTICE OF INTENTION TO APPEAL.
- 6. PETITION OF APPEAL.
 - (a) *To be Method of Appealing.*
 - (b) *Form.*

- (c) *Printing.*
- (d) *Counsel's Signature.*
- (e) *Certificate of Serving Notice.*
- (f) *Lodgment.*
- (g) *Presentation.*
- (h) *Amendment.*
- 7. ORDER FOR SERVICE.
 - (a) *When Granted.*
 - (b) *How Served.*
- 8. SECURITY FOR COSTS.
 - (a) *Recognisance for 500l.*
 - (b) *Bond for, or payment of, 200l.*
 - (c) *Certificate of Sufficiency of Substitute and Sureties.*
 - (d) *Objecting to Substitute.*
 - (e) *Execution and Return of Bond and Recognisance.*
- 9. APPEARANCE.
- 10. APPENDIX OF DOCUMENTS.
 - (a) *Preparation of Appellant's Appendix.*
 - (b) *Delivery of Printed Copies.*
 - (c) *Preparation of Respondent's Appendix.*
- 11. PRINTED CASES.
 - (a) *How printed.*
 - (b) *To be signed by Counsel.*
 - (c) *Joint Case.*
 - (d) *Lodgment.*
 - (1) *Number of Copies.*
 - (2) *Time.*
 - (3) *Default.*
 - (4) *Bound Copies.*
 - (e) *Extending Time for Lodgment.*
 - (f) *Amendment.*
 - (g) *Supplemental Cases.*
- 12. ADDITIONAL CASES.
- 13. PRELIMINARY OBJECTIONS.
- 14. SETTING DOWN.
- 15. HEARING.
- 16. EVIDENCE.
- 17. REHEARING.
- 18. JUDGMENT.
 - (a) *Delivery.*
 - (b) *Application as to Costs*
 - (c) *Draft Judgment.*
 - (d) *Fair Copy.*
 - (e) *Entry in Journal.*
 - (f) *Printed Copies.*
 - (g) *Finality.*
 - (h) *Amendment after Entry.*
 - (i) *Making Judgment an order of the High Court.*
- 19. REMITTING CAUSE.
- 20. STAYING PROCEEDINGS BELOW.
- 21. CROSS APPEALS.
- 22. CONSOLIDATION.
- 23. APPEAL COMMITTEE.
- 24. INCIDENTAL APPLICATIONS.
- 25. COSTS.
 - (a) *Of Cause.*
 - (b) *On Dismissal for Non Pros.*
 - (c) *On Non-appearance of Respondent.*
 - (d) *When Cause Remitted.*
 - (e) *Ultimate Costs of Appendices.*

(f) *Taxation.*

(1) On Application of Party.

(2) When Cause Remitted.

(3) On Requisition of Master of Rolls, &c.

26. APPLICATION OF 200*l.* DEPOSIT.(a) *When Appeal affirmed.*(b) *When Appeal reversed.*(c) *When Appeal dismissed for Non Pros.*

27. PAYMENT OF COSTS OUT OF RECOGNISANCE OR BOND.

I. FROM CHIEF CLERK TO JUDGE.

1. BEFORE CERTIFICATE MADE.

It is the right of every person to have his case heard before the judge in person, and the invariable practice to give any party engaged in proceedings in chambers the opportunity of such a hearing directly: (*Morg. & Chute*, 121; *Dan.* 1045.)

A witness may demand to have his examination conducted before the judge in person: (*Re London and County Assurance Company*, 5 W. R. 794.)

The matter is brought from the chief clerk to the judge by simple adjournment: (*Id.*)

2. AFTER CERTIFICATE MADE AND BEFORE SIGNATURE BY JUDGE.

(a) *Judge's Opinion taken on Summons.*

Any party may, after the proceedings before the chief clerk have been concluded, and before the certificate or report has been signed and adopted, take the opinion of the judge upon the result of the whole proceeding when it is brought by the chief clerk to a conclusion: (15 & 16 Vict. c. 80, s. 33.)

The application is by summons: (C. O. 35, rr. 50, 53; *Morg. & Chute*, 129.)

(b) *Time.*

(1) Ordinary Certificate.

The time within which any party is to be at liberty to take the opinion of the judge upon any proceeding which has been concluded, but as to which the certificate of the chief clerk has not been signed and adopted by the judge, is four clear days after the certificate has been signed by the chief clerk: (C. O. 35, r. 49.) Sundays and other days on which the offices are closed, except Monday and Tuesday in Easter week, are not reckoned in the clear days: (C. O. 37, r. 11.)

(2) Certificate to be Acted on by Paymaster-General.

Any party desiring to take the opinion of the judge [on any certificate to be acted upon by the Paymaster-General without further order], must obtain a summons for that purpose before twelve o'clock on [the day after the certificate has been signed by the chief clerk]: (C. O. 35, r. 53.)

(3) Certificate on Passing Receiver's Accounts.

The summons must be issued immediately after the chief clerk has signed the certificate: (*Dan.* 1220.)

(4) Certificate of Computation of Interest or Apportionment of Fund.

When directed to be acted on without the judge's signature, the summons should be issued immediately after the chief clerk's certificate: (*Id.*, see C. O. 35, r. 45.)

(c) *Hearing.*

The summons is heard by the judge in person, generally in chambers: (*Dan.* 1220.)

It may be adjourned into court:

It may be treated as an application to vary, and brought on for argument at the hearing on further consideration: (*Id.*)
 No formal order is drawn up: (*Id.*)

3. AFTER CERTIFICATE SIGNED BY JUDGE.

(a) *How Application made.*

[The application is] either at chambers or in open court, according to the nature of the case, and by summons or motion: (15 & 16 Vict. c. 80, s. 34.)

It is usually by summons: (Dan. 1224.)

(b) *Time.*

(1) Ordinary Certificate.

The time within which an application may be made, by summons or motion [is] eight clear days after the filing of [the] certificate: (C. O. 35, r. 52.)

Days on which the offices are closed are reckoned in computing the time: (C. O. 37, r. 11.)

But if the time expires on a close day, the application may be made on the next open day: (*Id.*, r. 12.)

(2) Certificate to be Acted on by Paymaster-General.

The time for applying to discharge or vary [any] certificate [to be acted upon by the Paymaster-General without any further order] when signed and adopted by the judge [is] two clear days after the filing thereof: (C. O. 35, r. 53.)

Sundays and other close days, except Monday and Tuesday in Easter week, are not reckoned in the computation of time: (C. O. 37, r. 11.)

(3) Certificate on Passing Receiver's Accounts.

The application should be made as soon as the judge has signed the certificate: (Dan. 1223.)

(4) General Rule.

It is sufficient if the summons is obtained within, though not returnable till after, the time: (Morg. & Chute, 130; Dan. 1223.)

(c) *Hearing.*

If the application is by summons, and to be argued by counsel, it is generally adjourned till, and is heard with, the cause on further consideration: (Dan. 1224.)

If by motion, and the further consideration of the cause is about to come on, it should be made on the hearing on further consideration, unless there is a special reason to the contrary: (*Id.*)

A review of the certificate may be directed: (Dan. 1226.)

Where an application to take the judge's opinion (see *sup.* 2) has been disposed of, the same question cannot be argued again, but an order to the same effect will at once be made to enable the parties to appeal: (Dan. 1225.)

(d) *Evidence.*

Affidavits not used before the chief clerk cannot be used on application to vary his certificate: (Morg. & Chute, 130.)

4. AFTER CERTIFICATE HAS BECOME BINDING.

When any certificate or report of the chief clerk has been signed or adopted by the judge [it is] filed and [is] thenceforth binding on all the parties to the proceedings unless discharged or varied: (15 & 16 Vict. c. 80, s. 34.)

If no application to discharge or vary has been made within the time, the certificate will not be opened except by special leave of the court, and

then only in a strong case, generally of fraud, surprise, or mistake : (Dan. 1223.)

5. IN CASE OF ORDERS.

Prior to the order being made, each party may demand a hearing before the judge in person : (see *sup.* 1.)

If an order has been made by the chief clerk, without any objection being raised by the parties, as he is merely the deputy of the judge, it is an order of the judge himself, and an appeal from it to the judge in court must be made within the same time as an appeal from an order made by the judge himself in chambers : (see *post*, V.)

II. FROM DISTRICT REGISTRAR.

Any person affected by any order or decision of a district registrar may appeal to a judge. Such appeal may be made, notwithstanding that the order or decision was in respect of a proceeding or matter as to which the district registrar had jurisdiction only by consent : (O. XXXV., r. 7.) Every . . . appeal to a judge from a district registrar in any action in the Chancery Division shall be to the judge to whom the action is assigned : (*Id.*, r. 10.)

Such appeal shall be by summons within four days after the decision complained of, or such further time as may be allowed by a judge or the registrar : (O. XXXV., r. 7.)

The summons must be made returnable within four days (*Bell v. North Staffordshire Railway Company*, L. Rep. 4 Q. B. Div. 205); but the court may enlarge the time, even after the lapse of the four days : (*Burke v. Rooney*, L. Rep. 4 C. P. Div. 226; *Gibbons v. London Financial Association*, L. Rep. 4 C. P. Div. 263.)

An appeal from a district registrar shall be no stay of proceedings unless so ordered by a judge or the registrar : (O. XXXV., r. 8.)

III. FROM REFEREE.

1. REFERENCE FOR REPORT.

In the case of a reference for inquiry or report under the Judicature Act, 1873, s. 56, the report . . . may be adopted wholly or partially by the court : (J. A., 1873, s. 56.)

And the court may differ from the referee as to any finding which is an inference from the facts that the referee has reported (*per* Brett, L.J., *Longman v. East*; *Pontifex v. Severn*; *Mellin v. Monico*, L. Rep. 3 C. P. Div. 155; 38 L. T. Rep. N. S. 8; 47 L. J. 211, C. P.; 26 W. R. 183.)

The court shall have power to require any explanation or reason from the referee, and to remit the . . . matter, or any part thereof, for . . . further consideration to the same or any other referee : (O. XXXVI., r. 34, March, 1879.)

The application for the opinion of the court on the report is by summons as in the case of a chief clerk's certificate : (*Wood v. Barnicott*, W. N. 1878, p. 36, *sup.* 1. 1a.)

The court may decide the question referred to any referee on the evidence taken before him either with or without additional evidence as the court may direct : (O. XXXVI., r. 34.)

2. REFERENCE FOR TRIAL.

In case of a reference for trial, under the Judicature Act, 1873, s. 57, whether with or without consent, the appeal is of the same nature as the appeal from the finding of a jury, or of a judge without a jury : (*per* Brett, L.J., *Longman v. East, &c.*, *sup.*)

The court has power to set aside the report of any referee on any question of fact on any trial before him : (J. A., 1873, s. 58.)

The court [has also] power to . . . remit the cause or matter, or any part thereof, for re-trial . . . to the same or any other referee: (O. XXXVI., r. 34, March, 1879.)

The application should be by motion, and may be made by any party affected: (*Wood v. Barnicott*, W. N., 1878, p. 25.)

The court may decide the question referred to any referee on the evidence taken before him, either with or without additional evidence as the court may direct: (O. XXXVI., r. 34, March, 1879.)

IV. FROM TAXING OFFICER TO JUDGE.

1. IN WHAT CASES.

Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to [in writing before the taxing officer] may apply to a judge at chambers for an order to review the taxation as to the same item or part of an item, and the judge may thereupon make such order as to the judge may seem just; but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid: (Add. rr. Aug. 1875, Sp. All. r. 32.) [See Costs.]

It is the practice not to interfere where the matter complained of is in the taxing officer's discretion, and he has exercised it, unless some serious mistake has been made: (*Turnbull v. Janson*, L. Rep. 3 C. P. Div. 264; 47 L. J. 384, C. P.)

The court will not interfere with the taxation of counsel's fees by such officer, unless there is ground for thinking that he has not exercised a reasonable and fair discretion: (*Hargreaves v. Scott*, L. Rep. 4 C. P. Div. 21; 40 L. T. Rep. N. S. 35; 27 W. R. 323.)

Generally a judge will review the taxation only when it involves some principle, not where the question is one of mere *quantum*: (Ayck. 430; *Morg. & Chute*, 641.)

Allowances by the taxing officer in respect of fees to conveyancing counsel or other scientific persons whose assistance is obtained by the court are subject to appeal to the judge, whose decision is final: (15 & 16 Vict. c. 80, s. 43.)

2. HOW BROUGHT.

The application is by summons: (O. LIV., r. 1.)

3. EVIDENCE.

Such application shall be heard and determined by the judge upon the evidence which shall have been brought in before the taxing officer, and no further evidence shall be received upon the hearing thereof, unless the judge shall otherwise direct: (Add. rr., Aug., 1875, Sp. All. r. 33.)

4. EFFECT OF ORDER—REFUSAL.

An appeal lies from the judge to the Court of Appeal: (Ayck. 430; see *post*, VI.)

V. FROM JUDGE AT CHAMBERS TO JUDGE IN COURT.

1. HOW BROUGHT.

An application to a judge in court to discharge an order made by him at chambers is made by motion: (*Dickson v. Harrison*, L. Rep. 9 Ch. Div. 243; 38 L. T. Rep. N. S. 95; 47 L. J. 761, Ch.; 26 W. R. 730.)

2. TIME.

(a) In Ordinary Cases.

The appeal must in ordinary cases be brought within twenty-one days: (*Dickson v. Harrison*, *sup.*)

(b) *In Company Cases.*

The appeal in cases under the 12th section of the Companies Act, 1862, must be brought within three weeks: (*Dickson's case*, L. Rep. 12 Ch. Div. 298; 41 L. T. Rep. N. S. 184.)

VI. FROM THE CHANCERY DIVISION TO THE COURT OF APPEAL.

1. CONSTITUTION AND JURISDICTION OF COURT OF APPEAL.

(a) *Generally.*

[One of the permanent divisions of the Supreme Court] under the name of "Her Majesty's Court of Appeal," shall have and exercise appellate jurisdiction, with such original jurisdiction as. . . mentioned [in the Judicature Act, 1873] as may be incident to the determination of any appeal; (J. A. 1873, s. 4.)

The Court of Appeal shall be a Superior Court of Record, and there shall be transferred to and vested in such court all jurisdiction and powers of the courts following; (that is to say,)

- (1.) All jurisdiction and powers of the Lord Chancellor and of the Court of Appeal in Chancery [including the Lord Chancellor as a Judge of Rehearing or Appeal: (J. A. 1873, s. 100.)] in the exercise of his and its appellate jurisdiction, and of the same court as a Court of Appeal in Bankruptcy;
- (2.) All jurisdiction and powers of the Court of Appeal in Chancery of the county palatine of Lancaster, and all jurisdiction and powers of the Chancellor of the duchy and county palatine of Lancaster when sitting alone or apart from the Lords Justices of Appeal in Chancery as a judge of rehearing or appeal from the decrees or orders of the Court of Chancery of the county palatine of Lancaster;
- (3.) All jurisdiction and powers of the Court of the Lord Warden of the Stannaries, assisted by his assessors, including all jurisdiction and powers of the said Lord Warden when sitting in his capacity of judge;
- (4.) All jurisdiction and powers of the Court of Exchequer Chamber;
- (5.) All jurisdiction vested in or capable of being exercised by Her Majesty in Council, or the Judicial Committee of Her Majesty's Privy Council, upon appeal from any judgment or order of the High Court of Admiralty, or from any order in lunacy made by the Lord Chancellor, or any other person having jurisdiction in lunacy: (J. A., 1873, s. 18.)

(b) *Appealable Judgments and Orders.*

The . . . Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as. . . [in the Judicature Act, 1873] mentioned, of Her Majesty's High Court of Justice, or of any judges or judge thereof, subject to the provisions of [the Act, and the] Rules and Orders of Court for regulating the terms and conditions on which such appeals shall be allowed: (J. A., 1873, s. 19.)

An appeal lies from the judgment of the High Court on a special case stated by an umpire under the L. C. C. A. 1845: (*Bidder v. The North Staffordshire Railway Company*, L. Rep. 4 Q. B. Div. 412; 40 L. T. Rep. N. S. 801; 48 L. J. 248, Q. B.; 27 W. R. 540).

An appeal lies from a judgment of a divisional court refusing to order a County Court judge to settle and sign a case for the opinion of a Superior Court: (*Clarke v. Roche*, 36 L. T. Rep. N. S. 727.)

Where an action is tried before a judge without a jury, and the judge decides upon questions of fact, and thereupon gives judgment, the proper

mode of reviewing his decision, either in law or fact, is by appeal, and not by motion for a new trial: (*Potter v. Cotton*, L. Rep. 5 Ex. Div. 137; 41 L. T. Rep. N. S. 460; 28 W. R. 160; 49 L. J. 158, Ex.)

(c) *Non-appealable Judgments and Orders.*

(1) *Judgments of Divisional Courts of Appeal.*

The determination of all appeals from a County Court, or from any other inferior court which may be heard and determined by divisional courts of the said High Court of Justice, shall be final unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court by which any such appeal from an inferior court shall have been heard: (J. A., 1873, s. 45; see PART II.)

(2) *Criminal Matters.*

The determination of any question of law arising in criminal trials, ... by the judges of the High Court [under 11 & 12 Vict. c. 78, or any amending Act] shall be final, and without appeal; and no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said judges under the said Act of the eleventh and twelfth years of Her Majesty's reign: (J. A., 1873, s. 47; see PART II.)

(3) *Decision given or joined in by Member of the Appeal Court.*

No judge of the said Court of Appeal shall sit as a judge on the hearing of an appeal from any judgment or order made by himself, or made by any divisional court of the High Court of which he was and is a member: (J. A. 1875, s. 4.)

(4) *Consent Orders.*

No order made by the High Court of Justice or any judge thereof, by the consent of parties, ... shall be subject to any appeal, except by leave of the court or judge making the order: (J. A., 1873, s. 49.)

An undertaking by counsel not to appeal against an order, if not inserted therein, does not bar the client's right to appeal: (*Re Hull and County Bank*, L. Rep. 13 Ch. Div. 261; 41 L. T. Rep. N. S. 537; 28 W. R. 125.)

There is no appeal from an order of a judge made on the trial by consent of an interpleader matter: (*Edd v. Winsor*, W. N. 1878, p. 88.)

When a judge at chambers directed an interpleader issue to be tried in Glamorganshire, and by consent it was heard and disposed of by a judge at chambers, it was held that there was no jurisdiction to hear the appeal (*Buse v. Rosser*, 28 W. R. 87.)

(5) *Order as to Costs.*

No order made by the High Court of Justice or any judge thereof as to costs only, which by law are left to the discretion of the court, ... shall be subject to any appeal, except by leave of the court or judge making the order: (J. A., 1873, s. 49.)

An appeal cannot generally be brought for costs alone: (*Taylor v. Dowlen*, L. Rep. 4 Ch. App. 697; *Re Hoskin's Trust*, L. Rep. 6 Ch. Div. 281; 46 L. J. 817, Ch.; 25 W. R. 779.) The case of a trustee deprived of costs for impropriety of conduct is no exception to the rule: (*Id.*)

But where a question of law and principle is involved, an appeal lies, though only as to costs: (*Re Rio Grande De Sul Steamship Company*, L. Rep. 5 Ch. Div. 284.)

An order is not less an order as to costs alone, because it directs how the costs are to be paid, whether out of a fund, by an individual, by a corporation, or in any other manner: (*Re Chennell*, L. Rep. 8 Ch. Div. 492; 38 L. T. Rep. N. S. 494; 47 L. J. 583, Ch.; 26 W. R. 595.)

Charges and expenses of trustees are not costs at all, or not costs in the discretion of the court: (*Id.*)

When the costs are not in the discretion of the court, an order made as to them may be appealed: (*Witt v. Corcoran*, L. Rep. 2 Ch. Div. 69; 45 L. J. 603, Ch.; and see *Marcus v. General Steam Navigation Company*, W. N. 1876, p. 157; *Ashworth v. Outram*, L. Rep. 5 Ch. Div. 943.)

When a judge of the Chancery Division dismisses an action without costs, the Court of Appeal cannot vary the order by dismissing the action with costs: (*Harris v. Aaron*, L. Rep. 4 Ch. Div. 749; 46 L. J. 488, Ch.)

When the appeal is on a matter wholly collateral, and the rest merely for costs, the Court of Appeal has no power to vary the order as to costs: (*Graham v. Campbell*, L. Rep. 7 Ch. Div. 490; 38 L. T. Rep. N. S. 195; 47 L. J. 593, Ch.)

The court will not open a decision which it otherwise affirms for the mere purpose of making a different order as to costs: (*Re New Gas Company*, 25 W. R. 643.)

(6) Discretionary Orders.

The court will not as a rule, on a question which depends on the discretion of a judge below, interfere with such discretion: (*Golding v. Wharton Saltworks Company*, L. Rep. 1 Q. B. Div. 374.)

But when the judge below has given his reasons, and they are either based on facts which turn out to be incorrect, or are manifestly insufficient, the Court of Appeal will interfere: (*Sturla v. Frecchia*, W. N. 1877, p. 188.)

The following matters are discretionary:

Primâ facie the words "it shall be lawful" import a discretion (*Reg. v. Bishop of Oxford*, L. Rep. 4 Q. B. Div. 553; 41 L. T. Rep. N. S. 122; 48 L. J. 609, Q. B.; W. N. 1880, p. 61);

Striking out pleadings as embarrassing (*Golding v. Wharton Saltworks Company* (*sup.*)); but an appeal has been allowed (*Davey v. Garrett*, L. Rep. 7 Ch. Div. 473; 38 L. T. Rep. N. S. 77; 47 L. J. 218, Ch.; 26 W. R. 110);

Ordering points of law to be decided before statement of claim, under Order XXXIV., r. 2 (*Metropolitan Board of Works v. New River Company*, L. Rep. 2 Q. B. Div. 67);

Amount of security for costs to be given (*Sturla v. Frecchia*, *sup.*);

Committal for contempt (*Ashworth v. Outram*, L. Rep. 5 Ch. Div. 943);

Leave to amend (*Byrd v. Nunn*, L. Rep. 7 Ch. Div. 284; 38 L. T. Rep. N. S. 585; 47 L. J. 1, Ch.; 26 W. R. 101); though an appeal has been allowed (*Tildesley v. Harper*, L. Rep. 10 Ch. Div. 393; 39 L. T. Rep. 552);

Excluding counter-claim. An appeal will only be allowed in a very strong case (*Huggons v. Tweed*, L. Rep. 10 Ch. Div. 359);

Manner in which action shall be tried. An appeal will only be allowed in a very strong case (*Ruston v. Tobin*, L. Rep. 10 Ch. Div. 558; 40 L. T. Rep. N. S. 111);

Order for persons to be summoned for examination to give information concerning the trade dealings, estate, or effects of a company; unless in an extreme case (*Re Gold Company*, L. Rep. 12 Ch. Div. 77);

A person so summoned to be examined has no *locus standi* to appeal against the order directing him to attend for examination (*Id.*).

(7) Direct from Judge in Chambers.

No appeal shall lie from any order [made by a judge of the High Court

in chambers] to set aside or discharge which no motion, [on notice, to the judge himself sitting in court] has been made, unless by special leave of the judge by whom such order was made, or of the Court of Appeal: (J. A., 1873, s. 49.)

Leave is given by certificate of the judge below that he does not wish to hear further argument: (*Re Marsh*, W. N. 1877, p. 205.)

Where an appeal from chambers only lies to the judge who made the order there, and the case has been fully argued before him there, there is a direct appeal to the Court of Appeal, without leave: (*per Hall*, V.C., *Murr v. Cooke*, W. N. 1876, p. 193; 24 W. R. 756.)

There is nothing to prevent the Court of Appeal from hearing an appeal from an order made by a judge of the Chancery Division in chambers upon any terms it may think fit: (*Re Elsom*, L. Rep. 6 Ch. Div. 346.)

It may dispense with such judge's certificate, if the appellant satisfies the Court of Appeal

1. That the judge did not wish to hear further argument; or,
2. That the judge declines to give a certificate: (*Id.*)

In the latter case application must be made to the Court of Appeal to set down the appeal without certificate: (*Id.*)

When the appeal had been set down it was heard without the certificate of the judge below as to no further argument being desired: (*Re Marsh*, W. N. 1877, p. 205.)

A direct appeal from chambers has been allowed where amendments have been made entailing expense, and security for costs has been refused: (*Northampton Coal Company v. Midland Waggon Company*, L. Rep. 7 Ch. Div. 500; 38 L. T. Rep. N. S. 82; 26 W. R. 458.)

(8) Interpleader.

In interpleader no appeal will lie to the Court of Appeal, either from a decision of the Court, or from a judge in chambers, who has dealt with the case summarily: (O. I., r. 2; *Dodds v. Shepherd*, L. Rep. 1 Ex. Div. 75; 45 L. J. Ex. 437; *Buse v. Roper*, 41 L. T. Rep. N. S. 457.)

But an appeal does lie from a judgment on an interpleader issue: (*Witt v. Parker*, 36 L. T. Rep. N. S. 538; 46 L. J. 450, Q. B.; 25 W. R. 518.)

(9) Judgment in Absence Below.

If a party appealing from the decision of a judge at chambers does not appear in the High Court to support the motion, and judgment is thereupon pronounced against him in his absence, he cannot afterwards appeal to the Court of Appeal against the judgment of the High Court; the Court of Appeal has no jurisdiction to afford him relief: (*Walker v. Budden*, L. Rep. 5 Q. B. Div. 267.)

(10) Decisions formerly Final.

When by Act of Parliament it is provided that the decision of any court or judge, the jurisdiction of which court or judge is transferred to the High Court of Justice, is to be final, an appeal shall not lie in any such case from the decision of the High Court of Justice, or of any judge thereof to Her Majesty's Court of Appeal: (App. Jur. A., 1876, s. 20.)

There is no appeal from the decision of a divisional court on a special case stated by an arbitrator in a reference made under the former practice, and providing that no writ of error shall lie: (*Jones v. Victoria Graving Docks Company*, L. Rep. 2 Q. B. Div. 314.)

2. INCIDENTAL POWERS.

For all the purposes of and incidental to the hearing and determination of any appeal within its jurisdiction, and the amendment, execution, and enforcement of any judgment or order made on any such appeal, and for

the purpose of every other authority expressly given to the Court of Appeal by [the Judicature Act, 1873] the . . . Court of Appeal shall have all the power, authority, and jurisdiction by [the] Act vested in the High Court of Justice : (J. A., 1873, s. 19, and see *post*, 13, 15.)

3. INCIDENTAL DIRECTIONS.

In any cause or matter pending before the Court of Appeal, any direction incidental thereto, not involving the decision of the appeal, may be given by a single judge of the Court of Appeal : (J. A., 1873, s. 52.)

A single judge of the Court of Appeal may at any time during vacation make any interim order to prevent prejudice to the claims of any parties pending an appeal as he may think fit ; but every such order made by a single judge may be discharged or varied by the Court of Appeal or a divisional court thereof : (*Id.*)

4. HOW APPEAL BROUGHT.

(a) *From Refusal of Ex parte Application.*

Where an *ex parte* application has been refused by the court below, an application for a similar purpose may be made to the Court of Appeal *ex parte* within four days from the date of such refusal, or within such enlarged time as a judge of the court below or of the Appeal Court may allow : (O. LVIII., r. 10.)

The time may be enlarged : (*Id.* r. 18.)

(b) *In other cases.*

(1) Notice of Appeal.

All appeals to the Court of Appeal . . . shall be brought by notice of motion in a summary way, and no petition, case, or other formal proceeding other than such notice of motion shall be necessary : (O. LVIII., r. 2.)

The notice, not the entry, of appeal is now the material step : (*Ex parte Saffery*, L. Rep. 5 Ch. Div. 366.)

Notice of appeal from any judgment, whether final or interlocutory, shall be a fourteen days' notice, and notice of appeal from any interlocutory order shall be a four days' notice : (O. LVIII., r. 4.)

A winding-up order is final within this rule : (*Re Stockton Iron Furnace*, L. Rep. 10 Ch. Div. 335.)

The appellant may by the notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part : (O. LVIII., r. 2.)

As to the form of notice of appeal, see *Little's case* (L. Rep. 8 Ch. Div. 806).

Where an appellant gave notice of appeal against the whole of an order, it was held that the order might be set right in a particular part, though such part was not specified in the notice : (*Duchess of Westminster Silver Lead Ore Company*, L. Rep. 10 Ch. Div. 307 ; 40 L. T. Rep. N. S. 300 ; 27 W. R. 539.)

If the first notice of appeal is irregular, or not entered at all, or only after time, a second notice may be given if the time for appealing has not expired, and it is unnecessary to move that the former entry may be vacated : (*Norton v. London and North-Western Railway Company*, L. Rep. 11 Ch. Div. 118 ; 47 L. J. 859, Ch. ; 40 L. T. Rep. N. S. 597 ; 27 W. R. 773 ; and see *Waddell v. Blockey*, L. Rep. 10 Ch. Div. 416.)

If notice to discontinue the action is given, the appeal comes to an end : (*Conybeare v. Lewis*, L. Rep. 13 Ch. Div. 469.)

(2) Amendment of Notice.

Any notice of appeal may be amended at any time as to the Court of Appeal may seem fit : (O. LVIII., r. 3.)

The Court of Appeal has full discretion as to amendment, and special circumstances need not be shown: (*Re Stockton Iron Furnace Company*, L. Rep. 10 Ch. Div. 335.)

(3) Service.

The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all or any parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may seem just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties: (O. LVIII., r. 3.)

Where the one of two defendants, against whom a decision had been given, appealed, the Court ordered the other defendant, in whose favour the decision had been given, to be served, and adjourned the appeal in the meantime: (*Purnell v. Great Western Railway Company*, L. Rep. 1 Q. B. Div. 636; 45 L. J. 687, Q. B.; and see *Hunter v. Hunter*, 24 W. R. 504.)

5. TIME FOR APPEALING.

(a) From Interlocutory Order.

No appeal from any interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days: (O. LVIII., r. 15.)

Where an order on an interlocutory application is included in an order made on further consideration, an appeal from the former part must be made within twenty-one days (*Cummins v. Heron*, L. Rep. 4 Ch. Div. 787; 46 L. J. 423, Ch.); and where an order was made on further consideration and adjourned summons to vary the chief clerk's certificate, it was held that the appeal must be, as from the substantial part of it, an interlocutory application: (*White v. Witt*, L. Rep. 5 Ch. Div. 589; 37 L. T. Rep. N. S. 110; 46 L. J. 560, Ch.; 25 W. R. 455.)

An interlocutory order which amounts to a finding a verdict is not open to appeal after twenty-one days, because the time for appealing from the final order founded on it has not expired: (per James, L.J., *White v. Witt*, *sup.*)

The following are interlocutory:

An order on summons by a creditor in an administration action (*Pheysey v. Pheysey*, L. Rep. 12 Ch. Div. 305; 41 L. T. Rep. N. S. 607);

An order to sign final judgment on a specially indorsed writ (*Standard Discount Company v. La Grange*, L. Rep. 3 C. P. Div. 67; 37 L. T. Rep. N. S. 372; 47 L. J. 3, C. P.; 26 W. R. 25);

An order on an application to vary the chief clerk's certificate (*White v. Witt*, *sup.*);

An order refusing a motion to a judge to discharge an order made in chambers (*Dickson v. Harrison*, *sup.*);

A definite verdict of a judge of the Chancery Division on a matter of fact (*Krehl v. Burrell*, L. Rep. 10 Ch. Div. 420; 39 L. T. Rep. N. S. 461; 40 L. J. 252, Ch.; 27 W. R. 234), whether the verdict on the facts is given on a day prior to the judgment on the whole case, or whether both are given at the same time, provided that before the trial begins there is a distinct announcement that the issues of fact are to be tried separately, and such issues are then definitely settled (*Lowe v. Lowe*, L. Rep. 10 Ch. Div. 432; 40 L. T. Rep. N. S. 236; 48 L. J. 361, Ch.; 27 W. R. 309; *Potter v. Cotton*, 41 L. T. Rep. N. S. 460; 28 W. R. 160);

An order on an interpleader issue (*McAndrew v. Barker*, L. Rep. 7 Ch. Div. 701).

(b) *From Winding-up, Bankruptcy, or other Matter not an Action.*

The time for appealing from any order or decision made or given in the matter of the winding-up of a company under the provisions of the Companies Act, 1862, or any Act amending the same, or any order or decision made in the matter of any bankruptcy, or in any other matter not being an action, shall be the same as the time limited for appeal from an interlocutory order [viz., twenty-one days]: (O. LVIII., r. 9.)

The following orders are within the rule:

An order on a petition to wind-up a company (*Re National Funds Assurance Company*, L. Rep. 4 Ch. Div. 305; 35 L. T. Rep. N. S. 689; 46 L. J. 183, Ch.; 25 W. R. 158);

An order as to placing on, and removing from, the list of contributories, a person's name (*Taylor's case*, L. Rep. 8 Ch. Div. 643; 47 L. J. 701, Ch.);

An order made under the Trustee Relief Act (*Re Bailie's Trusts*, L. Rep. 4 Ch. Div. 785; 35 L. T. Rep. N. S. 917; 46 L. J. 330, Ch.; 25 W. R. 310);

An order made under the Vendor and Purchaser Act, 1874, s. 9 (*Re Blyth and Young*, L. Rep. 13 Ch. Div. 416; 41 L. T. Rep. N. S. 746).

(c) *From Final Orders and Judgments.*

No other appeal shall, except by such leave [of the Court of Appeal] be brought after the expiration of one year: (O. LVIII., r. 15.)

The time for appeal from an order which is final, though made on an interlocutory application, in one year: (*Attorney-General v. Great Eastern Railway Company*, 40 L. T. Rep. N. S. 65; 48 L. J. 429, Ch.; 27 W. R. 759.)

The following are final:

An order made on a petition in an old suit directing payment only, to the person whom the court held entitled, of a fund in court (*Harris v. Newton*, 21 L. J. 630);

An order overruling a demurrer (*Trowell v. Shenton*, L. Rep. 8 Ch. Div. 321);

A decision in an issue stated under the Regulation of Railways Act, 1868, s. 41, as to compensation (*New River Company v. Midland Railway Company*, 36 L. T. Rep. N. S. 539);

A decision of a judge of the Chancery Division involving a finding of fact, although distinct from the rest of the judgment, if no definite issues of fact were settled before the commencement of the trial (*Lowe v. Lowe*, *sup.*; *Dollman v. Jones*, L. Rep. 12 Ch. Div. 553; 41 L. T. Rep. N. S. 258; *Potter v. Cotton*, *sup.*).

(d) *How calculated.*

The said respective periods [of twenty-one days and one year respectively] shall be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal: (O. LVIII., r. 15.)

The time runs in the case of an order actually granted from the signing, not the pronouncing, of the order: (*Ex parte Garrard*, L. Rep. 5 Ch. Div. 61; 46 L. J. 10, Bank.)

Where an order is granted, but in form not satisfactory to the applicant, the time does not run till the order has been drawn up: (*Berdan v. Birmingham Small Arms Company*, L. Rep. 7 Ch. Div. 25; 37 L. T. Rep. N. S. 588; 47 L. J. 96, Ch.; 26 W. R. 89.)

The time for appealing from the dismissal of a suit at the hearing dates from the time of pronouncing judgment: (*International Financial Society v. City of Moscow Gas Company*, L. Rep. 7 Ch. Div. 241; 37 L. T. Rep. N. S. 736; 47 L. J. 258, Ch.; 26 W. R. 272.)

Where an order is wholly refused, the time runs from when the judge so declares: (*Berdan v. Birmingham Small Arms Company, sup.*)

Where several claims are made by an application and some are granted and others refused, the time for an appeal from the refusal only runs from the date of the refusal, not the perfecting of the order: (*Trail v. Jackson, L. Rep. 4 Ch. Div. 7; 46 L. J. 16, Ch.; 25 W. R. 36.*)

When a judge of the Chancery Division refuses a motion before him in court to discharge or vary an order made by him in chambers, the time runs from the date of such refusal, and not from the date of the drawing up of the order made in chambers: (*Dickson v. Harrison, L. Rep. 9 Ch. Div. 243; 38 L. T. Rep. N. S. 795; 47 L. J. 761, Ch.*)

Where a petitioner applied for payment of a fund out of court, the title as to one-half of which was not disputed, and the court ordered that half to be paid out, it was held that the time for appealing ran from the date of drawing up the order: (*Re Michell's Trusts, L. Rep. 9 Ch. Div. 5; 48 L. J. 50, Ch.*)

When an interlocutory motion is refused, and the court adds a direction as to the costs of the application, the time for appealing is not thereby extended: (*Swindell v. Birmingham Syndicate, L. Rep. 3 Ch. Div. 127.*)

Sundays are included in the twenty-one days: (*Ex parte Viney, L. Rep. 4 Ch. Div. 794.*)

The time runs notwithstanding the closing of the office: (*Ex parte Saffery, L. Rep. 5 Ch. Div. 365; 36 L. T. Rep. N. S. 552; 46 L. J. 89, Bank.; 26 W. R. 572.*)

When the notice of appeal is too late, the filing by the respondent of affidavits in reply will not cure the defect: (*Ex parte Fardon's Vinegar Company, W. N. 1880, p. 76.*)

(e) *Special Leave enlarging Time.*

"Special leave" means leave granted on the ground of special circumstances: (per Jessel, M.R., *Re Stockton Iron Furnace Company, L. Rep. 10 Ch. Div. 348.*)

After the time has elapsed very special circumstances must be shown to induce the court to give further time, as misleading conduct on the part of the other side, a mistake made in the office itself, or by some officer of the court, or some sudden accident which could not be foreseen: (*International Financial Society v. City of Moscow Gas Company, sup.*)

The fact that an appellant has misconstrued the provisions of one of the rules is not such a special circumstance as to induce the court to give further time to appeal: (*Id.*)

The fact of an informal notice of appeal having been given is not a sufficient special circumstance: (*Re Blyth and Young, L. Rep. 13 Ch. Div. 416; 41 L. T. Rep. N. S. 746.*)

A *bonâ fide* mistake of the party's legal advisers as to the time within which the appeal must be brought is not of itself a sufficient special circumstance: (*Highton v. Treherne, W. N. 1878, p. 227; 39 L. T. Rep. N. S. 411; 48 L. J. 169, Ex.; 27 W. R. 245; McAndrew v. Barker, sup.*) Nor is a mistake as to setting down the appeal: (*Re Mansel, L. Rep. 7 Ch. Div. 711.*) Nor is the fact that the Court of Appeal has come to a different opinion on a doubtful point of law, at any rate after the time has elapsed for appealing, and the decree is final, and there is no fund remaining in court: (*Craig v. Phillips, L. Rep. 7 Ch. Div. 249; 37 L. T. Rep. N. S. 772; 47 L. J. 239, Ch.; 26 W. R. 292.*) Nor is the discovery of fresh evidence a sufficient special circumstance: (*Exchange and Discount Bank v. Billinghamurst, W. N. 1880, p. 2.*)

But where a notice of appeal had been given within time, and then

withdrawn under a mistake in favour of another notice which was not in time, an extension was allowed: (*Taylor's case*, L. Rep. 8 Ch. Div. 643; 42 L. J. 696, Ch.)

After the time has elapsed for appealing, an application for extension of time is by motion on notice: (*Evennett v. Lawrence*, L. Rep. 4 Ch. Div. 139; 46 L. J. 119, Ch.)

6. SETTING DOWN APPEAL.

The party appealing from a judgment or order shall produce to the proper officer of the Court of Appeal the judgment or order or an office copy thereof, and shall leave with him a copy of the notice of appeal to be filed, and such officer shall thereupon set down the appeal by entering the same in the proper list of appeals: (O. LVIII., r. 8.) A *præcipe* must also be delivered, the form of which is given in Schedule E. 27, to the Rules of April, 1880.

The entry is not now the material step: (*Ex parte Saffery*, L. Rep. 5 Ch. Div. 366.)

The appeal must be set down before the day named in the notice of appeal for making the motion, or if the court is not then sitting, before the next sitting day, or the appeal will be dismissed on the respondent's application, as an abandoned appeal: (*Re National Funds Assurance Company*, L. Rep. 4 Ch. Div. 305; *Re Mansel, sup.*; *Shoetensack v. Price and Co.* W. N. 1880, p. 69.)

If the party obtaining an interlocutory order does not draw up the order till after twenty-one days have expired, and notice of appeal has been given within that time, he cannot object that the appeal has not been set down before the day named in the notice: (*Re Harker*; *Goodbarne v. Fothergill*, L. Rep. 10 Ch. Div. 613; 40 L. T. Rep. N. S. 408; 27 W. R. 587.)

An appeal from the refusal of an interlocutory order may be set down without production of the order appealed from or a copy: (*Smith v. Grinelle*, L. Rep. 3 Ch. Div. 80.)

7. ABANDONED APPEAL.

The appeal is not before the court until set down and entered, and if this is not done the appeal is abandoned, though, if the time for appealing has not expired, a fresh notice may be given: (*Norton v. London and North-Western Railway Company*, L. Rep. 11 Ch. Div. 118.)

If the appeal is not set down the respondent who has been served with notice of appeal is not bound to appear: (*Webb v. Mansell*, L. Rep. 2 Q. B. Div. 117; 25 W. R. 389.)

If he appear, he cannot move to dismiss for want of prosecution, but is only entitled to his costs of an abandoned appeal: (*Waddell v. Blockey*, L. Rep. 10 Ch. Div. 416); and he cannot then get his costs of the abandoned appeal, but must make a substantive motion (*Id.*; *Price v. Price*, 21 L. J. 478; *Machu v. O'Connor*, W. N. 1878, p. 144), of which notice must be given: (*Id.*)

The costs of the application for costs of the abandoned appeal will not be allowed unless a demand has been made for the latter costs, and not complied with: (*Griffin v. Allen*, L. Rep. 11 Ch. Div. 913.)

When the appellant has given notice withdrawing his notice of appeal as irregular, a motion to discharge the notice of appeal as abandoned must not be made *ex parte*: (*Re Oakwell Collieries*, L. Rep. 7 Ch. Div. 706; 26 W. R. 577.)

When an appeal has been set down by the appellant, and is in the paper for hearing, and he does not appear, the respondent is entitled to have the

appeal dismissed without proving service of the notice of appeal: (*Ex parte Lows*, L. Rep. 7 Ch. Div. 160; 37 L. T. Rep. N. S. 583; 47 L. J. Bank. 24; 26 W. R. 229.)

If the respondent does not appear, the appellant on proving service of the notice of appeal may proceed in the respondent's absence.

8. CROSS APPEAL.

(a) Notice by Respondent.

It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the court below should be varied, he shall give notice of such intention to any parties who may be affected by such contention: (O. LVIII., r. 6.)

As to what parties may be served with such a notice, see *Ex parte Payne* (L. Rep. 11 Ch. Div. 539).

The rule applies when the question sought to be raised is one in which the original plaintiff has no interest: (*Hunter v. Hunter*, W. N. 1876, p. 138; *Ralph v. Carrick*, L. Rep. 11 Ch. Div. 873; 28 W. R. 67; and see *Cracknall v. Janson*, L. Rep. 11 Ch. Div. 1; 40 L. T. Rep. N. S. 640; 27 W. R. 851.)

Subject to any special order which may be made, notice by a respondent shall, in the case of any appeal from a final judgment, be an 'eight days' notice, and in the case of an appeal from an interlocutory order a two days' notice: (O. LVIII., r. 7.)

(b) Effect of Respondent's Omission to give Notice.

The omission [by the respondent] to give such notice shall not diminish the powers conferred by the [Judicature] Act [1873] upon the Court of Appeal, but may, in the discretion of the court, be ground for an adjournment of the appeal, or for a special order as to costs: (O. LVIII., r. 6.)

9. HEARING.

[The appeal] shall come on to be heard according to its order in [the list of appeals] unless the court or a judge thereof shall otherwise direct, but so as not to come into the paper for hearing before the day named in the notice of appeal: (O. LVIII., r. 8.)

All appeals to the Court of Appeal shall be by way of re-hearing: (O. LVIII., r. 2.)

Every appeal to the Court of Appeal shall, where the subject-matter of the appeal is a final order, decree, or judgment, be heard before not less than three judges of the said court sitting together, and shall, when the subject-matter of the appeal is an interlocutory order, decree, or judgment, be heard before not less than two judges of the said court sitting together: (J. A., 1875, s. 12.)

Any doubt which may arise as to what decrees, orders, or judgments are final, and what are interlocutory, shall be determined by the Court of Appeal: (J. A., 1875, s. 12.)

Two counsel are heard on each side: (*Sneesby v. Lancashire and Yorkshire Railway Company*, L. Rep. 1 Q. B. Div. 44.)

When a case has been argued on its merits in the court below, and a technical objection might have been, but was not then made, it will not be allowed to be made on appeal: (*Gilbert v. Endean*, L. Rep. 9 Ch. Div. 260.)

The court will not allow the appellant to raise a case totally inconsistent with and contradictory to that which he originally raised: (*Ex parte Reddish*, L. Rep. 5 Ch. Div. 882.)

The court will not allow the whole of an order to be opened for the

purpose of making a different order as to costs : (*Re New Gas Company*, 25 W. R. 643.)

The Court of Appeal [has] all the powers and duties as to amendment and otherwise of the court of first instance . . . (O. LVIII., r. 5.)

10. EVIDENCE.

(a) *How Brought before Court.*

When any question of fact is involved in an appeal, the evidence taken in the court below bearing on such question shall, subject to any special order, be brought before the Court of Appeal as follows :—

(i.) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed.

(ii.) As to any evidence given orally, by the production of a copy of the judge's notes, or such other materials as the court may deem expedient : (O. LVIII., r. 11.)

If, upon the hearing of an appeal, a question arise as to the ruling or direction of the judge to a jury or assessors, the court shall have regard to verified notes or other evidence, and to such other materials as the court may deem expedient : (O. LVIII., r. 13.)

If evidence has been dealt with in the court below, as if admissible, it cannot be objected to in the Court of Appeal : (*Gilbert v. Endean*, *sup.*)

Office copies are dispensed with if the originals are produced : (*Sickles v. Norris*, 45 L. J. 148, C. P.)

And it is not necessary to supply each judge with office copies, it being sufficient if office and ordinary copies are in court : (*Crawford v. Hornsea Steam Brick and Tile Works Company*, 24 W. R. 422.)

At the hearing of an appeal a party is entitled to read a shorthand writer's notes of the evidence taken in the court below as his impression of what passed; and the judge's notes will be taken by the Court of Appeal to represent rightly the whole effect : (*Re Gee*; *Laming v. Gee*, 41 L. T. Rep. N. S. 744.)

The Court of Appeal, however, strongly discourages shorthand notes of evidence. The judge's notes ought, as a general rule, to be sufficient for the purposes of appeal : (*Kelly v. Byles*, L. Rep. 13 Ch. Div. 693.)

Where an appellant had, by reason of his poverty, been unable to take shorthand notes of the evidence in the court below, the Court of Appeal sent a request in writing to the judge of the court below for a copy of his notes of the evidence, that the appellant might not be prejudiced in the prosecution of his appeal : (*Dence v. Mason*, 41 L. T. Rep. N. S. 573.)

The Court of Appeal is not bound to accept the decision of the court below on a question of fact where the evidence is conflicting (*Bigsby v. Dickenson*, *inf.*; *The Gladibanta*, L. Rep. 1 P. Div. 287); but the case should be an exceptional one to induce the Court of Appeal to interfere with the view the judge below has taken of the evidence : (*Ungley v. Ungley*, L. Rep. 5 Ch. Div. 890; 25 W. R. 734.)

(b) *Ordering Evidence to be Printed.*

Where evidence has not been printed in the court below, the court below or a judge thereof, or the Court of Appeal or a judge thereof, may order the whole or any part thereof to be printed for the purpose of the appeal : (O. LVIII., r. 12.)

A copy of the judge's notes has been ordered to be printed : (W. N. 1876, p. 23.)

Any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof, unless the Court of Appeal or a judge thereof shall otherwise order : (O. LVIII., r. 12.)

(c) *Further Evidence.*

(1) How taken.

The Court of Appeal [has] . . . full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner: (O. LVIII., r. 5.)

Further evidence includes any evidence whatever not used at the trial or hearing below, and it is immaterial that it might have been used in the court below on giving notice: (*Re Chennell*, L. Rep. 8 Ch. Div. 505; 38 L. T. Rep. N. S. 494; 47 L. J. 583, Ch.; 26 W. R. 595.)

When a party, taken by surprise, is refused permission below to produce rebutting evidence, the Court of Appeal will, in a proper case, permit the fresh evidence to be taken on appeal: (*Bigsby v. Dickenson*, L. Rep. 4 Ch. Div. 24.)

But parties cannot take the chance of the result of the hearing below, and then tender fresh evidence on appeal: (*Re Phoenix Bessemer Steel Company*, L. Rep. 4 Ch. Div. 115.)

Affidavits to be used in the Court of Appeal should be filed in the court below: (*Watts v. Watts*, 45 L. J. 658, Ch.)

As to admitting parol evidence, see *Re Coal Economising Gas Company*, 45 L. J. 83, Ch.; *Weston's case* L. Rep. 10 Ch. Div. 579; 40 L. T. Rep. N. S. 43; 48 L. J. 475, Ch.; 27 W. R. 310.)

(2) Where special leave required.

Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought: (O. LVIII., r. 5.)

Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent) [to the date of the decision from which the appeal is brought] shall be admitted on special grounds only, and not without special leave of the court: (O. LVIII., r. 5.)

When special leave is required to produce further affidavit or documentary evidence, a separate notice of motion for leave may be delivered (*Re Chennell*, *sup.*), or notice may be given that special leave will be asked when the case comes before the Court of Appeal (*Re Hastie*, L. Rep. 1 Ch. Div. 562; 45 L. J. 288, Ch.; *Re Chennell*, *sup.*); but a party who wishes to examine fresh witnesses at the hearing of the appeal must apply for leave by motion previously to the hearing of the appeal: (*Dicks v. Brooks*, L. Rep. 13 Ch. Div. 652.)

11. JUDGMENT ON APPEAL.

For all the purposes of and incidental to the hearing and determination of any appeal within its jurisdiction . . . and for the purpose of every other authority expressly given to the Court of Appeal by [the Judicature Act, 1873], the said Court of Appeal [has] all the power, authority, and jurisdiction . . . vested in the High Court of Justice: (J. A., 1873, s. 19.)

The Court of Appeal shall have power to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the said court, notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision: (O. LVIII., r. 5.)

The Court of Appeal has incidental original jurisdiction only for the purpose of exercising its appellate jurisdiction: (per James, L.J., *Flower*

v. *Lloyd*, L. Rep. 6 Ch. Div. 297; 37 L. T. Rep. N. S. 419; 46 L. J. 838, Ch.; 25 W. R. 793.)

It has no power to make any order of or for the High Court except by way of substituting a proper order for an order improperly made (*Id.*); and the Court of Appeal cannot, when an action has been altogether dismissed by the court below, stay proceedings pending appeal, but it will, in a proper case, grant an injunction restraining any of the parties parting with the property till the hearing of the appeal: (*Wilson v. Church*, L. Rep. 11 Ch. Div. 576; 27 W. R. 843.)

A new trial has been ordered not only as between a plaintiff and one defendant appealing, but as against the other defendant in whose favour was the decision below: (*Purnell v. Great Western Railway Company*, L. Rep. 1 Q. B. Div. 636.)

And the court may make a proper decree independently of any notice by the respondents: (*Kevan v. Crawford*, 21 S. J. 668.)

In rectifying an order made below, the court may set aside anything done under it, as by directing a call to be repaid: (*Re British Farmers' Company*, L. Rep. 7 Ch. Div. 540.)

But the court cannot order a petition to wind-up to be transferred for original hearing with the hearing of an appeal from the dismissal of a petition against the same company: (*Re Dunraven Coal and Iron Mining Company*, 33 L. T. Rep. N. S. 371; 24 W. Rep. 37.)

And cannot make an order of the House of Lords an order of the High Court: (*British Dynamite Company v. Krebs*, L. Rep. 11 Ch. Div. 448.)

No interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may seem just: (O. LVIII., r. 14.)

The object of this is to prevent parties being prejudiced by their having omitted to appeal from an interlocutory order (per Mellish, L.J., *Sugden v. Lord St. Leonards*, L. Rep. 1 P. Div. 209), although such order incidentally involves a decision of the point: (per Jessel, M.R., *White v. Witt*, *sup.*)

If upon the hearing of an appeal from a judgment pronounced by a judge or court on the verdict or finding of . . . a judge without a jury, it shall appear to the Court of Appeal that a new trial ought to be had, it shall be lawful for the Court of Appeal, if it shall think fit, to order that the verdict and judgment shall be set aside, and that a new trial shall be had: (O. LVIII., r. 5a, March, 1879.)

For all the purposes of and incidental to the amendment . . . of any judgment or order made on any . . . appeal . . . the . . . Court of Appeal shall have all the power, authority, and jurisdiction . . . vested in the High Court of Justice: (J. A., 1873, s. 19.)

12. REHEARING.

The Court of Appeal has no jurisdiction to rehear an appeal, though fraud is alleged in procuring judgment in the original hearing, and fresh evidence is offered (*Flower v. Lloyd*, *sup.*); and, query, whether there is any remedy by original action to set aside the decree as obtained by fraud: (*Id.*, and compare *Flower v. Lloyd*, L. Rep. 10 Ch. Div. 327.)

Where an appeal had been heard and dismissed, and the appellants presented an appeal to the House of Lords, a motion that the Court of Appeal should rehear the case *pro formâ* for the purpose of inserting in the order dismissing the appeal a document as having been read, which was not in fact read to the court at the hearing, and which could not then be adduced in evidence because it had not been duly authenticated, was refused: (*Ex parte Banco de Portugal*; *Re Hooper*, 42 L. T. Rep. N. S. 210; W. N. 1880, p. 29.)

13. EXECUTION.

For all the purposes of and incidental to the execution, and enforcement of any judgment or order made on any appeal . . . the said Court of Appeal shall have all the power, authority, and jurisdiction vested in the High Court of Justice: (J. A. 1873, s. 19.)

14. STAYING PROCEEDINGS.

Vexatious appeal may be stayed: (*Vale v. Oppert*, L. Rep. 5 Ch. Div. 969.)

An appeal shall not operate as a stay of execution or of proceeding under the decision appealed from, except so far as the court appealed from, or any judge thereof, or the Court of Appeal, may so order; and no intermediate act or proceeding shall be invalidated, except so far as the court appealed from may direct: (O. LVIII., r. 16.)

For cases in which proceedings have been stayed, see *Southwell v. Bowditch*, W. N. 1876, p. 38; *Grant v. Banque Franco-Egyptienne*, *Id.* 74; *Cooper v. Cooper*, L. Rep. 2 Ch. Div. 492; 45 L. J. 667, Ch.; *Morgan v. Elford*, L. Rep. 4 Ch. Div. 388; *The Attorney-General v. Swansea Improvements and Tramways Company*, L. Rep. 9 Ch. Div. 46; 48 L. J. 72, Ch.; *Adair v. Young*, L. Rep. 11 Ch. Div. 136; 40 L. T. Rep. N. S. 598, and cases cited *post*.

There is no authority for suspending an injunction once granted until an appeal has been heard: (*Flower v. Lloyd*, W. N. 1877, p. 81.)

The Court of Appeal has no original jurisdiction, in any case which has not reached hearing on appeal, to order a stay of proceedings on execution: (*Goddard v. Thompson*, 47 L. J. 382, Q. B.; 38 L. T. Rep. N. S. 167.)

The application must generally be made in the first place to the court or judge below: (O. LVIII., r. 17.)

The application to the Court of Appeal is by motion (O. LVIII., r. 18) not *ex parte*, but on notice: (*Republic of Peru v. Weguelin*, 24 W. R. 297.)

The application to the Court of Appeal is a motion by way of appeal *Attorney-General v. Swansea Improvements and Tramways Company* L. Rep. 9 Ch. Div. 46; 48 L. J. 72, Ch.);

But it need not be formally entered as an appeal: (*Id.*)

A person ordered in the court below to pay costs, must pay them into court, notwithstanding proceedings are stayed: (*Cooper v. Cooper*, *sup.*)

As a general rule, the costs of the application must be paid by the applicant: (*Merry v. Nicholls*, L. Rep. 8 Ch. App. 205; *Cooper v. Cooper*, *sup.*; see *Adair v. Young*, *sup.*)

When a party is appealing to the House of Lords, the court will stay proceedings so far as to prevent the appeal from being, if successful nugatory, but the appellants will be put on terms to speed the appeal (*Wilson v. Church*, L. Rep. 12 Ch. Div. 454; 41 L. T. Rep. N. S. 296 *Polini v. Gray*, L. Rep. 13 Ch. Div. 411; 41 L. T. Rep. N. S. 173; 41 L. J. 41, Ch.)

And the application should be made to the Court of Appeal, not to the Chancery Division: (*The Khedive*, L. Rep. 5 P. Div. 1; 41 L. T. Rep. N. S. 392.)

An original application for a stay of execution is by motion on notice (*Emma Silver Mining Company v. Lewis*, 48 L. J. 504, C. P.)

15. INCIDENTAL APPLICATIONS.

Every application to a judge of the Court of Appeal shall be by motion and the provisions of Order LIII. shall apply thereto: (O. LVIII., r. 18.

Order LIII. relates to motions in the High Court of Justice. [See MOTION.]

Wherever under these rules an application may be made either to th

court below or to the Court of Appeal, or to a judge of the court below or of the Court of Appeal, it shall be made in the first instance to the court or judge below: (O. LVIII., r. 17.)

The motion to the Court of Appeal is by way of appeal, but need not be set down: (see *sup.* 14.)

16. COSTS.

(a) *Effect of Non-payment in Court below.*

The fact that the appellants have not paid the costs in the court below is not sufficient ground for depriving them of the right to have their appeal heard: (*Plimpton v. Spiller*, 21 S. J. 668; and see *post* (c).)

(b) *Costs of Shorthand Notes* (see *post*, c).

(c) *Costs of Appeal.*

The Court of Appeal [has] power to make such order as to the whole or any part of the costs of the appeal as may seem just: (O. LVIII., r. 5.)

This rule applies to appeals from the Chancery Court of Lancaster: (*Anderson v. Welsby*, W. N. 1876, p. 230.)

As a general rule, the successful appellant gets his costs: (L. Rep. 1 Ch. Div. 41.) Each of two defendants, separately appealing, and successful, gets his costs: (*Dickenson v. Dodds*, L. Rep. 2 Ch. Div. 463.)

As to costs of partly successful appeal in an administration action, see *Macdonald v. Irvine*, 47 L. J. 494, Ch.

When an appellant succeeds on a point not raised in the court below, he gets the costs below, but not those of the appeal: (*Hussey v. Payne*, 47 L. J. 751, Ch.)

Where plaintiff gave notice of appeal, and defendants gave counter-notice that judgment ought to be varied in their favour, and the appeal was dismissed, the Court ordered the appellants to pay the costs, except so far as they had been occasioned by the counter-notice: (*The Lauretta*, L. Rep. 4 P. Div. 25; 40 L. T. Rep. 444; 48 L. J. 55, P. D. & A.; 27 W. R. 902.)

The costs of shorthand notes of evidence in the court below are not allowed as a general rule, but only where a case is made out for such allowance: (*Re Duchess of Westminster Silver Lead Ore Company*, L. Rep. 10 Ch. Div. 307; *Kelly v. Byles*, L. Rep. 13 Ch. Div. 682.)

Under an order of the Court of Appeal, directing payment of costs, without any intimation that the taxation and payment are to be postponed, the party to whom they are ordered to be paid is entitled to have them taxed and paid forthwith: (*Phillips v. Phillips*, L. Rep. 13 Ch. Div. 60.)

The court will not restrain a party from enforcing his certificate of taxing pending an appeal to the House of Lords, even though the plaintiff offers to pay into court such sum as may be directed. The costs must be paid, the solicitor of the other party giving his personal undertaking for repayment in case the decision is reversed in the House of Lords: (*Merry v. Nickalls*, *sup.*; *Morgan v. Elford*, *sup.*; *Grant v. Banque Franco-Egyptienne*, L. Rep. 3 C. P. Div. 202; 38 L. T. Rep. N. S. 622; 47 L. J. 455, C. P.; *Wilson v. Church* (No. 2) L. Rep. 12 Ch. Div. 454.)

(d) *Deposit or Security for Costs.*

(1) *When Ordered.*

Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal: (O. LVIII., r. 15.)

The court will not order security to be given for the costs in the court below as a condition of hearing an appeal: (*Plimpton v. Spiller*, 21 S. J. 668.)

The following have been held to be sufficient "special circumstances": non-payment of costs in the court below (*Plimpton v. Spiller, sup.*); insolvency of appellant, coupled with vexatious and unreasonable prosecution of the appeal (*Usill v. Brearley*, L. Rep. 3 C. P. Div. 206; 38 L. T. Rep. N. S. 249; 47 L. J. 380, C. P.; *Waddell v. Blockey*, L. Rep. 10 Ch. Div. 416); and insolvency alone seems *prima facie* a sufficient reason (per Cotton L. J., *Re Ivory*, L. Rep. 10 Ch. Div. 372; 39 L. T. Rep. N. S. 235; *Stock v. Hooper's Telegraph Works*, W. N. 1876, p. 230); though the court has refused to order security when the appeal is on a new point (*Rourke v. White Moss Colliery Company*, L. Rep. 1 C. P. Div. 556); foreign residency of a foreigner having no assets in the country (*Grant v. Banque Franco-Egyptienne*, L. Rep. 2 C. P. Div. 430; 38 L. T. Rep. N. S. 622; 47 L. J. 41, C. P.; 26 W. R. 68.)

(2) Demand for.

When the liability to give security is clear, security, when asked for, ought to be offered without an application to the court, and the offer, if reasonable, accepted: (*The Constantine*, L. Rep. 4 P. Div. 156.)

(3) Application for.

The application to the court is by motion, on notice which may be served without leave: (*Grills v. Dillon*, L. Rep. 2 Ch. Div. 325; 45 L. J. 432, Ch.)

The application should be made before the costs of appeal are incurred and the time fixed for hearing: (*Grant v. Banque Franco-Egyptienne*, L. Rep. 1 C. P. Div. 143.)

If the liability to give security is clear, regard will be had to the conduct of the parties in demanding and agreeing as to the security to be given as to the costs to be paid (see *inf.* 4). If the liability is not clear, the costs will be costs in the appeal: (*Phosphate Sewage Company v. Hartmont, inf.*)

(4) How Security given.

The security is given by payment of money into court, or by giving a bond, with or without sureties, to the party or person requiring the security, unless the court or a judge otherwise directs, and not to an officer of the court: (*Phosphate Sewage Company v. Hartmont*, L. Rep. 2 Ch. Div. 811; *Judd v. Green*, L. Rep. 4 Ch. Div. 784; 46 L. J. 257, Ch.; O. L.V. r. 3, April, 1880.)

It is not the practice to fix a time for giving the security: (*Vale v. Oppert*, L. Rep. 5 Ch. Div. 633; *Polini v. Gray*, L. Rep. 11 Ch. Div. 741, and see *post*, 5.)

(5) Default.

If the order is not complied with in a reasonable time the respondent may move to dismiss the appeal for want of prosecution; but what is a reasonable time must depend on the circumstances of each case: (*Polini v. Gray*; *Sturla v. Freccia*, L. Rep. 11 Ch. Div. 741; 28 W. R. 81.)

If the security is given before the motion to dismiss comes on for hearing, the appellant must pay the costs of the motion, and until he has done so the appeal will not be heard: (*Ex parte Isaacs*, L. Rep. 10 Ch. Div. 1; 39 L. T. Rep. N. S. 520; 27 W. R. 297.)

(6) Increasing Deposit.

The court may order the deposit given to be increased, or further security to be given: (*Re Baum*, L. Rep. 10 Ch. Div. 1; 38 L. T. Rep. N. S. 924; 26 W. R. 890.)

VII. FROM THE COURT OF APPEAL TO THE HOUSE OF LORDS.

1. WHERE APPEAL LIES.

Subject as in [the] Act mentioned, an appeal shall lie to the House of

Lords from any order or judgment of Her Majesty's Court of Appeal in England : (Appellate Jurisdiction Act, 1876, s. 3.)

Error shall not lie to the House of Lords : (*Id.*, s. 11.)

When it is sought to recover costs below they should be expressly appealed against : (Denison & Scott's H. L. Pr. 164.)

An appeal is not generally allowed as to costs alone, when costs are in the discretion of the court below ; or from judgment by consent ; or, in general, on a mere point of form ; or on a point of practice, unless on clear proof of a miscarriage ; or, generally on matters of discretion : (D. & Sc. 68-73.)

When the costs of an appeal dismissed for non-prosecution have not been paid, it is ground for a petition to the House against the reception of a fresh appeal : (*Id.*, 75.)

2. PARTIES.

(a) *Who may appeal.*

Any persons properly made parties in the court below, and who have a direct or some probable interest in the matter, may appeal ; and persons improperly made parties below may appeal where costs have been given against them : (D. & S. 31.)

A purchaser, though not a party, may appeal against an order setting aside a purchase made under a decree in the cause : (*Id.*) A creditor under a decree may appeal against the disallowance of a claim : (*Id.*)

(b) *Paupers.*

Persons may be allowed to prosecute an appeal as appellant or respondent *in formâ pauperis*.

They must present a petition for leave, two clear days' notice of the intention to do so being given to the other side.

The petition is necessary even when a person had been allowed to sue *in formâ pauperis* in the court below.

The petition must be accompanied by an affidavit setting forth that the petitioner is not worth 5*l.* in the world except the matter in question and his wearing apparel, and by a certificate from the minister and churchwardens stating that they know him to be a very poor man : (D. & S. 54.)

(c) *Declining to join as Appellants.*

When persons parties below, with an interest in the cause, decline to join as appellants, the responsibility will rest on the appellants to make them respondents : (D. & S. 32.)

(d) *Non-joinder.*

When any party below has been omitted to be made a party in the appeal, he may present a petition to be added, notwithstanding the printed cases have been lodged : (*Id.* and see *post*, 11 (g).)

An objection for want of parties to the action will not be allowed to be made for the first time on the appeal : (*Id.*, 33.)

(e) *Change of Parties.*

When a party to a suit sells and conveys all his right and interest under the decree to another for valuable consideration, it is an absolute bar to an appeal from that decree : (D. & S. 32, and see *post*, 11 (g.) and PARTIES.)

3. TIME FOR APPEALING.

Except when otherwise provided by statute, no petition of appeal [is] received, unless the same [is] lodged within one year from the date of the last decree, order, judgment, or interlocutor appealed from : (Standing Order I.)

Delivery of the petition of appeal to the housekeeper as late as midnight on the last day for bringing the appeal is a good lodgment: (D. & S. 43.)

In cases in which the person entitled to appeal are within the age of one and twenty years, or covert, *non compos mentis*, imprisoned, or out of Great Britain and Ireland, such person may be at liberty to present his appeal to the House, provided that the same be lodged in the Parliament office within one year next after full age, discovery, coming of sound mind, enlargement out of prison, or coming into Great Britain or Ireland. But in no case shall any person or persons be allowed a longer time, on account of mere absence, to present an appeal, than five years from the date of the last decree, order, judgment, or interlocutor appealed against: (S. O. I., Nov. 1876.)

A person going abroad to evade the decree of the court below is not allowed the benefit of this provision: (D. & S. 38.)

Although the time for appealing from an interlocutory order has expired, if the final decree is appealed from in time, the right to appeal from the interlocutory order is saved: (*Id.*)

4. LAW OFFICER'S FIAT.

An appeal shall not be entertained by the House of Lords without the consent of the Attorney-General or other law officers of the Crown, in any case where proceedings in error or on appeal could not hitherto have been had in the House of Lords without the fiat or consent of such officer: (A. J. A., 1876, s. 10.)

5. NOTICE OF INTENTION TO APPEAL.

Previous to any petition of appeal being presented to [the] House, notice shall be given to the agent or agents of the party or parties in the court below, who shall be made respondent or respondents to the said appeal, of the time when such petition of appeal is intended to be presented to [the] House: (S. O., 9th April, 1812; 43 Lords' Journ. 676, 685.)

A correct copy of the petition of appeal must be served at the same time: (D. & S. 42.)

Not less than two clear days' notice must be given: (Note to S. O., Nov., 1876.)

The notice will not of itself stay interim execution of a judgment appealed from: (D. & S. 42.)

6. PETITION OF APPEAL.

(a) *To be method of Appealing.*

Every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before Her Majesty the Queen in her court of Parliament, in order that the said court may determine what, of right, and according to the law and custom of this realm, ought to be done in the subject-matter of such appeal: (A. J. A., 1876, s. 4.)

(b) *Form.*

A form of petition is given in the Standing Orders of November, 1876 W. N. 1876, part 2, p. 475.

The schedule must set out the title of the parties to the cause or matter; and the decrees, orders, judgments, or interlocutors appealed against; and where the appeal is not against the whole decree, the part appealed against must be defined: (S. O., Nov., 1876.)

When the appeal is from the whole decree, both the formal and effective parts must be printed in italics; where part only is appealed from, the part must be printed in italics, the rest being Roman type: (D. & S. 45.)

(c) Printing.

The appeal (must be) printed on parchment (quarto size), in such form as will enable paper copies thereof to be hereafter bound up with the printed cases: (Directions, S. O., Nov., 1876; W. N. 1876, 475; and see *sup.* (b).)

(d) Counsel's Signature.

All petitions of appeal [must] be signed, and the reasonableness thereof certified, by two counsel who shall have attended as counsel in the court below, or shall purpose attending as counsel at the hearing in [the] House: (S. O. II., Nov., 1876; W. N., 1876, p. 475.)

Counsel must sign at the end of the petition, and at the end of the schedule.

(e) Certificate of Serving Notice.

The day on which . . . notice [of the intention to appeal] was given, or caused to be given, shall be indorsed by the agent or agents for the petitioner on the back of the [petition of] appeal: (S. O., 9th April, 1812, 43 Lords' Journ. 676, 685.)

The certificate is written on the last page of the petition: (D. & S. 42.)

The form of indorsement is given in the Standing Orders of November, 1876.

(f) Lodgment.

The petition of appeal must be lodged in the Parliament Office: (Directions, S. O., Nov., 1879.)

Four printed copies of the petition must at the same time be lodged: (D. & S. 42.)

It may be lodged in recess: (*Id.*, 47.)

(g) Presentation.

The appeal is laid upon the table by the clerk of Parliaments, though nominally presented by the Lord Chancellor: (*Id.*)

(h) Amendment.

Errors in the appeal may be corrected on petition, of the intention to present which two days' notice must be given to the other side: (D. & S. 46.)

Mere clerical errors may be corrected by permission of the clerks of the judicial office, but not generally by the pen: (*Id.*)

7. ORDER FOR SERVICE.

(a) When Granted.

If the House be . . . sitting [when the petition is lodged], or, if not, on the next ensuing meeting of the House, an order thereon for service on the respondents or their solicitors, ordering the respondents to lodge cases in answer to the appeal, will be issued to the appellant's agent: (Directions, S. O., Nov., 1876.)

(b) How Served.

By delivering to the party mentioned a true copy of the order, at the same time showing him the original: (D. & S. 46.)

The "order of service" issued upon the presentation of an appeal for service on the respondent or his solicitor [must] be returned to the Parliament office, together with an affidavit of due service entered thereon, within the time limited for the appellant to lodge his printed cases, unless within that period all the respondents shall have lodged their printed cases; in default, the appeal to stand dismissed: (S. O. III., Nov., 1876.)

The affidavit should be sworn before a commissioner in England or Ireland, or a justice of the peace in Scotland: (D. & S. 46.)

If default is made the appeal may be entered on petition, or a new appeal presented, if in time: (*Id.*)

8. SECURITY FOR COSTS.

(a) *Recognisance for 500l.*

In all appeals . . . the appellant or appellants [must] give security to the Clerk of the Parliaments by recognisance to be entered into, in person or by substitute, to the Queen of the penalty of five hundred pounds, conditioned to pay to the respondent or respondents all such costs as may be ordered to be paid . . . by the House in the matter of the appeal: (S. O. IV., Nov., 1876.)

Each appellant, where there are more than one, is required to enter into the recognisance: (Directions, S. O., Nov., 1876.)

Parties suing *in formâ pauperis* are not required to enter into the recognisance: (D. & S. 52.)

Within one week after the presentation of the appeal the appellants [must] submit to the Clerk of the Parliaments (in the event of a substitute being proposed to enter into the recognisance in lieu of the appellants) the name of such substitute: (S. O. IV., Nov., 1876.)

Two clear days' previous notice of the names so proposed (for recognisance) [is] to be given to the solicitor or agent of the respondents: (*Id.*)

(b) *Bond for, or Payment of, 200l.*

[Besides the recognisance mentioned] the appellant or appellants must either—

(a) Procure two sufficient sureties, to the satisfaction of the clerk of Parliaments, to enter into a joint and several bond to the amount of 200l., or

(b) Pay in to the account of the fee fund of the House of Lords the sum of 200l.: (S. O. IV., Nov., 1876.)

Parties suing *in formâ pauperis* are not required to enter into the bond, or pay the money: (D. & S. 53.)

Within one week after the presentation of the appeal the appellant or appellants [must] pay in to the account of the fee fund of the House of Lords the said sum of two hundred pounds, or submit to the Clerk of the Parliaments the names of the sureties proposed to enter into the said bond. All drafts and cheques must be made payable to "House of Lords Fee Fund," and be crossed, "Bank of England, Western Branch:." (S. O. IV., Nov. 1876.)

Two clear days' previous notice of the names so proposed, for bond . . . [is] to be given to the solicitor or agent of the respondents: (*Id.*)

(c) *Certificate of Sufficiency of Substitute and Sureties.*

At the time of submitting the said names to the Clerk of the Parliaments a certificate from the solicitor or agent of the appellants is to be lodged in the Parliament office, certifying his belief in the sufficiency of the sureties and substitutes so proposed: (Directions, S. O., Nov., 1876.)

The form of certificate is given in the Standing Orders of Nov., 1876.

This certificate may be signed by the country solicitor or agent of the appellants: (App. A., S. O., Nov., 1876.)

(d) *Objecting to Substitute.*

Objections to the substitute must be made by lodging within one week after lodgment of the certificate, a written statement setting forth the grounds of objection. If the Clerk of the Parliaments should think it a valid one, the appellant must, within three weeks after presentation of the appeals, lodge a petition in justification of his nomination, together with an affidavit by the proposed substitute setting forth specifically the nature of the property in consideration of which he claims to be

accepted, and also that it is unincumbered. A copy of the affidavit must be served on the agent of the respondent before lodgment of the same. Respondent's counter affidavits, if any, must be lodged as early as possible, copies being served on the appellant's agent. The petition in justification will as a general rule be ordered to lie on the table. The Clerk of Parliaments, upon considering the affidavits, will either accept or reject the substitute, and the petition will, at the instance of the Clerk of Parliaments, be ordered as prayed, or referred to the appeal committee : (D. & S. 50.)

(e) *Execution and Return of Bond and Recognisance.*

At the termination of one week from the lodgment of such certificate, the bond and recognisance are to be issued to the solicitor or agent of the appellants for execution before a commissioner appointed to administer oaths in the Supreme Court of Judicature in England, or a commissioner appointed to administer oaths in Chancery in Ireland, or before a justice of the peace in Scotland : (Directions, S. O., Nov., 1876.)

The said bond and the recognisance (whether entered into by the appellants or by a substitute) [must] be returned to the Parliament office duly executed within one week from the date of the issue thereof to the solicitor or agent of the appellant or appellants. On default by the appellant or appellants in complying with the above conditions, the appeal to stand dismissed : (S. O., IV., Nov., 1876.)

The solicitors of those respondents who purpose lodging printed cases in answer to the appeal should attend at the Parliament office for the purpose of ascertaining the due execution of the recognisance and bond : (Directions, S. O. Nov., 1876.)

9. APPEARANCE.

The solicitors of those parties who propose lodging printed cases in answers to the appeal should attend at the Parliament office for the purpose of . . . entering their names in the appearance book. (Notice of the meeting of the appeal committee is only sent to the solicitors of respondents who have thus signified their appearance in the cause) : (Directions, S. O., Nov., 1876.)

10. APPENDIX OF DOCUMENTS.

(a) *Preparation of Appellant's Appendix.*

It is the duty of the appellant, with as little delay as possible after the presentation of the appeal, to furnish to the respondent a list of the proposed documents, and in due course a proof copy of the appendix. The proof is to be examined with the original documents by the respective solicitors of the parties : (Directions, S. O., Nov., 1876.)

The costs incurred in printing . . . will in the first instance be borne by the appellant : (*Id.*)

As to the manner of printing, see *post*, 11.

(b) *Delivery of Printed Copies.*

Ten copies of the appendix, as soon as printed, [are] to be delivered to the solicitor of the respondent : (*Id.*)

(c) *Preparation of Respondent's Appendix.*

The respondent is allowed to print any additional documents, used in evidence in the court below, which may be necessary for the support of his case on the argument of the appeal, such documents to be paged consecutively with the appendix : (*Id.*)

The proof [is] to be examined . . . by the respective solicitors, and [ten] prints [are] to be delivered to the solicitor of the appellants : (*Id.*)

The costs will, in the first instance, be borne by the respondent : (*Id* and see *post*, 11.)

11. PRINTED CASES.

(a) *How Printed.*

The case and appendix must be printed 4to size, with seven or eight letters in the margin for facilitating references, and should be submitted in proof to the clerks in the judicial office : (Directions, S. O., Nov., 1876.)

When reference is made to a document printed in the appendix, the case must contain a marginal note of the page of the appendix containing such document : (*Id.*)

(b) *To be Signed by Counsel.*

All printed cases [are to] be signed by one or more counsel who shall have attended as counsel in the court below, or shall purpose attending a counsel at the hearing in [the] house : (S. O. V., r. 3, Nov., 1876.)

(c) *Joint Case.*

In appeals in which the parties are able to agree in their statement of the subject-matter, it is optional to lodge a joint case with reasons *pro* and *con.*, following the practice heretofore in use in common law appeal on a special case : (Direction, S. O., Nov., 1876.)

(d) *Lodgment.*

(1) Number of Copies.

Forty copies (unbound) of the case and appendix are required to be lodged in the Parliament office : (Directions, S. O., Nov., 1876.)

(2) Time.

The printed cases and the appendix thereto [must] be lodged in the Parliament office within six weeks from the date of the presentation of the appeal to the House : (S. O. V., Nov., 1876.)

If the period expires during a recess it is extended to the third sitting day of the next ensuing meeting of the House : (S. O. VII., Nov., 1876.)

(3) Default.

On default by the appellant the appeal (will) stand dismissed : (S. O. V. Nov., 1876.)

There is no penalty on respondents who do not lodge their printed case within the above time (Directions to S. O., Nov., 1876), but respondent can only appear at the bar on a printed case : (*Id.*)

(4) Bound Copies.

On the lodgment of the respondent's case, ten . . . copies [bound in the manner specified in the following directions] are to be lodged in the Parliament office : (Directions, S. O., Nov., 1876.)

(*Directions for Binding Printed Cases for the use of the Law Lords.*)

1. Ten copies bound in purple cloth; two of the ten to be interleaved as regards the cases only.

2. Short title of cause on the back.

3. Label on side, stating short title of cause and contents of the volume thus :—

“A — and others *v.* B — and others.”

Printed copy of the appeal.

Appellants' case.

Respondent B.'s case.

Respondent C.'s case.

Appendix.

4. The volume to be indented, and the names of the parties written on the indentations to their respective cases.

5. References to the reports of the cause in the courts below, or the words "Not reported," to be written on the fly sheet.

6. The bound copies to be lodged immediately after the respondent's cases are delivered in.

The agents are requested to use their discretion as to the size of the volume, arrangement of the cases, and appendix. In dealing with bulky cases, it may be found advisable to bind the appendix as a separate volume, and also to divide the appellants' and respondents' cases into separate volumes.

It is the duty of the appellants' agent to carry out these directions : (App. B., S. O., Nov., 1876.)

(e) *Extending Time for Lodgment.*

Petition for Extension of Time to Lodge Cases, &c.

The petition must be engrossed on foolscap paper, and (unless assent of respondent's agent be obtained) a copy, and two clear days' notice of intention to present, must be given to respondent's agent : (App. C., S. O., Nov., 1876.)

The form of petition is given in the appendix to the Standing Orders of November, 1876.

Petitions for extension of time, lodged during the recess, do not prevent the dismissal of an appeal : (Direction to S. O., Nov., 1876.)

(f) *Amendment.*

The printed cases may be amended on petition, of which two previous clear days' notice should be given to the other side : (D. & S. 90.)

When there is a statement of fact in the case presented by the appellant, the respondent, if he objects thereto, should apply to have it struck out : (*Id.*)

When clerical errors occur, and the parties consent, leave to amend is sometimes given on application by letter to the judicial office, but not to do so by the pen : (*Id.*)

(g) *Supplemental Case.*

When any party or parties to an appeal shall die pending the same, subsequently to the printed case having been lodged, and the appeal shall be revived against his or her representative or representatives as the person or persons standing in the place of the person or persons so dying as aforesaid, a supplemental case shall be lodged by the party or parties so reviving the same respectively, stating the order or orders respectively made by the House in such case : (S. O. VIII., Nov. 1876.)

Supplemental cases need not be lodged upon reviving an appeal which has become abated after a full hearing : (D. & S. 96.)

The like rule shall be observed by the appellant or respondent respectively, when any person or persons, party or parties in the court below have been omitted to be made a party or parties in the appeal before [the] House, and shall by leave of the House, upon petition or otherwise, be added as a party or parties to the said appeal after the printed cases in such appeal shall have been lodged : (*Id.*)

12. ADDITIONAL CASES.

An additional case may be allowed, on petition by either party : (D. & S. 91.)

13. PRELIMINARY OBJECTIONS.

Objections that the appeal is incompetent or irregular should be taken before the appeal is set down by petition to the House praying that it may be dismissed or amended on the ground named : (D. & S. 55.)

It is generally referred to the Appeal Committee, who either report on

the point, or advise that the question should be argued by one counsel on each side at the bar : (*Id.*)

14. SETTING DOWN.

The appeal [must] be set down for hearing on the first sitting day after the expiration of [the period allowed for lodging the printed cases] or as soon before, at the option of either party, as all the printed cases and the appendix have been lodged : (S. O. V., Nov., 1876.)

As soon as the printed cases of all parties and the appendix thereto have been lodged, it is optional for either side to set down the cause for hearing, but it is obligatory on the appellant, upon the lodgment of his printed cases and the appendix, to set down the cause for hearing within the time limited (*ex parte* as to those respondents who have not already lodged printed cases, upon proof, by affidavit, of the due service of the order of service upon the respondents or their solicitors) : (Directions to S. O., Nov., 1876.)

A respondent who has lodged his printed cause is at liberty to set down the cause for hearing on the first sitting day after the expiration of the time limited for lodging printed cases : (*Id.*)

[After the cause is set down it will be] ripe for hearing, and will take its position on the effective cause list : (*Id.*)

15. HEARING.

Parties may appear in person at the bar of the House, or by any number of counsel, two of whom only will be heard on behalf of each party : (D. & S. 30.)

When the case comes on it is taken to be regular, but when an objection to its form is taken by the respondent, the House may permit the hearing on the merits, giving leave to the appellant to present an amended petition *nunc pro tunc* : (D. & S. 55.)

In *Fernie v. Young* (Lords' Journ., 24th April, 1866), on such an objection the appeal was dismissed with costs : (*Id.*)

When no party appears, the appeal is dismissed for want of prosecution without costs on either side : (D. & S. 99.)

When the appellant only fails to appear, the respondent may have the appeal dismissed, costs being in their Lordships' discretion, and generally the dismissal is with costs : (*Id.* 100, and see *post.*) Unless the judgment is affirmed, it is doubtful whether the appellant may, if within time, bring a fresh appeal : (*Id.* 102.)

Counsel are heard as follows : Two counsel open the case of the appellants, or of each class of the appellants where the interests of the classes and the grounds of appeal differ ; then two counsel are heard for the respondents or for each similar class ; where the defence is the same only one counsel is heard for each class, then one counsel for the appellant, or for each class of appellants, as above, is heard : (D. & S. 103.)

The parties are bound by the reasons stated in their respective cases, but their counsel may urge other grounds : (D. & S. 83.)

Parties cannot raise objections not raised in the court below, and on which they did not obtain the judgment of the court below, but such objection, may be raised in support of a decree : (*Id.*, 107.)

A respondent is not allowed, where there is no cross appeal, to contend that in one respect the decree below is too favourable to the appellant : (*Id.*)

16. EVIDENCE.

As a rule, no evidence can be used which is not used in the court below, but under special circumstances the rule may be departed from : (D. & S. 81, 111.)

As a rule, only those matters can be referred to which are in the printed

cases and the appendix, unless by consent some of them are referred to (*Id.*, 109); but the court has, on the prayer of the parties, heard documents so referred to read at length: (*Id.*)

A question of evidence may be argued, although not raised by the petition of appeal: (*Id.*, 114.)

When the decree does not refer to the evidence on which it is founded, the House cannot look at the evidence: (*Id.*, 115.)

17. REHEARING.

If a case raises questions of considerable difficulty and importance, and there is a strong difference of opinion among their Lordships, the House will direct the appeal to be reheard: (D. & S. 109; *De la Warre v. Sackville*, W. N. 1877, p. 217; Lords' Journ. 3rd Aug., 1877.)

18. JUDGMENT.

(a) *Delivery.*

Their Lordships state their reasons for advising the House to give judgment, affirming, reversing, or varying the decision appealed, after which the question is put, and the result announced by the Lord Chancellor: (D. & S. 116-7; *Pryce v. Monmouthshire Company*, 49 L. J. 130, Q. B.)

If the votes are equal, the decision is affirmed: (*Id.*)

It is the function of the House to pronounce the judgment which the court below should have pronounced: (*Id.*, 137.)

(b) *Application as to Costs.*

All application for costs, either of the affirmance or reversal of the appeal, or in the court below, must be made after their Lordships have stated their reasons, and before the House gives its judgment: (D. & S. 117.)

(c) *Draft Judgment.*

A draft copy of the judgment is drawn up by the Clerk of the Parliaments, and sent to the agents of all parties who have appeared at the bar on printed cases, to which draft a note of instructions is appended: (D. & S. 118.)

A special day is named on the draft for its return, and the draft must be returned, if other than clerical alterations are made, to the judicial office, with reasons for and against the proposed amendments: (D. & S. 117-8.)

The amendments and reasons are considered by the Clerk of the Parliaments, and the questions determined by him, or referred, at his instance, to one of their Lordships: (D. & S. 118.)

(d) *Fair Copy.*

When the wording is decided on, a fair copy, signed by the Clerk of the Parliaments, is issued to the successful litigant; and this is the authoritative judgment, and further amendments are virtually impossible: (D. & S. 119.)

(e) *Entry in Journals.*

The judgment is recorded in the journals of the House: (*Id.*)

(f) *Printed Copies.*

Printed copies of the judgment are supplied to the agents requiring them: (*Id.*)

(g) *Finality.*

The judgment is conclusive in the particular case: (D. & S. 132.)

(h) *Amendment after Entry.*

The form of judgment may be amended after entry in the journals on good grounds shown, e.g., some clerical error in drawing up, or some palpable and evident mistake apart from the merits: (D. & S. 133.)

The judgment may be amended on a point on which no judgment has been given below, and on which, through misapprehension, no argument has been stated to the House by the party against whom judgment was pronounced : (*Id.*)

(i) *Making Judgment an Order of the High Court.*

When the decision below is simply affirmed, the judgment of the House need not be made an order of the court below : (D. & S. 137.)

When the decision is varied or reversed, it must be made an order of the court below : (*Id.*)

The application must be made to the Chancery Division, not the Court of Appeal : (*British Dynamite Company v. Krebs*, L. Rep. 11 Ch. Div. 448.)

19. REMITTING CAUSE.

The House will in some cases reverse or vary a decision, and remit the cause back, with a declaration as to the course the court below is to take : (D. & S. 139.)

20. STAYING PROCEEDINGS BELOW.

The court can still stay proceedings below, pending appeal, but it is not the practice to do so, unless an application for the purpose has been made below and refused : (D. & S. 76.)

21. CROSS APPEAL.

All cross appeals [must] be presented to the House within the period allowed . . . for lodging cases in the original appeal : (S. O. VI., Nov. 1876.)

Separate printed cases must be lodged, unless leave is given on petition to include the matter in the original cases : (D. & S. 91.)

No security for costs is required : (*Id.*)

22. CONSOLIDATIONS.

Two or more appeals in a cause involving the same facts and points of law may be consolidated on petition : (D. & S. 44.)

23. APPEAL COMMITTEE.

The Appeal Committee is composed of such members of the House as attend during the Session : (D. & S. 29.)

It investigates the matters forming the subject of petition in judicial causes, and reports to the house. It recommends either a simple admission or rejection of the prayer of the petition, or it sets forth a special order for the consideration of the House. Practically the report is always adopted by the House : (*Id.*)

Counsel are not generally heard, but have been once, special leave being given : (*Id.*, citing *Lords' Jour.* 3rd Aug. 1877.)

24. INCIDENTAL APPLICATIONS.

The petition must be engrossed on foolscap paper bookwise. If the assent of the other side is refused, two clear days previous notice of the intention, with a copy of the petition must be served on the opposing agent, two copies being lodged in Parliament Office : (D. & S. 96.)

Application for postponement of a cause not in the paper must be made by petition or letter addressed to the Clerk of Parliament, through the judicial office : (*Id.*)

25. COSTS.

(a) *Of Cause.*

The House possesses power to deal with the costs of an appeal, and also with the costs below : (D. & S. 142.)

[The bond or sum given or paid as security for costs (*ante*) is] subject

to the order of the House with respect to the costs of the appeal: (S. O. IV., Nov. 1876.)

It was, up to 1877, the almost invariable practice not to give costs of a reversal (D. & S. 142, 145) but during and since the session of that year they have frequently been given: (*Id.* 145; *Garnet v. Bradley*, L. Rep. 3 App. Cas. 944; 39 L. T. Rep. N. S. 261; 48 L. J. 186, Ex.; 26 W. R. 698.)

Generally a successful respondent obtains his costs: (*Id.*)

When the decision of the Court of Appeal, reversing the decision of the court below, was reversed, and the original order restored, the costs of appeal to the Court of Appeal, but not of the appeal of the House, were given to the party ultimately successful: (*Minors v. Battison*, L. Rep. 1 App. Cas. 428.)

When their lordships are equally divided in opinion, the recent practice has been to give no costs: (*Pryce v. Monmouthshire Company*, 49 L. J. 130, Q. B.)

The court will, under particular circumstances, direct the costs of some or all of the parties to be paid out of the estate (*Id.*, 159), but not when the effect will be to make the winning party pay them: (*Id.*, 161.)

(b) *On Dismissal for Non Pros.*

Where neither party appeared, the dismissal was without costs: (*Id.*)

When the appellant does not appear the dismissal will be with costs: (*Id.*)

(c) *On Non-appearance of Respondent.*

When the respondent has not appeared till the appeal is appointed for hearing, he will not, although heard at the bar, be allowed his costs although the appeal is dismissed: (D. & S. 163.)

(d) *When Cause Remitted.*

When a cause is remitted, the court below may be left to deal with the general costs in the cause; or the costs of the appeal, and in the court below, may, when further proceedings are necessary, be ordered to be costs in the cause: (*Id.* 165.)

(e) *Ultimate Costs of Printing Appendices.*

These costs will ultimately be subject to the decision of the House with regard to the costs of the appeal: (Directions, S. O., Nov., 1876.)

(f) *Taxation.*

(1) *On Application of Party.*

In all cases in which [the] House shall make any order for payment of costs by any party or parties in any cause without specifying the amount the Clerk of the Parliaments or clerk assistant shall, upon the application of either party, appoint such person as he shall think fit to tax such costs: (S. O., Nov., 1876.)

The application is made by depositing in the taxing officer's office a copy of the bill of costs, with a request to tax indorsed thereon (Notice, Aug. 1877; see *Form* there.)

A copy of the bill must also be served on the agent of the other side: (D. & S. 169.)

And it is further ordered, that the same fees shall be demanded from and paid by the party applying for such taxation for and in respect thereof as are now or shall be fixed by any resolution of this House concerning such fees; and the said person so appointed to tax such costs may, if he thinks fit, either add or deduct the whole or a part of such fees at the foot of his report: (S. O. X., Nov. 1876.)

The person so appointed may tax and ascertain the amount and shall report the same to the Clerk of the Parliaments, or clerk assistant: (*Id.*)

And the Clerk of the Parliaments or clerk assistant may give a certificate of such costs, expressing the amount so reported to him as aforesaid; and the amount in money certified by him in such certificate shall be the sum to be demanded and paid under or by virtue of such order as aforesaid for payment of costs: (*Id.*)

(2) When Cause Remitted.

The Chancery Division may send a requisition to the taxing officer of the House to tax the costs: (D. & S. 170.)

(3) On Requisition of Master of Rolls, &c.

Costs relating to appeals are also taxed upon a requisition from the Master of the Rolls, &c., as in costs relating to private bills: (Notice of Aug., 1877.)

26. APPLICATION OF 200*l.* DEPOSIT.

(a) When Appeal Affirmed.

In all cases where the appellant has paid in the sum of 200*l.*, and when the House shall make any order for payment of costs by the appellant to the respondent, the Clerk of the Parliaments, or clerk assistant, shall pay over to the respondent or his agent the said sum of 200*l.*, or so much thereof as will liquidate the amount reported to the clerk of the Parliaments or clerk assistant by the taxing officer, as being due from the appellant to the respondent in respect of the appeal: (Directions to Agents.)

In all cases where the amount so reported by the taxing officer shall exceed 200*l.*, the Clerk of the Parliaments, or clerk assistant shall, in his certificate, credit the appellant with the 200*l.* so paid over to the respondent: (*Id.*)

Where there are two or more respondents entitled to their separate costs, the said 200*l.* shall be divided between the respondents in proportion to the amount of costs reported by the taxing officer to be due to each respondent: (*Id.*)

Where, after satisfying the order of the House, there be any sum remaining, part of the said 200*l.*, the same shall be paid back to the appellant or his agent upon a proper receipt for the same being given to the Clerk of the Parliaments or clerk assistant: (*Id.*)

(b) When Appeal Reversed.

In all cases in which the appellant is not ordered to pay the costs of the appeal, the Clerk of the Parliaments or clerk assistant shall, on receiving a proper receipt for the same, pay back to the appellant or his agent the said sum of 200*l.*: (*Id.*)

(c) When Appeal Dismissed for Non Pros.

In cases in which an appeal is dismissed for want of prosecution, the appellant shall be at liberty to serve a notice of such dismissal, according to the form (App. D. to S. O., Nov., 1876), upon the agent of the respondents (such service to be verified, if necessary, by affidavit); and unless the respondent shall, within four weeks from the date of such service, if the House be then sitting, or not later than the third sitting day after the expiration of the said four weeks, lodge in the office of the taxing officer of the House a copy of his bill of costs, the Clerk of the Parliaments or clerk assistant shall, upon a proper receipt for the same being given, repay to the appellant or his agent the said sum of 200*l.*: (*Id.*)

In the event of the respondent so lodging his bill of costs as aforesaid, the taxing officer may, if the sum demanded by the respondent be less than 200*l.*, tax the same; and the Clerk of the Parliaments or clerk assistant shall pay over to the respondent or his agent so much of the

said sum of 200*l.* as will liquidate the amount reported to the Clerk of the Parliaments or clerk assistant as being due from the appellant to the respondent in respect of the appeal, and the remaining portion of the said sum of 200*l.* shall be paid back to the appellant or his agent upon a proper receipt for the same being given to the Clerk of the Parliaments or clerk assistant: (*Id.*)

27. PAYMENT OF COSTS OUT OF RECOGNISANCE OR BOND.

After taxation, personal demand and service of the certificate of costs must be made on the losing party: (Den. & Sc. 172.)

If he absent himself a petition must be presented for substituted service on the agent: (*Id.*)

After service personally of judgment and personal demand, in case of refusal, the recognisance may be ordered to be estreated and proceedings taken to enforce the bond, on petition, with two clear days' previous notice: (*Id.* 173.)

After the estreat the respondent must petition the Lords of the Treasury for payment: (*Id.*)

APPEARANCE.

I. BY DEFENDANTS GENERALLY.

1. WHERE ENTERED.
2. TIME.
3. HOW ENTERED.
4. EFFECT.

II. BY INFANTS.

III. BY MARRIED WOMEN.

IV. BY LUNATICS (SO FOUND)

V. BY LUNATICS (NOT SO FOUND.)

VI. BY PARTNERSHIP FIRMS.

1. CONSISTING OF SEVERAL PERSONS.
2. CONSISTING OF ONE PERSON.

VII. BY THIRD PARTIES.

1. UNDER COUNTER-CLAIM.
2. UNDER NOTICE.

VIII. BY PARTIES ADDED.

IX. IN ACTIONS FOR RECOVERY OF LAND.

X. TO ORIGINAL SUMMONS.

XI. CONDITIONAL APPEARANCE.

XII. NOTICE OF APPEARANCE.

1. GENERAL RULE.
2. WHERE ENTERED AFTER TIME LIMITED.
3. BY A PERSON NOT ORIGINALLY DEFENDANT IN LAND ACTIONS.
4. ON CONDITIONAL APPEARANCE.

XIII. SETTING ASIDE.

1. FICTITIOUS ADDRESS.
2. ENTERING WITHOUT AUTHORITY.

XIV. BREACH OF UNDERTAKING TO APPEAR.

XV. WHERE SUBSEQUENT PROCEEDINGS TAKE PLACE.

XVI. DEFAULT.

I. BY DEFENDANTS GENERALLY.

1. WHERE ENTERED.

[If the writ is issued from the principal office.]

The defendant shall enter his appearance in London (Order XII., r. 1),

in the Writ, Appearance, and Judgment Department of the Central O (O. LXa., Dec., 1879; O. XII., r. 1a, April, 1880.)

[If the writ is issued out of a district registry.]

(1.) If any defendant . . . resides or carries on business within the district, he shall appear in the district registry.

(2.) If any defendant neither resides nor carries on business in the district, he may appear either in the district registry or in London: (O. XII., rr. 2, 3.)

2. TIME.

Where the service is within the jurisdiction, appearance must be entered within eight days after service of the writ, inclusive of the day of service: (see Form of Writ, App. A., pt. I., No. 1.)

Where the service is out of the jurisdiction appearance must be entered within the time directed by the order, which will appear in the body of the writ: (See Form of Writ, App. A., pt. I., No. 2; O. XI., r. 4.)

A defendant may appear at any time before judgment (O. XII., r. 15); but if after the times limited he must give notice thereof: (*Id.*, *supra*, XII.)

After judgment an appearance can only be entered by a defendant to leave of the court on an application by him for liberty to enter such an appearance, and attend the proceedings; the defendant submitting to be bound by the judgment and proceedings already had: (Dan. 462.)

The application is by petition of course, if the plaintiff will consent and, if not, by motion on notice or summons: (*Id.* 463, 139.)

A copy of the order when passed and entered should be served on the solicitors of the other defendants, and on the plaintiff's solicitor, when made on petition: (*Id.* 140.)

3. HOW ENTERED.

A defendant shall enter his appearance to a writ of summons by delivering to the proper officer a memorandum in writing, dated on the day of its delivery, and containing the name of the defendant's solicitor, stating that the defendant defends in person: (O. XII., r. 6 b, April 1880.)

He shall at the same time deliver to the officer a duplicate of the memorandum, which the officer shall seal with the official seal, showing the date on which it is sealed, and then return to the person entering the appearance, and the duplicate memorandum so sealed shall be a certificate that the appearance was entered on the day indicated by the seal: (*Id.*)

If two or more defendants in the same action shall appear by the same solicitor and at the same time, the names of all the defendants so appearing shall be inserted in one memorandum: (O. XII., r. 13.)

The solicitor of a defendant appearing by a solicitor shall state in such memorandum his place of business, and, if the appearance is entered in the London office, a place, to be called his address for service, which shall not be more than three miles from Temple Bar, and if the appearance is entered in a district registry, a place, to be called his address for service which shall be within the district: (O. XII., r. 7.)

A defendant appearing in person shall state in such memorandum his address, and, if the appearance is entered in the London office, a place, to be called his address for service, which shall not be more than three miles from Temple Bar, and, if the appearance is entered in a district registry, a place, to be called his address for service, which shall be within the district: (O. XII., r. 8.)

If the memorandum does not contain such address, it shall not be

received; and, if any such address shall be illusory or fictitious, the appearance may be set aside: (O. XII., r. 9.)

The memorandum of appearance shall be in the form [given in the rules of April, 1880,] with such variations as the circumstances of the case may require: (O. XII., r. 10, Sched. E 21, Rules, April, 1880.)

Upon receipt of a memorandum of appearance, the officer shall forthwith enter the appearance in the cause book: (O. XII., r. 11.)

4. EFFECT.

The effect of entering an ordinary appearance is to waive any irregularity in the prior proceedings: (Dan. 459); and any objection to the jurisdiction. As to the irregularity, compare *Re Pilcher*: (L. Rep. 12 Ch. Div. 905.)

The defendant to avoid waiver should enter a conditional appearance: (see *post*, XI.)

II. BY INFANTS.

An infant appears in the usual way, but he cannot take any further step until a guardian has been appointed: (Ayck. 588.)

In case of appearance after judgment the court must be satisfied that it is for the interest of the infant to adopt the proceedings: (Dan. 140.)

Where no appearance has been entered to a writ of summons for a defendant who is an infant . . . the plaintiff may apply to the court or a judge for an order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action. But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of such application was, after the expiration of the time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such writ of summons, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of the father or guardian, if any, of such infant, unless the court or judge at the time of hearing such application shall dispense with such last-mentioned service: (O. XIII., r. 1.)

III. BY MARRIED WOMEN.

In an action against husband and wife the husband should appear for both. If he fail to appear for the wife, an appearance may be entered for her by the plaintiff on proof of service of the writ on the husband alone: (Ayck. 597.)

Married women may also, by the leave of the court or a judge, . . . defend without their husbands, . . . on giving such security (if any) for costs as the court or a judge may require: (O. XVI., r. 8.)

A married woman, co-defendant with her husband, cannot appear separately from him without first obtaining special leave: (*Noel v. Noel*, L. Rep. 13 Ch. Div. 510.)

IV. BY LUNATICS (SO FOUND).

In all cases in which lunatics . . . [formerly] would have been liable to be sued as defendants in any action or suit . . . they may [in manner practised in the Court of Chancery] defend any action by their committees: (O. XVIII.)

If the lunatic has no committee, or the committee has an interest opposite to that of the lunatic, an order may be obtained for appointing another person as guardian for the purpose of defending, on motion or petition, as of course, supported by an affidavit as to the fitness of the proposed guardian, and that he has no interest adverse to the defendant: (Ayck. 601-2.)

V. BY LUNATICS (NOT SO FOUND).

In all cases in which. . . persons of unsound mind not so found by inquisition [formerly] would have been liable to be sued as defendants in any action or suit, they may [in manner practised in the Court of Chancery] defend any action by their. . . guardians appointed for that purpose: (O. XVIII.)

Where no appearance has been entered to a writ of summons for a defendant who is. . . a person of unsound mind not so found by inquisition, the plaintiff may apply to the court or a judge for an order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action. But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of such application was, after the expiration of the time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such writ of summons: (O. XIII., r. 1.)

VI. BY PARTNERSHIP FIRMS.

1. CONSISTING OF SEVERAL PERSONS.

Where partners are sued in the name of their firm, they shall appear individually in their own names. But all subsequent proceedings shall, nevertheless, continue in the name of the firm: (O. XII., r. 12.)

2. CONSISTING OF ONE PERSON.

Where any person carrying on business in the name of a firm apparently consisting of more than one person shall be sued in the name of the firm, he shall appear in his own name; but all subsequent proceedings shall, nevertheless, continue in the name of the firm: (O. XII., r. 12 a, Feb., 1876.)

VII. BY THIRD PARTIES.

1. UNDER COUNTER-CLAIM.

When a counter-claim raises questions between the defendant and the plaintiff along with any other person or persons, such last-named person or persons must enter an appearance within eight days from the service of the defence and counter-claim on him or them: (O. XXII., rr. 5, 6; App. B. No. 4.)

A form of memorandum of appearance is given in schedule E 25 to the Rules of April, 1880.

2. UNDER NOTICE.

If a person not a party to the action, who is served [with notice by a defendant of claim for relief over under Order XVI., r. 18] desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, he must enter an appearance in the action within eight days from the service of the notice. In default of his so doing, he shall be deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise. Provided always, that a person so served and failing to appear within the said

period of eight days may apply to the court or a judge for leave to appear, and such leave may be given upon such terms, if any, as the court or a judge shall think fit: (O. XVI., r. 20.)

A form of memorandum of appearance is given in schedule F 24 to the Rules of April, 1880.

VIII. BY PARTIES ADDED.

[A person, whether plaintiff or defendant, made a new party by an order under Order L., r. 4, and served therewith] shall be bound to enter an appearance thereto within the same time and in the same manner as if he had been served with a writ of summons: (O. L., r. 5.)

A form of memorandum of appearance is given in schedule E 23 to the Rules of April, 1880.

Parties added in other cases must enter an appearance: (See O. XVI., rr. 15, 16.)

[See PARTIES.]

IX. IN ACTIONS FOR RECOVERY OF LAND.

Any person not named as a defendant in a writ of summons for the recovery of land may by leave of the court or judge appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or his tenant: (O. XII., r. 18.)

Leave was given to an equitable tenant for life, in possession, to defend, and to use the name of the trustee, who had been named defendant, an indemnity to him against costs being ordered: (*Longbourne v. Fisher*, W. N. 1878, p. 28; 38 L. T. Rep. N. S. 216; 47 L. J. 379, Ch.; 26 W. R. 277.)

Any person appearing to defend an action for the recovery of land as landlord in respect of property whereof he is in possession only by his tenant, shall state in his appearance that he appears as landlord: (O. XII., r. 19.)

Where a person not named as defendant in any writ of summons for the recovery of land has obtained leave of the court or judge to appear and defend, he shall enter an appearance according to the foregoing rules, intituled in the action against the party or parties named in the writ as defendant or defendants, and shall forthwith give notice of such appearance to the plaintiff's solicitor, or to the plaintiff if he sues in person, and shall in all subsequent proceedings be named as a party defendant to the action: (O. XII., r. 20.)

Any person appearing to a writ of summons for the recovery of land shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in his memorandum of appearance or in a notice intituled in the cause, and signed by him or his solicitor; such notice to be served within four days after appearance; and an appearance where the defence is not so limited shall be deemed an appearance to defend for the whole: (O. XII., r. 21.)

The form of memorandum limiting defence is given in schedule E 22 to the Rules of April, 1880.

In case no appearance shall be entered in an action for the recovery of land, within the time limited for appearance, or if an appearance be entered but the defence be limited to part only, the plaintiff shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply: (O. XIII., r. 7.)

The notice mentioned . . . may be in the [following] form, with such variations as circumstances may require: (O. XII., r. 22):—

[Here put the letter and number.]

"In the High Court of Justice.

Queen's Bench (or Chancery C.P., or, &c.) Division.

Between *A.B.*, plaintiff,

and

C.D., and

E.F., defendants.

The defendant *C.D.* limits his defence to part only of the property mentioned in the writ in this action, that is to say, to the close called 'the Big field.'

Yours, &c.,

G.H.,

Solicitor for the said defendant *C.D.*

To Mr. *X.Y.*, plaintiff's solicitor."

(App. A. pt. I., No. 7.)

X. TO ORIGINAL SUMMONS.

Where proceedings originate in chambers, the parties served shall, before they are heard in chambers, enter appearances in the [Central] Office, and give notice thereof: (C. O. 35, r. 9.) [See ADMINISTRATION ON SUMMONS, CHAMBERS.]

XI. CONDITIONAL APPEARANCE.

A conditional appearance is necessary where the defendant wishes to avoid waiving irregularity in prior proceedings, or objections as to the jurisdiction: (Dan. 459; Day C. L. P. 40.)

Leave must be obtained on separate motion, or on petition of course, the defendant consenting to submit to any process which may be issued against him thereon: (Dan. 460.)

The appearance is entered at the entering seat in the registrar's office on production of the order: (*Id.*)

XII. NOTICE OF APPEARANCE.

1. GENERAL RULE.

A defendant shall, on the day on which he enters an appearance to a writ of summons, give notice of his appearance to the plaintiff's solicitor, or, if the plaintiff sues in person, to the plaintiff himself. The notice may be given either by notice in writing, served in the ordinary way at the address for service, or by prepaid letter directed to that address, and posted on the day of entering appearance in due course of post, and shall in either case be accompanied by the sealed duplicate memorandum [mentioned, *sup.* I., r. 3.]: (O. XII., r. 6b, April, 1880.)

A form of notice of entry of appearance is given in schedule B. 20 to the Rules of April, 1880.

If no notice is given, the appearance is incomplete, and judgment in default may be signed: (*Smith v. Dobbin*, W. N. 1877, p. 20; 47 L. J. 65, Ex.)

2. WHERE ENTERED AFTER TIME LIMITED.

If he appear at any time after the time limited for appearance he shall on the same day give notice thereof to the plaintiff's solicitor, or to the plaintiff himself if he sues in person, and he shall not, unless the court or a judge otherwise orders, be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ: (O. XII., r. 15.)

If after judgment, notice must be given the same day: (Dan. 140.)

3. BY A PERSON NOT ORIGINALLY DEFENDANT IN LAND ACTIONS.
[See *ante*, IX.]

4. ON CONDITIONAL APPEARANCE.

Notice must be given the same day : (Dan. 460.)

XIII. SETTING ASIDE.

1. FICTITIOUS ADDRESS.

If any address [required to be inserted in the memorandum of appearance of a defendant appearing in person] shall be illusory or fictitious, the appearance may be set aside by the court or a judge, on the application of the plaintiff : (O. XII., r. 9.)
[See *ante*.]

2. ENTERING WITHOUT AUTHORITY.

If a solicitor enter an appearance without authority, the appearance may be ordered to be discharged with costs to be paid by him : (*Re Lloyd*, L. Rep. 12 Ch. Div. 449.)

XIV. BREACH OF UNDERTAKING TO APPEAR.

A solicitor not entering an appearance in pursuance of his written undertaking so to do on behalf of any defendant shall be liable to an attachment : (O. XII., r. 14.)

XV. WHERE SUBSEQUENT PROCEEDINGS TAKE PLACE.

If a sole defendant appears, or all the defendants appear in the district registry, or if all the defendants who appear appear in the district registry and the others make default in appearance, then, subject to the power of removal hereinafter provided, the action shall proceed in the district registry : (O. XII., r. 4.)

If the defendant appears, or any of the defendants appear, in London, the action shall proceed in London ; provided that if the court or a judge shall be satisfied that the defendant appearing in London is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, such court or judge may order that the action may proceed in the district registry, notwithstanding such appearance in London : (O. XII., r. 5.) [See DISTRICT REGISTRY.]

XVI. DEFAULT.

In actions assigned by the 34th section of the Act to the Chancery Division . . . and in all other actions not by the rules [O. XIII.] otherwise specially provided for, in case the party served with the writ does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service the action may proceed as if such party had appeared : (O. XIII., r. 9.)

These are—

- (1.) All causes and matters pending in the Court of Chancery at the commencement of [the Act of 1873] :
- (2.) All causes and matters to be commenced after the commencement of [the] Act, under any Act of Parliament, by which exclusive jurisdiction in respect to such causes or matters has been given to the Court of Chancery, or to any judges or judge thereof respectively, except appeals from County Courts :
- (3.) All cases and matters for any of the following purposes :
The administration of the estates of deceased persons ;
The dissolution of partnerships or the taking of partnership or other accounts ;

The redemption or foreclosure of mortgages;
 The raising of portions, or other charges on land;
 The sale and distribution of the proceeds of property subject to any lien or charge;
 The execution of trusts, charitable or private;
 The rectification, or setting aside, or cancellation of deeds or other written instruments;
 The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases;
 The partition or sale of real estates;
 The wardship of infants and the care of infants' estates.
 As to the other actions, see JUDGMENT and see ACCOUNT.

APPOINTMENT OF TRUSTEES.

[See TRUSTEES.]

APPORTIONMENT OF FUND.

When a fund has to be apportioned, upon the return of the summons to proceed [see CHAMBERS] a concise statement is directed to be brought in showing the fund, the charges thereon, the persons amongst, and the amounts in which it is divisible. If any costs are payable out of the fund they will be taxed by anticipation : (Dan. 1144.)

The apportionment must be certified, as the Chancery paymaster will not act upon an affidavit verifying an apportionment : (Seton, 4th ed. 840.)

ARBITRATION.

- I. FORMER PRACTICE UNAFFECTED.
- II. WHAT MATTERS MAY BE REFERRED.
- III. WHO MAY REFER.
- IV. REFERENCE OF MATTER IN ACTION.
 1. BY CONSENT.
 2. COMPULSORILY.
 - (a) *Before Trial*
 - (b) *At Trial*
- V. MAKING SUBMISSION A RULE OF COURT.
 1. IN WHAT CASES.
 2. OF WHAT DIVISION MADE A RULE.
 3. HOW APPLICATION MADE.
 4. FILING SUBMISSION.
 5. SUBSEQUENT MOTIONS.
- VI. APPOINTMENT OF ARBITRATOR OR UMPIRE.
- VII. REVOKING PARTY'S APPOINTMENT OF SOLE ARBITRATOR.
- VIII. COMPELLING ATTENDANCE OF WITNESSES.
- IX. PROCEEDINGS BEFORE ARBITRATOR.
- X. RESTRAINING ARBITRATOR FROM ACTING.
- XI. ENLARGING TIME FOR MAKING AWARD.
- XII. STATING SPECIAL CASE.
- XIII. DIRECTING STATEMENT OF CASE OR TRIAL OF ISSUE.

XIV. REMITTING AWARD.

XV. SETTING ASIDE REFERENCE.

XVI. SETTING ASIDE AWARD.

1. GROUNDS FOR.

2. PROCEDURE.

(a) *On Submission which cannot be made a Rule.*

(b) *On Submission which has been or may be made a Rule.*

(c) *On Compulsory Reference.*

(d) *On Award under Lands Clauses Act.*

XVII. SETTING ASIDE JUDGMENT ON AWARD.

XVIII. ENFORCING AWARD.

1. WHEN SUBMISSION CANNOT BE MADE A RULE.

2. WHERE SUBMISSION HAS BEEN MADE A RULE.

3. ON JUDGE'S ORDERS.

4. ON COMPULSORY REFERENCE.

5. ORDERING DELIVERY OF POSSESSION OF LAND.

XIX. STAYING LITIGATION IN CONTRAVENTION OF ARBITRATION.

I. FORMER PRACTICE UNAFFECTED.

The former practice as to arbitration is unaffected by the Judicature Acts and Rules thereunder (*Cruikshank v. Floating Swimming Baths Company*, L. Rep. 1 C. P. Div. 260; 34 L. T. Rep. N. S. 733; 45 L. J. 684, C. P.; 24 W. R. 644; per Brett, L.J., *Longman v. East*; *Mellin v. Monaco*; *Pontifex v. Severn*, L. Rep. 3 C. P. Div. 142; 47 L. J. 211, C. P.; 26 W. R. 188; *Lloyd v. Lewis*, L. Rep. 2 Ex. Div. 7; 35 L. T. Rep. N. S. 539; 46 L. J. 81, Ex.; 25 W. R. 102); but each division of the High Court now possesses the jurisdiction formerly possessed by the courts consolidated in the High Court: (J. A., 1873, ss. 3 and 16.)

II. WHAT MATTERS MAY BE REFERRED.

The following matters (besides matters referable under particular statutes) may be referred;

All matters in dispute concerning any personal chattel, or personal wrong;

Partition, settlement of boundaries, disputes as to waste, and questions of title as to land;

Pure questions of law;

Actions or other proceedings (at any stage);

Damages;

Accounts, &c.;

The future conduct of parties with regard to the enjoyment of property: (Russell on Arbitration, 5th edit. 3-12.)

III. WHO MAY REFER.

Generally.

Everyone capable of making a disposition or release of his right can make a submission to an award: (Russ. Arb. 14.)

Infant.

When an infant is a party to an action, the court will refer it to chambers to ascertain whether the reference would be for the infant's benefit, and will make an order in accordance with the certificate made: (Russ. Arb. 18.)

Counsel.

A reference by the consent of a counsel will generally be binding on the party he represents: (Russ. Arb. 26-28.)

Committee.

A committee may, with the court's permission, bind the lunatic by a reference : (Russ. Arb. 31.)

An inquiry in chambers will be directed as in the case of an infant : (*Id.*)

Statutory Powers.

[See LANDS CLAUSES ACT, &C. And see Russell on Arbitration, Part I., c. 2.]

IV. REFERENCE OF MATTERS IN ACTION.

1. BY CONSENT.

By consent of the parties, the court will order the matters in question in an action to be referred to arbitration : (Dan. 1905.)

Forms of orders are given in Seton, 4th ed. 399, and a form is given in schedule H 22 to the Rules of April, 1880.

In an action affecting a charity, the reference will only be made with the consent of the Attorney-General : (Dan. 1906.)

If the order is silent as to the costs of the reference, each party must pay his own costs : (*Bullen v. King*, 36 L. T. Rep. N. S. 732.)

If the costs of the action and arbitration are included in the reference, the arbitrator may award them as between solicitor and client : (*Id.*)

The award need not be made an order of court before proceeding on it : (*Id.*)

As to making the award an order see *post*, V., 1.

2. COMPULSORILY.

(a) *Before Trial.*

If it be made to appear, at any time after the issuing of the writ, to the satisfaction of the court or a judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for such court or judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the court, upon such terms as to costs and otherwise as such court or judge shall think reasonable : (C. L. P. A. 1854, s. 3, as amended by 21 & 22 Vict. c. 74, s. 5.)

It was held at common law that this section applied only to applications before trial, and did not empower a judge trying a cause with a jury at Nisi Prius, to refer compulsorily : (Day, 246.)

"All matters in difference" cannot be referred under this section : (Day, 246.)

It was the practice at common law, where the matter in dispute consisted in part only of mere account, to refer the whole compulsorily (Day, 246), but since the new practice came into operation, it has been laid down by three out of four judges in the Court of Appeal that the old practice was wrong, and that the part only which is matter of mere account can be compulsorily referred : (*Clow v. Harper*, L. Rep. 3 Ex. Div. 198; 38 L. T. Rep. N. S. 269; 47 L. J. 393, Ex.; 26 W. R. 364.)

A form of order is given in schedule H 33 to the Rules of April, 1880.

The judge's discretion will not generally be interfered with : (Day, 247.)

Under the practice at common law the referee was bound to inquire into all questions arising incidentally, though not strictly matters of account : (*Id.*)

Where the order is silent as to costs, the arbitrator has no power over them (*Id.*), and after he has made his award, though he was empowered to certify by the order, he cannot certify that the action was fit to be tried in a superior court : (*Bedwell v. Wood*, 36 L. T. Rep. N. S. 213.)

(b) *At Trial.*

If upon the trial of any issue of fact by a judge under this Act it shall appear to the judge that the questions arising thereon involve matter of account which cannot conveniently be tried before him, it shall be lawful for him, at his discretion, to order that such matter of account be referred to an arbitrator appointed by the parties or to an officer of the court, upon such terms as to costs and otherwise as such judge shall think reasonable: (C. L. P. A. 1854, s. 6.)

This section is confined to the trial of issues of fact by a judge under sect. 1 of the Act of 1854: (Day, 250.)

No application by either party is necessary to give the further jurisdiction to refer: (*Id.*)

The award or certificate of such referee shall have the same effect as hereinbefore provided as to the award or certificate of a referee before trial; and it shall be competent for the judge to proceed to try and dispose of any other matters in question, not referred, in like manner as if no reference had been made: (C. L. P. A. 1854, s. 6.)

V. MAKING SUBMISSION A RULE OF COURT.

1. IN WHAT CASES.

Every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one [division of the High Court of Justice], on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of court: (C. L. P. A. 1854, s. 17.)

Where it appears from the submission that it is the intention of the parties that their respective cases shall be heard, and a decision arrived at upon the evidence which they have adduced before the arbitrator, the matter is not less an arbitration because the ultimate object is to ascertain the value of the property or the amount of compensation to be paid: (Day, C. L. P. 254.)

An agreement in the award that it may be made a rule of court makes it an irrevocable instrument except with the leave of the court, but the Act of 1854 has not that effect, and after revocation the court refused to make the reference a rule: (3 & 4 Will. 4, c. 42, s. 39; Dan, 1902; Day, 256, 259; *Randell v. Thompson*, L. Rep. 1 Q. B. Div. 748; but see *Moffat v. Cornelius*, 39 L. T. Rep. N. S. 102; *Christie v. Noble*, W. N. 1880, p. 71.)

A parol submission cannot be made a rule of court under either 9 & 10 Will. 3, c. 15, or the C. L. P. A. 1854: (Russ. Arb. 54; Day, C. L. P. 258.)

As to making submissions rules of court under 9 & 10 Will. 3, c. 15, see Russ. Arb. 51—57.

An order having been made with consent of all parties at the trial of an action that all matters in dispute be referred to arbitration, it is the award, and not the submission, that should be made a rule of court: (*Jones v. Jones*, 41 L. T. Rep. N. S. 651; 28 W. R. 133.)

2. OF WHAT DIVISION MADE A RULE.

If in any such agreement or submission it is provided that the same shall or may be made a rule of one in particular of the [divisions of the High Court], it may be made a rule of that [division] only: (C. L. P. A. 1854, s. 17.)

If when there is no such provision a case be stated in the award, for the opinion of one of the [divisions of the High Court], and such [division] be specified in the award, and the document authorising the reference have not, before the publication of the award to the parties been made a

rule of court, such document may be made a rule only of the [division] specified in the award: (C. L. P. A. 1854, s. 17.)

3. HOW APPLICATION MADE.

The application is by motion—on notice, unless the submission provides that either party may make it an order without notice: (Dan. 1902; *Re Oglesby's Arbitration*, W. N. 1879, p. 151.)

The execution of the submission must be proved, unless the application is consented to: (*Id.*)

When one person executes a submission for himself and another not his partner, his authority must be proved before the submission can be made a rule of court: (Day, 259.)

4. FILING SUBMISSION.

[In the Chancery Division] no order to make a submission to arbitration or an award a rule of court . . . shall be passed, until the original . . . submission to arbitration [or] award shall have been filed in the [Central] Office, and a note thereof made on the . . . order by the [master]: (C. O. 23, r. 23; J. A., 1879.)

5. SUBSEQUENT MOTIONS.

When in any case the document authorising the reference is or has been made a rule or order of any one of such Superior Courts, no other of such courts shall have any jurisdiction to entertain any motion respecting the arbitration or award: (C. L. P. A., 1854, s. 17.)

When the submission has been made a rule of any one division of the High Court, any motion concerning it can be made to that division only: (*Re Lomax's Arbitration*, 28 W. R. 485; W. N. 1880, p. 51.)

VI. APPOINTMENT OF ARBITRATOR OR UMPIRE.

If in any case of arbitration the document authorising reference provide that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator; or if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the terms of such document do not show that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one; or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator; or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting or die, and the terms of the document authorising the reference do not show that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one; in every such instance any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if within seven clear days after such notice shall have been served, no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any judge [of the High Court of Justice] . . . upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator as the case may be, and such arbitrator, umpire, and such arbitrator respectively shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties: (C. L. P. A., 1854, s. 12.)

A contract of sale, leaving the price to be determined by valuers and matters in difference to be determined by an umpire, is not within the section: (*Re Cox v. Hopwood*, 6 W. R. 664, cited Day, 254.)

The section applies to references under the Companies Clauses Act, and

the Companies Act, 1862 (Day, 254), and under the Railway Companies Arbitration Act, 1859 : (*Re Russell, &c., Company's Arbitration*, 42 L. T. Rep. N. S. 234.)

VII. REVOKING PARTY'S APPOINTMENT OF SOLE ARBITRATOR.

When the reference [in any arbitration] is or is intended to be to two arbitrators, one appointed by each party, it shall be lawful for either party, in the case of the death, refusal to act, or incapacity of any arbitrator appointed by him, to substitute a new arbitrator, unless the document authorising the reference show that it was intended that the vacancy should not be supplied; and if on such a reference one party fail to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party shall have appointed an arbitrator and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference, and an award made by him shall be binding on both parties as if the appointment had been by consent; provided, however, that the court or judge may revoke such appointment on such terms as shall seem just : (C. L. P. A., 1854, s. 13.)

VIII. COMPELLING ATTENDANCE OF WITNESSES.

The court making the order of reference or mentioned in the agreement that the submission may be made a rule, or any judge may, by rule or order, command the attendance and examination of any person to be named, or the production of any documents mentioned in the rule or order : (3 & 4 Will. 4, c. 42, s. 40.)

The application must state what county the witness resides in, or satisfy the court that such person cannot be found : (*Id.*)

The application may be by motion in court on affidavit, or to a judge at chambers on an affidavit or memorandum signed by the solicitor of the party who requires the evidence : (Russ. Arb. 173.)

The affidavit or memorandum must set forth the existence of the reference, either shortly or by verifying a copy of the submission, the name of the witness, the county of residence (see *sup.*), or facts to satisfy the court.

If a document is required it should be described as in a *subpœna duces tecum*. It should also be stated that the attendance or production is material. There should be annexed to the affidavit, or verified by it, a copy of the written appointment of the arbitrator, or the effect of the appointment should be concisely stated in the affidavit or memorandum : (*Id.*)

The order is absolute in the first instance when the order of reference has been made a rule of court : (*Id.*) Where the submission has been made a rule of the Chancery Division under the Act of 1854, the order is as of course : (Russ. Arb. 174.)

A form of order is given in schedule H 23 to the Rules of April, 1880.

A copy of the order must be served with or before service of a copy of an appointment of the time and place of attendance, signed by one at least of the arbitrators, or by the umpire, a reasonable time before the day of attendance, the originals being shown, and a sum for expenses and loss of time being paid or tendered : (3 & 4 Will. 4, c. 42, s. 40 ; Russ. Arb. 173-4.)

A witness not attending after service of the order and appointment is guilty of contempt of court : (*Id.*)

The witness is not bound to attend at more than two consecutive days to be named in the order: (*Id.*)

Notwithstanding the remarks in Russell on Arbitration (p. 174), the provisions of 3 & 4 Will. 4, c. 42, apply to references in which the submission has been a rule of court under 9 & 10 Will. 3, c. 15, or under the Act of 1854, and to references under a rule or order of the Chancery Division in an action: (see J. A., 1873, ss. 3 and 16.) The section applies only to witnesses, but the court possesses authority over parties: a submission made a rule of court under the parties' own agreement in the submission to produce all documents: (Russ. Arb. 175.)

IX. PROCEEDINGS BEFORE ARBITRATOR.

The proceedings upon any such arbitration as aforesaid shall, except otherwise directed hereby, or by the submission or document authorising the reference, be conducted in like manner, and subject to the same rules and enactments, as to the power of the arbitrator and of the court, the attendance of witnesses, the production of documents, enforcing or settling aside the award and otherwise, as upon a reference made by consent under a rule of court or judge's order: (C. L. P. A. 1854, s. 7.)

This section extends to both voluntary and compulsory arbitrations: (Russ. Arb. 176; Day, 250.) It does not interfere with the power of the parties to revoke the submission: (Day, 250.)

X. RESTRAINING ARBITRATOR FROM ACTING.

When the court is of opinion that under the circumstances it is not probable that an arbitrator will faithfully and honestly discharge his duty it may, at the instance of one of the parties to the arbitration, restrain him by injunction from acting: (*Beddow v. Beddow*, 47 L. J. 588, Ch 26 W. R. 570.)

XI. ENLARGING TIME FOR MAKING AWARD.

The arbitrator acting under any document or compulsory order (reference . . . or under any order referring the award back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed, and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party, but the parties may, by consent in writing, enlarge the term for making the award (C. L. P. A., 1854, s. 15.)

The three months are reckoned from the time the arbitrator holds his first sitting either with both parties before him, or under a peremptory appointment enabling him to proceed *ex parte*: (Day, 256.)

It shall be lawful for the . . . court of which such submission, document, or order is or may be made a rule or order, or for any judge thereof for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the awards; and if no period be stated for the enlargement in such consent or order for enlargement, shall be deemed to be an enlargement for one month: (C. L. P. A., 1854, s. 15.)

The application is by motion, on notice, or by summons: (Dan. 1904 Seton, 4th ed. 402.)

The power is discretionary, and will not be exercised unless both parties will afterwards be on an equal footing: (Day, 257.)

The court may enlarge the time beyond that to which the arbitrator has power to, and had enlarged it; and may enlarge it after the award has been made: (Seton, 402.)

The power may be exercised after the three months, and even after award made: (Day, 257.)

The section does not apply to compulsory references under the Public Health Act, 1848: (*Id.*)

XII. STATING SPECIAL CASE.

It shall be lawful for the arbitrator upon any compulsory reference under this Act, or upon any reference by consent of parties where the submission is or may be made a rule or order of any of the [divisions of the High Court], if he shall think fit, and if it is not provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the court: (C. L. P. A., 1854, s. 5.)

This section applies practically to all references: (Day, 249.)

The award will be set down as a special case for hearing on application by motion on notice: (Dan. 1904.)

The form of order to set down is given in Seton, 4th ed. 402.)

An umpire under the Lands Clauses Act may state his award in the form of a special case (*Rhodes v. Airedale Commissioners*, L. Rep. 1 C. P. Div. 402), and there is an appeal from the High Court's decision thereon to the Court of Appeal: (*Bidder v. North Staffordshire Railway Company*, L. Rep. 4 Q. B. Div. 412.)

Where on an order of reference, made by consent before the coming into operation of the present practice, it was ordered that neither party should bring any writ of error concerning the matters referred, and the arbitrator made an award dependent on the opinion of the court on a special case stated by him on which judgment was given, it was held that no appeal lay therefrom: (*Jones v. Victoria Graving Docks Company*, L. Rep. 2 Q. B. Div. 314.)

XIII. DIRECTING STATEMENT OF CASE OR TRIAL OF ISSUE.

If it shall appear to the court or a judge that the allowance or disallowance of any particular item or items in such account (see *sup.* IV., 2a), depends upon a question of law fit to be decided by the court, or upon a question of fact fit to be decided by a jury, or by a judge upon the consent of both parties as . . . provided [in the Act of 1854], it shall be lawful for such court or judge to direct a case to be stated, or an issue or issues to be tried; and the decision of the court upon such case, and the finding of the jury or judge upon such issue or issues, shall be taken and acted upon by the arbitrator as conclusive: (C. L. P. A., 1854, s. 4.)

XIV. REMITTING AWARD.

An arbitrator having signed his award is *functus officio*, and cannot alter the slightest error in it, though it has arisen from the mistake of the clerk in copying the draft: (*Mordue v. Palmer*, L. Rep. 6 Ch. App. 22; Day, 250.)

The proper course is to obtain an order to refer the award back to the arbitrator: (*Mordue v. Palmer*, *sup.*)

In any case where reference shall be made to arbitration as aforesaid, the court or a judge shall have power at any time and from time to time to remit the matters referred, or any or either of them, to the reconsideration and redetermination of the said arbitrator, upon such terms as to costs and otherwise as to the said court or judge may seem proper: (C. L. P. A. 1854, s. 8.)

The section applies to compulsory references, and references authorised by a submission containing a clause that it may be made a rule, and not expressly excluding such power: (*Re Morris*, 6 E. & B. 383.)

The object of this section is to enable the court to send the award back for the correction of errors which would otherwise vitiate it: (Dan. 1905; and see Seton, 404.)

An arbitrator's evidence in explanation of his award will be admitted on a motion to remit it back for mistake: (Seton, 405.)

The power to remit is not confined to cases where the award might be set aside, and the power has been exercised where the award has been valid: (See Russ. Arb. 463-4.)

Unless the court thinks the arbitrator can no longer be trusted, it will remit the award to him, though he has miscarried in the conduct of the reference: (Russ. Arb. 464.)

When an award is good on its face, the court will not generally refer it back, nor will it order that the arbitrator shall state a case when he has declined to do so: (Russ. Arb. 465.)

The general principle is that the arbitrator is final judge, both of law and fact, and this rule also applies to compulsory references: (*Id.*)

When the arbitrator states that the award as framed, though unimpeachable at law, does not carry out his intentions, the court will sometimes remit it for amendment: (*Id.*; and see cases cited in Russ. Arb. p. 466.)

The authorities are conflicting as to whether the application to remit must be made within the same time as an application to set aside the award: (Russ. Arb. 467; Day, 251.)

Probably a longer period will only be allowed in exceptional cases for the furtherance of the ends of justice, when the delay is explained by the circumstances: (Russ. Arb. 467.)

The court can refer back more than once: (Russ. Arb. 468.)

All the arbitrators' powers, save as affected by the order referring back, are revived: (Russ. Arb. 469.)

Unless such order limit some time, the arbitrators' revived authority lasts for three months from his entering on the matters of the reference, or his being called on by notice in writing by any party to act in it. But the time may be enlarged by the court or the parties: (*Id.*)

XV. SETTING ASIDE REFERENCE.

If a submission has been obtained by fraud or drawn up by mistake, the court on motion will set it aside. But it will not set aside an award on the ground of fraud or mistake in the submission: (Russ. Arb. 78.)

The court will not set aside an agreement of reference as obtained by undue pressure, if the party objecting has attended the reference, and taken the chance of an award in his favour: (*Id.*)

A compulsory reference may be set aside, if it appear that there is no dispute as to the amount, but only as to liability: (*Id.*)

XVI. SETTING ASIDE AWARD.

1. GROUNDS FOR.

(a) *Corrupt or Irregular Conduct of Arbitrator.*

The award cannot in any arbitration be impeached because it is erroneous in law or fact where the alleged error does not appear on the face of the award: (Russ. Arb. 661.)

Arbitrator's corrupt or partial conduct, or secret interest in the subject-matter, is ground for setting aside: (*Id.*)

Also refusing time to get counsel when the other side unexpectedly.

appears by counsel; receiving affidavits instead of *vivâ voce* evidence when directed to examine on oath; making award without hearing all the evidence (*Id.*); proceeding *ex parte* without sufficient cause (Russ. Arb. 662); appointing umpire by lot, instead of choice, unless by consent (Russ. Arb. 663); umpire refusing to rehear evidence: (*Id.*; see *Bottomley v. Ambler*, W. N. 1877, pp. 245, 272.)

(b) *Mistake in Law.*

This is a ground for setting aside only where the mistake is admitted by the arbitrator: (Russ. Arb. 302, 663.)

(c) *Nullity of Award.*

The court will only interfere when something may be done under the award which renders interference necessary, as when the award orders a verdict to be entered: (Russ. Arb. 664.)

(d) *Award not Final.*

This is a ground for setting aside: as if without special power the arbitrator make two awards, each deciding part of the matter referred, and not one entire award on all together (Russ. Arb. 665); or if the award fail to decide on all the matters referred, whether the omission appear on the face of the award or by other evidence, but not if the question undecided were not notified to the arbitrator as a matter in difference, or the parties showed by their conduct that they did not mean him to decide it (*Id.*). No objection attaches to delegating to the master the taxation of the costs, or appointing a stranger to perform a mere ministerial act: (Russ. Arb. 665, and see pp. 666-7.)

(e) *Uncertainty of Award.*

This is a good ground, as where it is doubtful whether the award has decided the questions referred, or how it has determined them, or when it leaves a disputed amount of money, other than costs, unascertained: (see Russ. Arb. 667-8.)

(f) *In Excess of Authority.*

This is a good ground, unless the bad part is clearly separable from the rest of the award, and does not affect the good part: (Russ. Arb. 668.)

An award is open to objection, if the arbitrator has awarded on a matter not submitted to him, or as to costs without authority, or has improperly directed costs to be taxed as between solicitor and client, &c. (See Russ. Arb. 668, 669.)

(g) *Fraudulent Concealment or Deception.*

If either party be guilty of fraudulent concealment of matters which he ought to have disclosed, or wilfully mislead or deceive the arbitrator, the award may be set aside: (Russ. Arb. 669.)

2. PROCEDURE.

(a) *On Submission which cannot be made a Rule.*

Awards on submissions which could not be made rules of court could not be set aside by a court of law, however gross the misconduct or corruption of the arbitrator: the only remedy was by bill in equity: (Russ. Arb., citing *Veale v. Warner*, 1 Saund. 327, c. note; *Greenhill v. Church*, 3 Rep. in Chanc. 89, p. 49; 2 Vern. 100, pl. 95; *Cavendish v. —*, 1 Cas. in Ch. 279.) Every division of the High Court of Justice has now jurisdiction in an action to set aside the award (J. A., 1873, ss. 3 and 16), or to give effect to an equitable defence based on the illegality or injustice of the proceedings: (see EQUITABLE RULES.)

(b) *On Submission which has been or may be made a Rule.*

Any arbitration or umpirage procured by corruption or undue means [is] void and of none effect, and may be set aside by . . . the court

where the rule is made for submission to such arbitration or umpire : (9 & 10 Will. 3, c. 15, s. 3.)

The award may also be set aside for mistake or error, if admitted by the arbitrator : (Russ. Arb. 671, 672.)

The submission must be made a rule of court, if it is not one already, before application to set aside : (Russ. Arb. 676.)

The application to set aside must be made before the day which, if terms had not been abolished, would have been the last day of the next term after such arbitration or umpirage has been made and published to the parties : (9 & 10 Will. 3, c. 15, s. 2; *Christ's College, Brecknock*, v. *Martin*, L. Rep. 3 Q. B. Div. 16; 36 L. T. Rep. N. S. 537; 26 W. R. 637.)

The publishing required by the statute is to the parties by their having notice that the award has been made, and the time runs from the date of the notice, though the party has not till afterwards intimation of the contents of the award, or has not been served with a copy of the award, and, apparently, although the notice expresses that the award is ready to be delivered on payment of the arbitrator's charges, although they are excessive : (see cases in Russ. Arb. 651-2.)

The application can only be entertained by the division of which the submission is a rule : (*Re Lomax's Arbitration*, 28 W. R. 485; W. N. 1880, p. 51.)

It is sufficient if the notice of motion be given within the time : (Seton, 405.)

The application is by motion, of which notice must be given to the other parties and the arbitrators : (Dan., 1903.)

The arbitrators' evidence will be admitted on the motion (Seton, 405) unless he is a barrister : (Russ. Arb., 677.)

The affidavits must be entitled, "In the matter," &c. : (Russ. Arb., 673.)

A judge in chambers has no power to set aside the award, though in vacation he may stay all proceedings under the award till the next sittings, to allow time for an application to avoid it to be made to the court : (Russ. Arb., 648.)

The affidavits must be filed whether the rule *nisi* is granted or refused : (Russ. Arb., 678.)

Where a rule to show cause is obtained to set aside an award . . . the several objections thereto intended to be insisted upon at the time of moving to make such rule absolute shall be stated in the rule to show cause : (R. G. H. T., 1853, r. 169.)

A party is generally confined to the grounds stated in the rule : (Russ. Arb. 681-4.)

(c) On Compulsory Reference.

All applications to set aside any award made on a compulsory reference under [the C. L. P. A. 1854] shall and may be made within the first seven days of [what, if terms had not been abolished would have been] the term next following the publication of the award to the parties, whether made in vacation or term; and if no such application is made, or if no rule is granted thereon, or if any rule granted thereon is afterwards discharged, such award shall be final between the parties : (C. L. P. A. 1854, s. 9; *Christ's College, Brecknock* v. *Martin*, *sup.*)

It is not necessary to make the judge's order a rule of court before applying to set aside : (Day, 251; Russ. Arb., 676.)

The application is by motion, supported by affidavits, and a rule *nisi* is first granted, as stated *sup.*

(d) Award under Lands Clauses Act.

When a submission is made a rule of court under sect. 36 of the Lands

Clauses Act, the time for applying to set it aside is that limited by 9 & 10 Will. 3, c. 5 : (*Harper v. Great Eastern Railway Company*, L. Rep. 20 Eq. 39 ; see *sup.*) (b.)

XVII. SETTING ASIDE JUDGMENT ON AWARD.

If the plaintiff, pursuant to the award, enter up a verdict and sign judgment in the cause referred, the defendant may, within the time limited for setting aside award (see *sup.* XVI.), move to set aside both judgment and award, if the latter be defective : (Russ. Arb., 692.)

Although the time for setting aside the award has long elapsed, the party is at liberty, as soon as judgment has been signed, to move to set the latter aside, whether execution has been issued or executed, and whether a motion has been made to set aside the award or a rule therefor discharged : (see Russ. Arb., 692-5.)

XVIII. ENFORCING AWARD.

1. WHEN SUBMISSION CANNOT BE MADE A RULE.

In this case the award can only be enforced by action : (Ch. Arch., 13th ed., 1365.)

2. WHERE SUBMISSION HAS BEEN MADE A RULE.

Any party refusing or neglecting to execute the award is guilty of a contempt of the court of which the submission is a rule : (9 & 10 Will. 3, c. 15, s. 1.)

This is subject to the provisions of the Debtors Act, 1869, when the payment of money is involved.

The party cannot be attached until the submission has been made a rule of court (Russ. Arb., 52) ; the party liable must have a demand made on him to obey the award ; and the award and rule must be personally served : (see Russ. Arb., 592, 614 ; and EXECUTION.)

The award may be enforced in execution on leave obtained on summons : (Ch. Arch., 13th ed., 1366-7.)

3. ON JUDGE'S ORDER.

The award may be enforced by execution after the order has been made a rule of court : (Ch. Arch., 1367 ; see EXECUTION.)

When a verdict has been taken subject to a reference, judgment may be signed on the award without moving for judgment : (*Lloyd v. Lewis*, *sup.* I.)

Where, by consent, all facts were ordered to be stated by the parties, or, failing agreement between them, by an arbitrator in the form of a special case, and the arbitrator found the facts in favour of the defendant on all material points in issue between the parties to an action, the court, in the exercise of its discretion, refused to allow the plaintiff to discontinue the action : (*Stahlschmidt v. Walford*, L. Rep. 4 Q. B. Div. 217 ; 40 L. T. Rep. N. S. ; 48 L. J. 348, Q. B.)

4. ON COMPULSORY REFERENCE.

The award or certificate of such referee shall be enforceable by the same process as the finding of a jury upon the matter referred : (C. L. P. A. 1854, s. 3.)

Any award made on a compulsory reference under this Act may, by authority of a judge, on such terms as to him may seem reasonable, be enforced at any time after seven days from the time of publication, notwithstanding that the time for moving to set it aside has not elapsed : (C. L. P. A., 1854, s. 10.)

5. ORDERING DELIVERY OF POSSESSION OF LAND.

When any award made on any such submission, document, or order of reference as aforesaid directs that possession of any lands or tenements

capable of being the subject of an action [for the recovery of land] shall be delivered to any party, either forthwith or at any future time, or that any such party is entitled to the possession of any such lands or tenements, it shall be lawful for the court of which the document authorising the reference is or is made a rule or order, to order any party to the reference who shall be in possession of any such lands or tenements, or any person in possession of the same claiming under or put in possession by him since the making of the document authorising the reference, to deliver possession of the same to the party entitled thereto, pursuant to the award, and such rule or order to deliver possession shall have the effect of a judgment [for the recovery of land] against every such party or person named in it, and execution may issue, and possession shall be delivered by the sheriff as on [such] a judgment: (C. L. P. A. 1854, s. 16.)

XIX. STAYING LITIGATION IN CONTRAVENTION OF ARBITRATION.

Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the court in which action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before [delivery of defence], upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise, as to such court or judge may seem fit: (C. L. P. A. 1854, s. 11.)

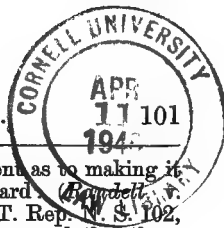
The onus of proving that no adequate relief can be obtained by proceeding under the arbitration lies on the plaintiff: (Dan. 1907; Russ. Arb. 46; but see *Mulkern v. Lord*, L. Rep. 4 App. Cas. 182.)

The proceedings will be stayed wherever the application is made *bonâ fide* by a party who has always been ready to refer, and there are matters in dispute within the meaning of the agreement: (*Id.*)

The agreement of reference need not be contained in the original instrument under which the dispute arose: (*Randell v. Thompson*, L. Rep. 1 Q. B. Div. 748.)

An agreement to refer all disputes to a foreign court is within the section: (*Law v. Garrett*, L. Rep. 8 Ch. Div. 26.)

Proceedings will not be stayed where there is a *bonâ fide* suggestion of fraud affecting the questions referred, and not merely one item in the account (Dan. 1907; Seton, 406, *Russell v. Russell*, 42 L. T. Rep. N. S. 112); when the matter agreed to be referred is only set up by the defendant by way of counter-claim (*Atkinson v. Ellison*, W. N. 1875, p. 201); where some of the intended parties not having concurred, it would be contrary to the intention of the other parties to refer (Dan. 1907); if the notice to refer under the agreement is not co-extensive with the object of the action (Seton, 406); and cannot be stayed; where



submission has not been made, and contains an agreement as to making it a rule of court, and it has been revoked before award. (*Randell v. Thompson, sup.*; but see *Moffat v. Cornelius*, 39 L. T. Rep. N. S. 102, where *Randell v. Thompson* was distinguished on the ground that there was no power to the court to appoint an arbitrator.)

As to staying proceedings, when the rules of building societies provide for arbitration, see *Wright v. Monarch Investment Building Society* (L. Rep. 5 Ch Div. 726); *Mulkern v. Lord (sup.)*

The application may be made by one of several defendants: (Seton, 406.)

The application is by motion on notice (Dan. 1908), or summons (*Atkinson v. Ellison, sup.*).

The court has a discretion as to making the order, and its jurisdiction is not ousted by the agreement so as to make the action demurrable (Seton, 406); at least where there is no covenant not to sue: (Russ. Arb. 41.)

The methods of compelling the reference are:

1. Where a time has been fixed for making the award, by staying proceedings until further order, with liberty to apply if no award made within the time fixed; or enlarging time to name an arbitrator where that has not been done;

2. By staying proceedings, and appointing arbitrators, and giving the necessary directions: (Seton, 400, 406.)

The rule or order staying proceedings may at any time afterwards be discharged or varied as justice may require: (C. L. P. A. 1854, s. 11.)

ARGUMENT.

The following form of entry for argument, generally, is given by schedule E, 29 to the Rules of April, 1880:

"In the High Court of Justice.

Division.

18

No.

Between

Plaintiff,

and

Defendant.

Set down for argument the

Dated the day of 18

(Signed)

(Address)

."

ARREST.

I. FOR CONTEMPT OF COURT.

1. WHAT IS CONTEMPT.

2. PROCESS FOR ARREST.

3. DISCHARGE FROM CUSTODY.

II. OF ABSCONDING DEFENDANT.

1. ON CAPIAS.

(a) *In what Actions.*

(b) *When Application made.*

(c) *How Application made.*

(d) *Evidence.*

(e) *Order.*

(f) *Arrest.*

(g) *Security*

(h) *Rescinding or Varying Order and Discharging from Custody.*

(i) *Costs and Fees.*

2. ON NE EXEAT REGNO.

(a) *In what Cases.*

- (b) *When Application made.*
- (c) *How Application made.*
- (d) *Evidence.*
- (e) *Order.*
- (f) *Writ.*
- (g) *Execution.*
- (h) *Security.*
- (i) *Discharge of Writ.*

III. PRIVILEGE FROM ARREST.

- 1. PERMANENT.
- 2. TEMPORARY.

I. FOR CONTEMPT OF COURT.

1. WHAT IS CONTEMPT.

The following acts are special contempts of court:—

Publishing, before an action or matter is finally heard, with or without comments, pleadings, or evidence, or any *ex parte* or defamatory statement tending to prejudice the public mind against parties, or to prevent a fair trial;

Sending letters threatening exposure, or using intimidating language calculated to deter parties from prosecuting their action, or to prevent witnesses from coming forward to give their evidence;

Defiant disobedience of a judge in the legitimate exercise of his jurisdiction;

Addressing a contemptuous letter to a judge reflecting upon or tending to interfere with the administration of justice in his court: (Seton, 4th ed. 1589-1590);

Arresting officers or attendants upon the court, suitors or witnesses, during their necessary attendance: (C. O. 42, r. 1);

Using violence or abusive language to a person serving the process or orders of the court, or using scandalous or contemptuous words against the court or the process thereof: (C. O. 42, r. 2.)

Removing a ward from the custodian assigned by the court;

Marrying, or procuring the marriage of, a ward, without the court's sanction;

Disobeying an injunction or restraining order;

Interfering with a receiver or sequestrator appointed by the court: (Dan. 937.)

The mere disobedience or neglect of a judgment or order of the court is a contempt, punishable in some cases by attachment or committal. [See EXECUTION.]

2. PROCESS FOR ARREST.

Contempts under Consolidated Order 42, r. 2 are punishable by committal upon motion, on notice to the party offending: (C. O. 42, r. 2.)

The power to commit to prison for contempt of court is not affected by the Debtors Act, 1869: (*Harvey v. Hall*, L. Rep. 11 Eq. 31.)

For contempt of subpoena and assault on the party serving it, if established by two witnesses, the order to commit is absolute, if by one witness only, *nisi*; and the course is the same when the contempt is for violence or abusive or scandalous words against the court or the process thereof: (Seton, 4th ed. 1589.)

The order for committal need not contain an adjudication of the contempt: (*Id.*)

3. DISCHARGE FROM CUSTODY.

The person imprisoned will be detained until he has cleared his contempt

by performing the act required, or by making an adequate submission : (Seton, 1596.)

In the latter case the court may release him upon such terms as to costs or otherwise as shall seem proper : (*Id.*)

When the contempt is in non-performance of an act, the contemnor cannot, after performance, be detained for non-payment of the costs of the contempt : (*Jackson v. Mawby*, L. Rep. 1 Ch. Div. 86.)

II. OF ABSCONDING DEFENDANT.

1. ON CAPIAS.

(a) *In what Actions.*

General Rule.

A defendant about to abscond is liable to arrest, on proof being given, as mentioned *post* (d), in any action in the High Court of Justice, in which, if brought before the 1st January, 1870, the defendant would have been liable to arrest : (Debtors Act, 1869, 32 & 33 Vict. c. 62, s. 6.)

The plaintiff's cause of action against the defendant must in all actions be to the amount of 50*l.* or upwards : (*Id.*)

What Actions on Contract.

In actions on contract arrest may be ordered, whether the action sounds in debt, being for goods sold, money lent, or on a bill of exchange or promissory note, or sounds merely in damages, though unliquidated ; where it is for stipulated damages on a guarantee ; where it is on a bond, if a money bond for the principal and interest only due, if for performance of covenants or indemnity only for the amount of the real damage sustained, if in the nature of liquidated damages for the penalty ; where it is on a judgment ; where it is on an award, though the defendant has previously been arrested in an action for the very cause of action, which is the subject of the award ; where it is on a covenant to pay a sum certain : (Ch. Arch., 13th edit., 660-3.)

The defendant cannot be arrested in an action for goods bargained and sold, or sold only, unless there are some special circumstances ; for a penalty ; for interest, unless expressly contracted to be paid ; or in case of set-off, unless the balance owing to the plaintiff is over 50*l.* ; or in an action on a replevin bond, or bail bond ; or on a judgment in an action in which the defendant has been already held to bail : (*Id.*)

Actions of Tort.

A defendant may generally be ordered to be arrested in an action of tort : (see Ch. Arch. 663.)

In actions on remedial statutes his arrest may be ordered ; but in actions on penal statutes he cannot be so ordered unless the statute expressly authorises arrest (*Id.*) Perhaps a defendant may now be arrested in some actions of *fi. fa.* : (Ch. Arch. 664, n. y.)

(b) *When Application Made.*

The application may be made any time after the writ has been issued, and before final judgment : (D. A. 1869, s. 6 ; Ch. Arch., 679.)

(c) *How Application Made.*

The order of the Court of Chancery under the Debtors Act, 1869, made no provision for the practice as to the arrest of an absconding defendant. The only rules made under the Act are those of Michaelmas Term, 1869.

The application shall be made *ex parte* (R. G. M. T. 1869, r. 6), and must be made to a judge of the High Court in chambers : (D. A. 1869, s. 6 ; Ch. Arch. 679.)

(d) Evidence.

The evidence of the facts required to be proved must be by affidavit: (R. G. M. T. 1869.)

Where the action is for a penalty or a sum in the nature of a penalty other than a penalty in respect of any contract, the affidavit must speak to the following facts:—

(a) That the plaintiff has good cause of action against the defendant to the amount of 50*l.* or upwards.

(b) That the defendant is about to quit England, unless he be apprehended: (32 & 33 Vict. c. 62, s. 6.)

In other cases the affidavit must specify the following facts:—

(a) That the plaintiff has good cause of action against the defendant to the amount of 50*l.* or upwards.

(b) That the defendant is about to quit England unless he be apprehended.

(c) That the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action: (32 & 33 Vict. c. 62, s. 6.)

Besides the above particulars each affidavit must state the deponent's abode and condition—generally the Christian and surname of the defendant in full—the circumstances tending to show that the defendant is about to quit England; which may be given on information and belief, or in some cases less than that; such a statement as to the cause of action that perjury may be assigned on it if false, which statement must be direct and positive (unless it is impossible to swear positively), and show a sufficient cause of action for which the defendant may be required to find security for the amount stated, the cause of action being stated explicitly and with a sufficient degree of particularity and certainty, and which statement must correspond with the writ of summons and the statement of claim: (Chit. Arch. 665–676; 3 & 4 Will. 4 c. 42, s. 12.)

The affidavit, so far as relates to the cause of action, must be sworn within a year before application is made: (Chit. Arch. 678.)

It may be sworn before the writ of summons is issued: (*Id.*, 677.)

(e) The Order.

The judge, if satisfied with the evidence, may order the defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the security prescribed, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the court, or, when the action is for a penalty or sum in the nature of a penalty, other than a penalty in respect of any contract, unless or until he has given the security prescribed to the effect that any sum recovered against the defendant in the action shall be paid, or that he shall be rendered to prison: (32 & 33 Vict. c. 62, s. 6.)

The judge has an absolute discretion, if satisfied by the evidence, whether he will make the order.

The form of order now in use is that given in schedule H 29, to the Rules of April, 1880.

Concurrent orders may be issued for arrest in different counties: (R. G. M. T., 1869, r. 6.)

Prior to its being delivered to the sheriff the order must be indorsed with the following particulars:

The name and place of abode or office of business of the solicitor obtaining the same, and, when such solicitor acts as agent for a solicitor in the country, the name and place of abode of the country solicitor;

If no solicitor has been employed in obtaining the order it must be

indorsed with a memorandum expressing that it has been sued out by the plaintiff in person, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be: (R. G. M. T., 1869, r. 6; R. G. H. T., 1853, r. 73.)

(f) *The Arrest.*

The arrest must be made within one calendar month after the date of the order, including the day of such date: (see Form sched. H. 29, Rules, April, 1880.)

A true copy of the order should be delivered to the defendant when arrested.

The sheriff or other officer named in an order to arrest under the 6th section shall, within two days after the arrest, indorse on the order the true date of such arrest: (R. G. M. T., 1869, r. 11.)

(g) *Security.*

The security to be given by the defendant may be a deposit in court of the amount mentioned in the order, or a bond to the plaintiff by the defendant and two sufficient sureties (or, with leave of a judge, more than two), or, with the plaintiff's consent, any other form of security: (R. G. M. T., 1869, r. 7.)

When the action is for a penalty or sum in the nature of a penalty, other than a penalty in respect of any contract, the penalty of the security bond must be sufficient to include the probable costs of the action, and the terms must be those in italics.

The plaintiff may, within four days after receiving particulars of the names and addresses of the proposed sureties, and the form of the proposed bond, give notice that he objects thereto, stating therein in what particulars; and, in case of his so doing, the sufficiency of the security shall be determined by the judge (R. G. M. T., 1869, r. 8), who shall have power to award the costs of such reference to either party. It shall be the plaintiff's duty to obtain an appointment for that purpose, and unless he does so within four days after giving notice of objection, the security shall be deemed sufficient: (R. G. M. T., 1869, r. 7.)

The money deposited, and the security, and all proceedings thereon, shall be subject to the order and control of the court or a judge: (R. G. M. T., 1869, r. 8.)

(h) *Rescinding or Varying Order and Discharging from Custody.*

Without payment.

The defendant shall be at liberty, at any time after the arrest, to apply to rescind or vary the order, or to be discharged from custody, or for such other relief as may be just: (R. G. M. T. 1869, r. 6.)

If it be shown by affidavits that the defendant was not about to quit England, or that his intended absence was not such as the Act contemplated, or in case of any irregularity, the court or a judge may make such an order on motion or summons: (Chit. Arch. 695-9.)

Such affidavits may be answered: (Chit. Arch. 698.)

The defendant cannot be kept in prison after final judgment has been signed: (*Hume v. Druryff*, L. Rep. 8 Ex. 214.)

On Payment or Delivery of Security.

Upon payment into court of the amount mentioned in the order, a receipt shall be given by the proper officer; and upon receiving the bond or other security, a certificate to that effect shall be given, signed or attested by the plaintiff's attorney; and the delivery of such receipt or

certificate to the sheriff shall entitle the defendant to be discharged out of custody : (Reg. Gen. M. T. 1869, r. 10.)

(i) *Costs and Fees.*

Unless otherwise ordered, the costs of and consequent on an order to arrest shall be costs in the cause : (R. G. M. T. 1869, r. 9.)

The sheriff and officer shall be entitled to the same fees in respect thereof as are now payable upon a *capias* : (R. G. M. T. 1869, r. 6 ; see Chit. Archb. 12th edit., 1776.)

2. ON NE EXEAT REGNO.

(a) *In what Cases.*

A defendant about to abscond is liable to arrest on a writ of *ne exeat regno* in respect of equitable claims only which were, prior to the coming into operation of the Judicature Acts and Rules, enforceable in the Court of Chancery, and which, in other respects, are of the amount and owing under the same circumstances as a claim for which a debtor may be arrested on a *capias* under sect. 6 of the Debtors Act, 1869 : (Dan. 1548 ; *Drover v. Beyer*, L. Rep. 13 Ch. Div. 242 ; 41 L. T. Rep. N. S. 393 ; 49 L. J. 37, Ch. ; 28 W. R. 89, 110 ; see *sup.* 1a.)

The writ will not be refused merely because the common law courts and the Court of Chancery had concurrent jurisdiction, as in the case of an account or a bill to recover the amount due on a lost bond : (Dan. 1549.)

The writ will not be granted when the defendant has already been arrested under the Debtors Act, 1869 (Dan. 1550), unless such arrest is in respect of a different demand : (*Id.*)

The demand must be pecuniary and actually due : (Dan. 1551.)

The writ may be granted, although it has not been expressly claimed by the writ or statement of claim (Dan. 1553), and may be granted in proceedings commenced by administration summons in chambers, or, against a contributory in a winding-up without commencing an action : (Seton, 4th edit., 317.)

(b) *When application made.*

The application may be made before service of the writ or original summons (Dan. 1554 ; Seton, 4th edit., 317), and should be made as promptly as possible : (*Id.* 1555.)

It cannot be made after final judgment is signed : (Comp. *Drover v. Beyer*, *sup.* ; and *Hume v. Druyff*, L. Rep. 8 Ex. 214.)

The application is by motion *Ex parte* : (Dan. 1554.)

(d) *Evidence.*

The evidence is by affidavit, usually made by the plaintiff himself, unless he is under some legal disability, as lunacy (Dan. 1555), or is not in a position to speak positively to the facts. The affidavit must be positive, and mere information and belief will not, except in the case of an account, be sufficient. The affidavit must be as positive as to the equitable debt as an affidavit of a legal debt on an application for a *capias* : (Dan. 1555 ; *sup.* 1.)

Even when the affidavit is positive, if it appears that, under the circumstances, the deponent could only have acquired his knowledge from the information of others it will be insufficient : (Dan. 1555 ; but compare O. XXXVII., r. 3.)

The affidavit must show positively that the defendant intends going abroad, either by showing threats thereof or facts evincing it. The deponent must also show his means of knowledge (Dan. 1555-6), and that the absence of the defendant will materially prejudice the plaintiff in

the prosecution of his action: (per Jessel, M.R. in *Drover v. Beyer*, *sup.*)

The affidavits must not be sworn until the writ is issued: (Dan. 1557; and see EVIDENCE.)

If the application is made before appearance, the issuing of the writ must be proved, either by the certificate of the Master of the Supreme Court (Dan. 1557), or, probably, by production of the original writ sealed with the official seal.

In the case of an *ex parte* application for . . . a writ of *ne exeat regno*, the party making such application is to furnish copies of the affidavits upon which it is granted upon payment of the proper charges immediately upon the receipt of [the] written request [of the opposite party or his solicitor, with an undertaking to pay the proper charges] or within such time as may be specified in such request, or may have been directed by the court: (Add. Rules, Aug. 1875, O. V., r. 10.)

(e) *Order.*

The order will generally only be made on the applicant's undertaking to abide by any order as to damages (Dan. 1557), and to accept short notice of motion to discharge: (Seton, 4th edit., 317.)

(f) *Writ.*

The writ must be prepared by the solicitor (C. O. 3, r. 1) engrossed on parchment (Dan. 1557 n) and sealed with the seal of the Central Office, which will be impressed on production of the order therefor, and a præcipe: (Dan. 1557; J. A. 1879.)

The writ must be indorsed with the name and place of business of the solicitor, and agent (if any); or with the name and residence of a plaintiff suing in person, and in either case with the address for service, if any; and it must be marked on the back, in words at length, with the amount of the sum for which the defendant is to give security: (Dan. 1557-8.)

When the writ is issued against a personal representative, at the instance of a legatee, or person claiming a share of the residue, it must be marked for the whole amount due from the defendant, not to the plaintiff only, but to all the other persons interested in the estate: (Dan. 1558.)

Where the writ has been indorsed for a larger sum than is really due, the court will make an order that the security shall be given for so much only as is really due without quashing the writ; and this may be done upon the hearing of a motion to quash the writ: (Dan. 1558.)

(g) *Execution.*

The writ must be delivered to the sheriff with instructions: (*Id.*)

(h) *Security.*

When the capture is made, the defendant, to obtain his discharge, must execute a bond, with two sufficient sureties, to the sheriff, in double the sum marked on the writ, conditioned not to go or to attempt to go into parts beyond the seas, or into Scotland, without the leave of the court: (Dan. 1559.)

The sheriff may, instead, take a deposit of the amount indorsed on the writ of *ne exeat regno*: (*Id.*)

The sheriff should make a return to the writ: (*Id.*)

The defendant cannot be kept in prison after final judgment is signed: (*Hume v. Druryff*, L. Rep. 8 Ex. 214.)

(i) *Discharge of Writ.*

The writ may be discharged on motion with notice, for irregularity; upon the merits; or upon payment into court of the amount indorsed; on payment by defendant to the plaintiff of the sum for which security

has been given, though it appears that a much larger sum is due from the defendant to the plaintiff: (Dan. 1559-1561.)

III. PRIVILEGE FROM ARREST.

1. PERMANENT.

The Royal Family; servants in ordinary or menial servants of the Sovereign (unless with leave of the Lord Chamberlain); peers and peeresses, whether of England, Scotland, or Ireland; members of the House of Commons during session, and *eundo et redeundo* for forty days before and after Parliament, and as well after dissolution as prorogation (*Re Anglo-French Co-operative Society*, W. N. 1880, p. 78); members of Convocation during the same period; ambassadors and their servants; judges of the Supreme or High Court; coroners or deputy coroners while executing their office; parties, witnesses, solicitors, and other persons connected with and attending legal proceedings, whether compelled so to do by process or not; defendants in actions on securities under 32 & 33 Vict. c. 62, s. 6, until judgment obtained and action brought thereon; married women, unless they have deceitfully represented themselves to be sole; executors, administrators, and heirs, sued for debts of the deceased, unless they have given a sufficient promise in writing to pay, or unless an executor or administrator has committed a *devastavit*; infants where infancy is a bar to the action; seamen, unless upon affidavit that debt was contracted before entry into Her Majesty's service; soldiers and mariners in certain cases under the Mutiny Act: (Chit. Arch. 13th edit. 648-659.)

The privilege of Parliament is no protection against arrest for contempt of a gross or criminal nature: (Seton, 4th edit. 1590; *Re Anglo-French Co-operative Society*, W. N. 1880, p. 73.)

2. TEMPORARY.

Those specially privileged for a year and a day by the Queen's writ of protection; persons connected with a cause and attending in the course of it, whether compelled by process or not, while going to, attending, and returning from court or chambers; barristers attending upon the Supreme or High Court for the purpose of being engaged in the business of the same, or on circuit (which is continuous), whether having business or not; parties, &c., attending an arbitration of a cause referred; clergymen whilst performing divine service, and going to church for the purpose and returning: (Chit. Arch. 687-693.)

ASSESSORS.

[See TRIAL.]

ASSIGNMENT OF DEBTS AND CHOSSES IN ACTION.

Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal *choses in action*, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or *choses in action*, shall be and be deemed to have been effectual in law (subject to all equities

which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or *chose in action* from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: (J. A., 1873, s. 25, sub-sect. 6.)

If the debtor, trustee, or other person liable in respect of such debt or *chose in action* shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or *chose in action*, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees: (*Id.*) [See INTERPLEADER, TRUSTEE.]

BILL OF EXCHANGE.

No writ shall hereafter be issued under the Summary Procedure or Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67): (O. II., r. 6a, April, 1880.)

The ordinary process now applies with respect to all actions on bills of exchange, whether overdue six months or not.

Forms of indorsement of the writ are contained in Appendix A, pt. 2, s. 2, to the Rules of 1875.

BILL OF SALE.

- I. ATTESTATION.
- II. REGISTRAR OF BILLS OF SALE.
- III. REGISTRATION.
- IV. RENEWAL OF REGISTRATION.
- V. SEARCHES, INSPECTION, AND TAKING COPIES.
- VI. RECTIFICATION OF REGISTER.
- VII. ENTRY OF SATISFACTION.
- VIII. SWEARING AFFIDAVITS.

I. ATTESTATION.

The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor: (41 & 42 Viet. c. 31, s. 10.)

II. REGISTRAR OF BILLS OF SALE.

The masters shall be the registrar for the purposes of the Bills of Sale Act, 1878, and any one of the masters may perform all or any of the duties of the registrar: (O. LXA., r. 9, April, 1880.)

III. REGISTRATION.

Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule

or inventory, and of every attestation of the execution of such bill of sale together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to and the said copy and affidavit shall be filed with the registrar within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed: (41 & 42 Vict. c. 31, s. 10.)

If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void: (*Id.*)

A form of affidavit is given in schedule B. 25 to the Rules of April, 1880.

When the time for registering a bill of sale expires on a Sunday, or other day on which the registrar's office is closed, the registration shall be valid if made on the next following day on which the office is open: (41 & 42 Vict. c. 31, s. 22.)

The registrar shall keep a book (in this Act called "the register") for the purposes of [the] Act, and shall, upon the filing of any bill of sale or copy under [the] Act, enter therein in the form set forth in the second schedule (B.) to [the] Act annexed, or in any other prescribed form, the name, residence, and occupation of the person by whom the bill was made or given (or in case the same was made or given by any person under or in the execution of process, then the name, residence, and occupation of the person against whom such process was issued, and also the name of the person or persons to whom or in whose favour the bill was given), and the other particulars shown in the said schedule or to be prescribed under [the] Act, and shall number all such bills registered in each year consecutively, according to the respective dates of their registration: (41 & 42 Vict. c. 31, s. 12.)

IV. RENEWAL OF REGISTRATION.

The registration of a bill of sale, whether executed before or after the commencement of [the] Act, must be renewed once at least every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal (as the case may be), the registration shall become void.

The renewal of a registration shall be effected by filing with the registrar an affidavit stating the date of the bill of sale and of the last registration thereof, and the names, residences, and occupations of the parties thereto as stated therein, and that the bill of sale is still a subsisting security.

Every such affidavit may be in the form set forth in the Schedule (A.) to [the] Act annexed.

A renewal of registration shall not become necessary by reason only of a transfer or assignment of a bill of sale: (41 & 42 Vict. c. 31, s. 11.)

Upon the registration of any affidavit of renewal the like entry shall be

made [as in the case of registration] with the addition of the date and number of the last previous entry relating to the same bill, and the bill of sale or copy originally filed shall be thereupon marked with the number affixed to such affidavit of renewal: (41 & 42 Vict. c. 31, s. 12.)

V. SEARCHES, INSPECTION, AND TAKING COPIES.

The registrar shall . . . keep an index of the names of the grantors of registered bills of sale with reference to entries in the register of the bills of sale given by each . . . grantor.

Such index shall be arranged in divisions corresponding with the letters of the alphabet, so that all grantors whose surnames begin with the same letter (and no others) shall be comprised in one division, but the arrangement within each such division need not be strictly alphabetical: (41 & 42 Vict. c. 31, s. 12.)

The Registrar of Bills of Sale . . . shall, on a request in writing giving sufficient particulars, and on payment of the prescribed fee, cause a search to be made in the registers or indexes under his custody, and issue a certificate of the result of the search: (O. LXA., r. 8a, May, 1880, in lieu of O. LXA., r. 8, April, 1880.)

The fee for a person searching under sect. 16 of the Act of 1878, was 1s. for every copy of a bill inspected, payable by a judicature stamp.

Any person shall be entitled to have an office copy or extract of any registered bill of sale, and affidavit of execution filed therewith, or copy thereof, and of any affidavit filed therewith, if any, or registered affidavit of renewal, upon paying for the same at the like rate as for office copies of judgments of the High Court of Justice, and any copy of a registered bill of sale, and affidavit purporting to be an office copy thereof, shall in all courts and before all arbitrators or other persons, be admitted as *prima facie* evidence thereof, and of the fact and date of registration as shown thereon: (see 41 & 42 Vict. c. 31, s. 16.)

VI. RECTIFICATION OF REGISTER.

Any judge of the High Court of Justice, on being satisfied that the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed by [the] Act, or the omission or mis-statement of the name, residence, or occupation of any person, was accidental or due to inadvertence, may in his discretion order such omission or mis-statement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration on such terms and conditions (if any) as to security, notice by advertisement, or otherwise, or as to any other matter, as he thinks fit to direct: (41 & 42 Vict. c. 31, s. 14.)

VII. ENTRY OF SATISFACTION.

Subject to and in accordance with any rules made under [the] Act the registrar may order a memorandum of satisfaction to be written upon any registered copy of a bill of sale, upon the prescribed evidence being given that the debt (if any) for which such bill of sale was made or given has been satisfied or discharged: (41 & 42 Vict. c. 31, s. 15.)

A memorandum of satisfaction may be ordered to be written upon a registered copy of a bill of sale on a consent to the satisfaction, signed by the person entitled to the benefit of the bill of sale, and verified by affidavit, being produced to the registrar, and filed in the Central Office: (O. LXA., r. 10, April, 1880.)

Where this consent cannot be obtained, the registrar may, on application by summons, and on hearing the person entitled to the benefit of the

bill of sale, or on affidavit of service of the summons on that person, and in either case on proof to the satisfaction of the registrar that the debt (if any) for which the bill of sale was made has been satisfied or discharged, order a memorandum of satisfaction to be written upon a registered copy thereof: (*Id.*)

A form of summons is given in schedule H. 56 to the Rules of April, 1880.

VIII. SWEARING AFFIDAVITS.

Every affidavit required by or for the purposes of [the] Act may be sworn before a master of [the Supreme Court] or before any commissioner empowered to take affidavits in the Supreme Court of Judicature: (41 & 42 Vict. c. 31, s. 22.)

BOUNDARIES.

Settlement of.

It must be shown that the plaintiff has a clear legal title to land of which the defendant, against whom relief is sought, is in possession, and that without the assistance of the court the boundaries cannot be found: (Seton, 4th ed. 1033.)

Suits respecting boundaries of estates in the colonies have been entertained, when the contract has been made in this country: (*Id.*)

Where a tenant has confused boundaries between the land demised and his own freehold, the court may ascertain the boundaries before the end of the term: (*Spike v. Harding*, L. Rep. 7 Ch. Div. 871; 38 L. T. Rep. N. S. 285; 47 L. J. 323, Ch.)

The boundaries may be ascertained by

- (1) Commission granted for the purpose: (Dan. 1033.)
- (2) Directing an inquiry in chambers as in the case of partitions: (*Spike v. Harding sup.*)
- (3) Trying the question or questions as any other question in an action may be tried: (Dan. 1033.)

When the boundaries are confused through default of a tenant or copyholder, as the commissioners cannot set out the boundaries with certainty, the court directs so much of the defendant's own land to be set out as shall be equal to the quantity originally granted or leased: (Dan. 1034.)

The judgment does not order mutual conveyances, but directs that, after the lands have been set out, the defendant is to deliver possession to the plaintiff, and that the plaintiff and his heirs are to hold and enjoy the same against the defendant or any person or persons claiming under him: (Dan. 1034.)

Further consideration is generally reserved till after the return of the commission or the trial of the question: (*Id.*)

There is no settled rule as to costs: (*Id.*; Seton, 1034.)

BURIAL ACTS.

[See CHARITIES.]

CANCELLATION, &c., OF INSTRUMENTS.

- I. JURISDICTION.
- II. INDORSEMENT OF WRIT.
- III. JUDGMENT.

1. RECTIFICATION.
2. SETTING ASIDE.
3. CANCELLATION.

I. JURISDICTION.

All causes and matters for . . . the rectification, or setting aside, or cancellation of deeds or other written documents [are] assigned to the Chancery Division: (J. A., 1873, s. 34.)

Grounds for setting aside an instrument may be relied on as a defence, or set up by way of counter-claim in any division: (J. A., 1873, s. 24, sub-sects. 2, 3; *Mostyn v. The West Mostyn Coal and Iron Company*, L. Rep. 1 C. P. Div. 145; 34 L. T. Rep. N. S. 325; 45 L. J. 401, C. P.; 24 W. R. 401; and see ACTION.)

As to the grounds of relief, see Seton on Decrees, 4th ed. 1341-78; *Hart v. Swaine*, L. Rep. 7 Ch. Div. 42.

II. INDORSEMENT OF WRIT.

A form of indorsement is given in Appendix A, p. 2, s. 1, to the Rules of 1875.

III. JUDGMENT.

1. RECTIFICATION.

In rectifying a deed the usual course is to direct the decree or declaration of the court to be indorsed on the deed, and this is sufficient to pass the legal estate, without any conveyance, at least where the deed comprises less land than was intended: (Seton, 1234, 1343; *Hart v. Swaine*, *sup.*) But the better course where deeds affecting the legal estate in real property are rectified is to direct the execution of proper conveyances: (Seton, 1343.) In some cases the alterations in the deed have been initialed by the judge: (Seton, 1234.)

2. SETTING ASIDE.

Where an assurance of land is set aside on the ground of mistake or fraud, rendering it void in equity, a reconveyance should be directed; *secus* in the case of forgery or fraud rendering a deed void at law: (Seton, 1343.)

As to deeds impeached for being fraudulent and void as against creditors, see Seton, 1369-71.

Where land was sold on the *bonâ fide* representation of the vendor that it was freehold, and conveyed to the purchaser, and afterwards turned out to be copyhold, the Court, in setting aside the sale, made a declaration that the conveyance was inoperative, and ordered a memorandum of the judgment to be indorsed by the registrar on the deed, and that the conveyance and other documents of title should be delivered to the vendor: (*Hart v. Swaine*, *sup.*) When the conveyance is effectual, a reconveyance should be directed: (Seton, 1353.)

Where a purchase by a solicitor or agent is set aside, an account of rent and profits on the footing of wilful default ought to be directed, though no special case thereof has been raised on the pleadings: (Seton, 1355.)

3. CANCELLATION.

The court will order forged instruments, whether assurances of land or otherwise, to be delivered up to be cancelled: (Seton, 1346.)

Forged deeds should not be cancelled by being torn or defaced, but kept to be produced on criminal proceedings: (*Id.*)

As to deeds impeached for being fraudulent and void as against creditors, see Seton, 1369-71.

CAUSE OF ACTION.

[See WRIT OF SUMMONS.]

CENTRAL OFFICE.

- I. ABOLITION OF OFFICES.
- II. CONSTITUTION OF CENTRAL OFFICE.
 1. ESTABLISHMENT.
 2. OFFICERS TRANSFERRED.
 3. PRESENT STAFF.
 - (a) *Masters.*
 - (b) *Clerks.*
- III. CONTROL AND SUPERINTENDENCE.
- IV. DISTRIBUTION OF BUSINESS.
- V. SEAL OF CENTRAL OFFICE.
- VI. ADMINISTERING OATHS.
- VII. SEARCHES, INSPECTION, AND TAKING EXTRACTS.
- VIII. FEES.
- IX. REMOVAL OF DOCUMENTS.

I. ABOLITION OF OFFICES.

The offices of

- (1) Record and Writ Clerk,
- (2) Masters in the Queen's Bench, Common Pleas, and Exchequer Divisions,
- (3) Associates in the Queen's Bench, Common Pleas and Exchequer Divisions,

are abolished as from the 28th Oct. 1879: (J. A., 1879, ss. 2 and 14; sched. 1, p. 1.)

The offices of

- (1) Clerk of Enrolments,
- (2) Clerk of Petty Bag,

will be abolished on occurrence of the next vacancy: (s. 14; sched. 1, p. 2.)

The offices of

- (1) Queen's Remembrancer,
- (2) Registrar of Certificates of Acknowledgments of Married Women,
- (3) Registrar of Judgments,

will be filled on the next vacancy by the Senior Master of the Supreme Court: (J. A., 1879, 42 & 43 Vict. c. 78, s. 14; sched. 1, p. 3.)

Any enactment or document referring to an officer or office abolished shall, as far as it continues applicable, be construed as referring to the officer or office substituted: (J. A. 1879, s. 27.)

II. CONSTITUTION OF CENTRAL OFFICE.

1. ESTABLISHMENT.

There is established a Central Office of the Supreme Court of Judicature (s. 4), in which the following offices are amalgamated:

- (1) The Record and Writ Clerk's office,
- (2) The Enrolment office,
- (3) The Report office,
- (4) The offices of the Masters of the Queen's Bench, Common Pleas, and Exchequer Divisions,
- (5) The Bills of Sale office,
- (6) The offices of the Associates of the Queen's Bench, Common Pleas and Exchequer Divisions,
- (7) The Crown office of the Queen's Bench Division,
- (8) The Queen's Remembrancer's office,
- (9) The office of the Registrar of Certificates of Acknowledgments of Married Women,
- (10) The office of the Registrar of Judgments,
- (11) Other offices of the Supreme Court from time to time included in Rules of Court: (J. A., 1879, s. 5.)

2. OFFICERS TRANSFERRED.

The following officers existing on the 28th Oct. 1879 :

- (1) The Recorder and Writ Clerks,
- (2) The Clerk of Enrolments,
- (3) The Clerks in the Report office,
- (4) The Masters of the Queen's Bench, Common Pleas, and Exchequer Divisions,
- (5) The Associates in the Queen's Bench, Common Pleas, and Exchequer Divisions,
- (6) The Queen's Remembrancer,
- (7) The Queen's Coroner and Attorney,
- (8) The Master of the Crown office [other than (7)],
- (9) The Registrar of Certificates of Acknowledgments of Married Women,
- (10) The Registrar of Judgments,
- (11) The clerks and messengers of, or employed at, the offices of the officer (1)—(10),
- (12) Officers employed under the Registrars of the Probate, Divorce, and Admiralty Divisions, selected for the Central Office by the judge,
- (13) Other officers and persons employed in the Supreme Court or the offices thereof, from time to time transferred by Rules of Court,

are transferred to the Central Office: (J. A., 1879, ss. 2, 3, 6.)

3. PRESENT STAFF.

(a) *Masters.*

The first masters of the Supreme Court of Judicature shall be—

The . . Masters of the Queen's Bench, Common Pleas, and Exchequer Divisions;

The . . Queen's Coroner and Attorney;

The . . Master of the Crown office other than the Queen's Coroner and Attorney,

The . . Record and Writ Clerks; and

The . . Associates in the Queen's Bench, Common Pleas, and Exchequer Divisions,

[respectively existing on the 28th Oct. 1879]: (J. A., 1879, ss. 2, 3, 8.)

The office of Master of the Supreme Court of Judicature shall be deemed to be substituted for the several offices specified in the first part

of the first schedule to the Supreme Court of Judicature (Officers) Act, 1879, [viz., the offices of

Record and Writ Clerk,

Master in the Queen's Bench, Common Pleas, and Exchequer
Divisions of the High Court of Justice,

Associate in the Queen's Bench, Common Pleas, and Exchequer
Divisions of the High Court of Justice,]

and all enactments and documents referring to any of those offices, or to any of the persons holding them, shall, unless the context otherwise requires, be construed and have effect accordingly: (O. LXA., r. 3, December, 1879.)

(b) Clerks.

The clerks in the Central Office shall be classified as

- (1) Principal clerks,
- (2) First-class clerks,
- (3) Second-class clerks,
- (4) Copying clerks,

or in such other manner as the Lord Chancellor, with the concurrence of the Treasury, from time to time directs: (J. A., 1879, s. 13.)

III. CONTROL AND SUPERINTENDENCE.

Except that the Clerk of Enrolments existing on the 28th Oct., 1879, retains his control and superintendence over the business formerly performed in his office, and over the persons for the time being employed in the performance of that business . . . the Central Office is under the control and superintendence of the Masters of the Supreme Court of Judicature: (J. A., 1879, s. 7.)

It shall be the special duty of one of the masters to be present at, and control the business of the Central Office, and he shall give the necessary directions with respect to questions of practice and procedure relating to the business of the Central Office. The masters shall select five of their number to discharge this duty in turn, according to a rota to be fixed by themselves: (O. LXA., r. 2, December, 1879.)

IV. DISTRIBUTION OF BUSINESS.

(1.) The business to be performed in the Central Office shall, subject to Rules of Court, comprise all the business performed in the offices by or in pursuance of this Act amalgamated with the Central Office, and shall be distributed among the several officers of the Central Office in such manner as may be directed by rules of court.

(2.) The several officers of the Central Office shall be interchangeable one with another, and shall be capable of performing and liable to perform the duties of each other in any department of the office, and generally shall perform such duties and have such powers, in relation to the business of the Supreme Court, as may be directed by rules of court, subject to this qualification, that the duties required to be performed by any officer transferred to the Central Office by or in pursuance of this Act shall, except as far as they are modified with his consent, be the same as or analogous to those which he performed before being so transferred.

(3.) Subject as aforesaid, all officers of the Central Office shall continue to perform the duties heretofore performed by them in their respective offices, and to have and exercise the powers heretofore vested in them, in the same manner, as nearly as may be, as if this Act had not passed: (J. A. 1879, s. 12.)

The central office shall, for the convenient despatch of business, be divided into the departments specified in the first column of the following

scheme, and the business and staff of the office shall be distributed among the departments in accordance with that scheme : (O. LXA., r. 1, December, 1879.)

SCHEME.

Name of Department.	Business.	Staff.
1. Writ, appearance, and judgment.	The sealing and issue of writs of summonses for the commencement of actions. The entry in the cause book of writs of summons, appearances, and judgments. The sealing and issue of notices for service under Order XVI., r. 18. The receipt and filing of pleadings delivered on entry of judgment. The transaction of all business heretofore conducted in the Record and Writ Office, except such part thereof as is transacted in the Record department.	The clerks employed in similar duties in the Record and Writ Office. Such of the clerks employed in the issue of writs and the entry of appearances and judgments in the master's offices of the Queen's Bench, Common Pleas, and Exchequer Divisions as may be selected by the masters for the purpose. And such of the officers employed under the registrars of the Probate, Divorce, and Admiralty Divisions as are selected for transfer to the Central Office.
2. Summons and Order.	The issue of summonses in the Queen's Bench, Common Pleas, and Exchequer Divisions, and the drawing up of all orders made either in court or in chambers in those divisions.	The clerks employed in the Rule Offices, and such of the other clerks in the masters' offices of the Queen's Bench, Common Pleas, and Exchequer Divisions as may be selected by the masters for the purpose. And such additional clerks as may be appointed from time to time for the purpose.
3. Filing and Record.	The filing of all affidavits to be filed in the central office, and all depositions to be used in the Chancery Division, and such other documents as may from time to time be directed by the masters to be filed, and the making and examination of office copies of documents filed in the department. The custody of all deeds and documents ordered to be left with the masters. The business heretofore performed in the Report Office under the direction and control of the Clerks of Records and Writs.	The clerks and writers employed in similar duties in the Record and Writ Office with such additional clerks and such writers and messengers as may be from time to time found necessary.
4. Taxing.	The taxation of costs in the Queen's Bench, Common Pleas, and Exchequer Divisions, except such costs as have heretofore been taxed in	Such of the clerks in the master's offices of these three divisions as may be selected by the masters for the purpose.

SCHEME—continued.

Name of Department.	Business.	Staff.
5. Enrolment.	the Queen's Remembrancer's Office or the Crown Office. The business heretofore performed in the Enrolment Office.	The clerks of the Enrolment Office.
6. Judgments.	The registry of judgments, executions, &c.	The clerks employed in similar duties under the registrar of judgments.
7. Bills of Sale.	The registry of bills of sale and other duties connected therewith.	The clerks employed in similar duties under the masters of the Queen's Bench Division as registrars of bills of sale.
8. Married Women's acknowledgments.	The registry of acknowledgments of deeds by married women.	The clerks employed in similar duties under the registrar of acknowledgments of deeds by married women.
9. Queen's Remembrancer.	The business heretofore performed in the Queen's Remembrancer's Office.	The clerks of the Queen's Remembrancer's Office.
10. Crown Office.	The business heretofore performed in the Crown Office.	The clerks of the Crown Office.
11. Associates.	The business heretofore performed in the Associates' Offices.	The clerks of the three Associates.

All deeds which by any statute or statutory rule are directed or permitted to be enrolled in any of the courts whose jurisdiction has been transferred to the High Court of Justice may be enrolled in the Enrolment Department of the Central Office : (O. LXA., r. 6, April, 1880.

V. SEAL OF CENTRAL OFFICE.

The official seals to be used in the Central Office shall be such as the Lord Chancellor from time to time directs.

All copies, certificates, and other documents appearing to be sealed with a seal of the Central Office shall be presumed to be office copies or certificates or other documents issued from the Central Office, and if duly stamped may be received in evidence, and no signature or other formality, except the sealing with a seal of the Central Office, shall be required for the authentication of any such copy, certificate, or other document : (O. LXA., r. 5, April, 1880.)

VI. ADMINISTERING OATHS.

Every master, and every first and second-class clerk in the Filing and Record Department, shall, by virtue of his office, have authority to take oaths and affidavits in the Supreme Court : (O. LXA., r. 4, December, 1879.)

VII. SEARCHES, INSPECTION, AND TAKING EXTRACTS.

The Clerk of Enrolments and each of the following registrars, namely—

The Registrar of Bills of Sale,

The Registrar of Certificates of Acknowledgments of Deeds by Married Women, and

The Registrar of Judgments,

shall, on a request in writing giving sufficient particulars, and on payment of the prescribed fee, cause a search to be made in the registers or indexes under his custody, and issue a certificate of the result of the search : (O. LXA., r. 8a, May, 1880.)

VIII. FEES.

Nothing in or done under the Act affects any liability to the payment of fees payable to any officer or office affected by the Act ; and all such fees will, subject to any regulations with regard thereto which may from time to time be made by Rules of Court, continue to be payable in the same manner and to the same persons as formerly : (J. A., 1879, s. 26.)

IX. REMOVAL OF DOCUMENTS.

No affidavit or record of the court shall be taken out of the Central Office without the order of a judge or master, and no subpoena for the production of any such document shall be issued : (O. LXA., r. 11, April, 1880.)

CERTIORARI.

I. TO REMOVE ACTION.

1. WHERE IT LIES.

- (a) *Generally.*
- (b) *To County Courts.*
- (c) *To Mayor's Court.*

2. GIVING SECURITY.

- (a) *General Rules.*
- (b) *County Court Cases.*
- (c) *Mayor's Court Cases.*

3. WHETHER ACTION NECESSARY.

4. WHERE LEAVE NECESSARY.

5. HOW LEAVE OBTAINED.

6. EVIDENCE.

7. ORDER.

8. THE WRIT.

- (a) *Issuing.*
- (b) *Service.*
- (c) *Effect.*

9. RETURN.

10. APPEARANCE.

11. QUASHING AND PROCEDENDO.

12. PROCEEDINGS AFTER REMOVAL ABOVE.

II. TO REMOVE JUDGMENT.

1. FROM COUNTY COURT.

2. FROM INFERIOR COURT OF RECORD.

I. TO REMOVE ACTION.

1. WHERE IT LIES.

- (a) *Generally.*

When any right, capable of being enforced in the Chancery Division, is sued for in an inferior court, and, by reason of the limited jurisdiction of the inferior court, the defendant cannot have complete justice, or the cause is without the jurisdiction of the inferior court, the defendant may obtain a writ of *certiorari* to remove the case into the Chancery Division : (Dan. 1430.)

It is a good ground that difficult questions of law are likely to arise : Ch. Arch. 1413.)

The writ does not lie where the action is maintainable only in the inferior court; or in general after judgment (except for the purpose of suing out execution, or giving the judgment of an inferior court the effect of a judgment of a superior court under 1 & 2 Vict. c. 110); or where the debt or damages laid or things demanded in the court below do not amount to 5*l.*, if the steward or judge of such court be a barister of three years' standing, unless the action concerned the freehold or inheritance, or title to lands, lease, or rent: (21 Jac. 1, c. 23; 12 Geo. 1, c. 29, s. 3; Ch. Arch. 13th edit. 1405.) If there be several causes, some under and others above 5*l.*, only the latter can be removed: (*Id.*)

(b) *To County Courts.*

No plaint entered in any County Court under [9 & 10 Vict. c. 90, is] removable [without order] unless the debt or damage claimed [exceeds] 50*l.*, and then only . . . in cases which appear to the judge [of the Chancery Division giving leave] fit to be tried in one of the superior courts: (9 & 10 Vict. c. 90, s. 90, which is unaffected, as to *certiorari*, by 13 & 14 Vict. c. 61, s. 16; Ch. Arch. 1412; Pol. & Nic. 230.)

Any action commenced in a County Court for a claim not exceeding 5*l.* may be removed by *certiorari* . . . if [the] Superior Court or judge [thereof deems] it desirable that the cause shall be tried in such Superior Court; and if [security is given]: (19 & 20 Vict. c. 108, s. 38.)

(c) *To Mayor's Court.*

No suit commenced on the equity side of the Lord Mayor's Court shall be removed from out of the said court into [the Chancery Division] . . . if the judge to whom . . . application shall be made shall consider that the matter in question in the said suit is fit to be tried in the Mayor's Court: (20 & 21 Vict. c. clvii., s. 20.)

No cause in the Mayor's Court (whatever the amount) is removable after plea pleaded, and before judgment, unless it appears to the judge of the High Court that it is fit to be tried there: (20 & 21 Vict. c. clvii., s. 19.)

As to cases under 50*l.* see *post*, 2, (c), and 4.

2. GIVING SECURITY.

(a) *General Rules.*

It was the practice in Chancery, before applying for the writ, to enter into a bond in 100*l.*, to be void if the plaintiff's bill contained matter sufficient to bear a *certiorari*, and if he proved the suggestion of his bill within fourteen days after the return of the writ: (Dan. 1431.)

No cause, where the cause of action does not amount to 20*l.* or upwards, can be removed before judgment from a court of record unless the defendant first enter into a recognisance with two sufficient sureties allowed by the inferior court, to the plaintiff below, for payment of the debt and costs in case judgment shall pass against the defendant: (19 Geo. 3, c. 70, s. 6; 7 & 8 Geo. 4, c. 71, s. 6; and see Ch. Arch. 1406.)

(b) *County Court Cases.*

If the claim exceeds 5*l.*, the judge ordering the *certiorari* may impose as a term that security for debt or costs shall be given: (9 & 10 Vict. c. 95, s. 90.)

The security is at the cost of the party giving it: (19 & 20 Vict. c. 108, s. 70.)

In lieu of security, a deposit may be made with the master of a sum equal in amount to the sum for which he would be required to give security, together with a memorandum, to be approved by the master, and signed by the party or his solicitor: (*Id.*, s. 71.)

If the claim is under 5*l.*, the party applying for the *certiorari* must give security, to be approved of by one of the masters of the Central

Office, for the amount of the claim and the costs of the trial, not exceeding in all 100l., and shall further assent to such terms, if any, as the court or judge above shall impose: (19 & 20 Vict. c. 108, s. 38.)

(c) *Mayor's Court Cases.*

When an action is pending in the Mayor's Court for a claim not exceeding 50l., it cannot be removed before judgment without the order of a judge of the High Court (*i.e.*, as, of course, on presenting a *præcipe*) unless the defendant give security in the Mayor's Court: (19 & 20 Vict. c. clvii., s. 16; and see Candy's M. C. Pr. 104.)

In case of a cause being removed, by order, after plea pleaded, and before judgment, security for costs may be imposed: (20 & 21 Vict. c. clvii., s. 19.)

3. WHETHER ACTION NECESSARY.

According to *Nothard v. Proctor* (L. Rep. 1 Ch. Div. 4), Seton on Decrees (4th ed. 329), and Daniel's Chancery Forms (3rd ed. 1001), it is now unnecessary to commence an action before applying for the writ; but the form of *præcipe* and writ in schedules E. 12 and G. 9 to the Rules of April, 1880, are intituled in an action pending in the High Court.

4. WHERE LEAVE NECESSARY.

Except in the case mentioned below the writ is issued as a matter of course: (Ch. Arch. 1307.)

Leave is necessary,

On removal from a County Court whether the plaint is under or over 5l.: (9 & 10 Vict. c. 95, s. 90; 19 & 20 Vict. c. 108, s. 38.)

On removal from the Mayor's Court in the cases of suits commenced on the equity side thereof (20 & 21 Vict. c. clvii., s. 20); causes pending, before judgment, where the debt or damages sought to be recovered do not exceed 50l. (unless the defendant has given the required security) (*Id.*, s. 16.); any cause before judgment and after plea pleaded: (*Id.*, s. 20.)

5. HOW LEAVE OBTAINED.

Generally the application is *ex parte*, and may be by motion in court, or original summons in chambers: (Dan. Forms, 3rd ed. 997.)

An application to remove an action from a County Court by *certiorari* should be by summons: (Pol. & Nic. 232.)

If the court directs the summons to operate as a stay of proceedings a copy must be served on the opposite party and the registrar of the County Court two clear days before the hearing day: (19 & 20 Vict. c. 108, s. 40.)

An application to remove an action from the Mayor's Court for a claim not exceeding 50l., or any action therein after plea pleaded and before judgment, should be by summons: (Candy's Mayor's Court Pr. 104, 106n.)

An application to remove, by *certiorari*, an action from the equity side of the Mayor's Court is by motion *ex parte*: (*Davies v. MacHenry*; L. Rep. 3 Ch. App. 200; *Tracy v. Open Stock Exchange*, L. Rep. 11 Eq. 556.)

It is more convenient to move at once, on notice, for an order for removal: (Seton, 327-330.)

6. EVIDENCE.

The application, if any, must be supported by affidavit stating all facts material to the case: (Ch. Arch. 1407; Pol. & Nic. 232.)

The affidavits must be intituled in the Chancery Division, but not in any cause: (*Id.*; but compare schedules E. 12 and G. 9 to the Rules of April, 1880.)

7. ORDER.

In County Court cases, above 5l., the judge may impose such terms as to

payment of costs, security for debt or costs, or otherwise, as he thinks fit : (9 & 10 Vict. c. 95, s. 90.)

In County Court cases, when the claim does not exceed 5*l.*, the court or judge may impose terms : (19 & 20 Vict. c. 108, s. 38.)

Mayor's Court cases, under 50*l.*, may be ordered to be removed without any security being given : (20 & 21 Vict. c. clvii., s. 16.)

In Mayor's Court cases, ordered to be removed before judgment and after plea pleaded, the judge may impose terms as to payment of costs, giving security for debt and costs, or damages and costs, or otherwise : (*Id.*, s. 19.)

8. THE WRIT.

(a) Issuing.

The writ may be issued out of the Petty Bag Office (Ch. Arch. 1407), or out of the Central Office : (Seton, 331.)

When it is issued pursuant to an order the form of *præcipe* in schedule E. 12 to the Rules of April, 1880, must be used.

A form of writ is given in schedule G. 9 to the Rules of April, 1880 ; and see Dan. Forms, 3rd ed., No. 1882.

Every writ of *certiorari* to the Mayor's Court must be made returnable immediately, whether in or out of term : (20 & 21 Vict. c. clvii., s. 52.)

In County Court cases the writ must be made returnable on a day certain : (Pol. & Nic. 232.)

(b) Service.

(1) General Rule.

The writ must be delivered to the judge or officer of the inferior court before any of the jury are sworn, and before issue or demurrer joined, or if such issue or demurrer be not joined, within six weeks after the defendant's appearance, and before a writ of inquiry has issued in case of a judgment by default : (43 Eliz. c. 5 ; 21 Jac. 1, c. 23, s. 2 ; Ch. Arch. 1407.)

(2) County Court Cases.

Where a *certiorari* granted *ex parte* is not lodged with the registrar of the County Court, and notice thereof given to the opposite party two clear days before the day fixed for hearing, the judge of the County Court may order the person who obtained the writ to pay all or some of the costs of the day, unless the court or judge above has made some order respecting such costs : (19 & 20 Vict. c. 108, s. 41.)

(3) Mayor's Court Cases.

No cause depending in the Mayor's Court shall be removed before judgment therein into any Superior Court, unless the writ removing such cause shall have been lodged with the proper officer within one month after service of the plaint, or unless such writ shall have been lodged with such officer before such action shall have been entered for trial according to the practice of the Mayor's Court : (20 & 21 Vict. c. clvii., s. 17.)

(c) Effect.

The writ, on delivery to the judge or officer, suspends all proceedings in the inferior court (Ch. Arch. 1408), and, if disobeyed, subjects the offender to attachment for contempt : (Pol. & Nic. 233.)

9. RETURN.

The record itself, formally made up, and not a mere copy, must be returned into the Court above. If the writ does not lie, the special circumstances must be stated in the return : (*Id.*)

10. APPEARANCE.

The memorandum of defendant's appearance must be annexed to the writ and return, and filed in the central office, and notice of appearance must be given to the plaintiff : (Ch. Arch. 1409 ; see APPEARANCE.)

If defendant does not appear, an order of course may be obtained for a *procedendo*, unless the defendant appear within four days after notice thereof : (R. G. H. T. 1853, r. 115 ; Ch. Arch. 1409.)

11. QUASHING AND PROCEDENDO.

After return, if the writ of *certiorari* has been issued when it does not lie, or is misdirected, or otherwise bad in point of law, it may be quashed by the court or a judge on motion *ex parte*, or summons to show cause : (Ch. Arch. 1409.)

It may also be quashed when it is clear it was sued out for delay only : (*Id.*)

Before return it cannot be quashed, but a *supersedeas* will be issued : (*Id.*)

When the defendant does not afterwards comply with the rules of the Chancery Division, a *procedendo* may be ordered : (Ch. Arch. 1410.)

A *præcipe* must be left when the *procedendo* is issued : (*Id.*)

A *procedendo* improperly issued may be quashed : (*Id.*)

After *procedendo*, no action can be removed before judgment : (21 Jac. 1, c. 23, s. 3 ; Ch. Arch. 1410.)

12. PROCEEDINGS AFTER REMOVAL ABOVE.

The plaintiff, if he proceeds, must begin *de novo* by delivering statement of claim : (Ch. Arch. 1410.)

After removal affidavits to be used in the Superior Courts may be intituled in the cause : (Ch. Arch. 1411.)

II. TO REMOVE JUDGMENT.

1. FROM COUNTY COURT.

If a judge of [the Chancery Division] shall be satisfied that a party against whom judgment for an amount exceeding 20*l.*, exclusive of costs, has been obtained in a County Court, has no goods or chattels which can be conveniently taken to satisfy such judgment, he may, if he shall think fit, and on such terms as to costs as he may direct, order a writ of *certiorari* to issue to remove the judgment of the County Court into [the Chancery Division] : (19 & 20 Vict. c. 108, s. 49.)

The application is by motion *ex parte*, or summons : (Dan. Forms, 768.)

The application is intituled in the matter of the Act, and of the judgment or action below : (Seton, 335.)

The writ must be served on the County Court judge, registrar, or clerk at registrar's office : (Dan. Forms. 769.)

When the judgment is removed it has the same force and effect, and the same proceedings may be had thereon, as in the case of a judgment of the Chancery Division, but no action shall be had on such judgment : (19 & 20 Vict. c. 108, s. 49.)

2. FROM INFERIOR COURT OF RECORD.

When judgment has been given in an inferior Court of Record, the Chancery Division, upon affidavit of such judgment having been obtained, and of diligent search and inquiry having been made after the person of the defendant or his effects, and of execution having issued against his person or effects, and that his person or effects are not to be found within the jurisdiction of the inferior court, may cause the record of judgment to be removed into the Chancery Division, and issue writs of execution thereon : (See 19 Geo. 3, c. 70. s. 4.)

The application is *ex parte* by motion or originating summons in chambers : (Dan. Forms, 778.)

CESTUI QUE TRUST.

[See PARTIES, TRUSTEES.]

CESTUI QUE VIE, PRODUCTION OF.

- I. IN WHAT CASES ORDERED.
- II. PRODUCTION BEFORE ONE OR TWO NOMINEES.
- III. PRODUCTION TO COURT OR COMMISSIONERS.
- IV. FINAL ORDER ON NON-PRODUCTION.
- V. PROCEDURE WHERE CESTUI QUE VIE IS ABROAD.
- VI. PROOF THAT CESTUI QUE VIE EXISTS, BUT CANNOT BE PRODUCED.

I. IN WHAT CASES ORDERED.

Any person or persons [having] any claim or demand in or to any remainder, reversion, or expectancy in or to any estate after the death of any person within age, married woman or any other person whatsoever may, once a year, if the person aggrieved shall think fit, move the [court] to order such guardian, trustee, husband, or other person concealing, or suspected to conceal such person, to produce and show such minor, married woman or other persons : (6 Anne c. 18, s. 1.)

II. PRODUCTION BEFORE ONE OR TWO NOMINEES.

The application is by motion, *ex parte* : (*Id.* ; Dan. 1909.)

[The evidence is by] affidavit made by the person so claiming such estate, of his or her title, and that he or she hath cause to believe that such minor, married woman, or other person is dead, and that his or her death is concealed by such guardian, trustee, husband, or any other person : (6 Anne c. 18, s. 1.)

It is sufficient to allege circumstances which give reason to suspect that the *cestui que vie* is dead : (Dan. 1909.) And where it is shown that an application has been made to the person being and claiming to be in possession in respect of the life estate, for production of the *cestui que vie*, and the person in possession does not respond to the application, the applicant is entitled to the order : (*Re Owen*, L. Rep. 10 Ch. Div. 166.)

[The court is] authorised and required to order such guardian, &c. [see *sup.* I.] at such time and place as the said court shall direct, on personal or other due service of such order, to produce and show to such person or persons (not exceeding two), as shall in such order be named by the party or parties prosecuting such order, such minor, married woman, or other persons aforesaid : (6 Anne, c. 18, s. 1.)

The person or persons to whom such production is directed should attend at the time and place specified in the order : (Dan. 1909.)

If the *cestui que vie* is then produced, the proceeding terminates : (*Id.*)

III. PRODUCTION TO COURT OR COMMISSIONERS.

If such guardian [&c.] shall refuse or neglect to produce such infant [&c.] on whose life any such estate doth depend, according to the direction of such order, then the court is authorised and required to order such guardian [&c.] to produce such minor [&c.] concealed, in the said court or otherwise before commissioners to be appointed by the

said court, at such time and place as the court shall direct; two of which commissioners shall be nominated by the party or parties prosecuting such order at his or their costs and charges: (6 Anne c. 18, s. 1.)

The application is *ex parte*, and must be supported by affidavits proving the service of the first order, the attendance at the place named, and the non-production: (Dan. 1909.)

This order must be personally served: (*Id.*)

The court may enlarge the time for production: (Dan. 1910.)

If the *cestui que vie* is produced the proceedings end.

IV. FINAL ORDER ON NON-PRODUCTION.

On non-production, after the order for production before commissioners, their return must be filed in the Petty Bag Office: (Dan. 1910.)

In case such guardian [&c.] shall neglect or refuse to produce such infant [&c.] in the court, or before commissioners . . . the said minor [&c.] shall be taken to be dead: (6 Anne c. 18, s. 1.)

When the order has been made for production in court, and (unless the order requiring production has declared that in default thereof the *cestui que vie* shall be deemed to be dead) in case of an order for production before commissioners, an order declaring that the *cestui que vie* shall be deemed to be dead must be obtained on motion, *ex parte*, supported by affidavit of service of the second order and the commissioners' return, if any: (Dan. 1910; but see Seton, 4th ed., 1279.)

[After such last-named order] it shall be lawful for any person claiming any right, title, or interest, in remainder or reversion, or otherwise, after the death of such infant [&c.] to enter upon such lands, tenements, and hereditaments, as if such infant [&c.] were actually dead: (6 Anne, c. 18, s. 1.)

V. PROCEDURE WHERE CESTUI QUE VIE IS ABROAD.

If it shall appear to the said court by affidavit that such married woman, or other person for whose life such estate is holden, is or lately was at some certain place beyond the seas in the said affidavit to be mentioned . . . the party or parties prosecuting such order as aforesaid, at his, her, or their costs and charges [may] send over one or both of the said persons appointed by the said order to view such minor [&c.]: (6 Anne, c. 18, s. 2.)

In case such guardian [&c.] concealing, or suspected to conceal, such persons as aforesaid, shall refuse or neglect to produce or procure to be produced to such person or persons a personal view of such infant [&c.] such person or persons are . . . required to make a true return of such refusal or neglect to the court . . . which return shall be filed in the Petty Bag Office: (*Id.*)

[After such return] such minor [&c.] shall be taken to be dead [and entry may be made on the property as mentioned; *sup.* IV.]: (*Id.*)

VI. PROOF THAT CESTUI QUE VIE EXISTS, BUT CANNOT BE PRODUCED.

If any such . . . person . . . holding or having any estate or interest determinable upon the life or lives of any other person or persons, shall, by any affidavit or otherwise, to the satisfaction of the said court . . . make appear that he, she, or they have used his, her, or their utmost endeavours to procure such infant [&c.] to appear in the said court . . . or elsewhere, according to the order of the said court in that behalf made, and that he, she, or they cannot procure or compel such infant [&c.]

so to appear, and that such infant [&c.] is, are, or were living at the time of such return made and filed as aforesaid, then it shall be lawful for such persons to continue in . . . possession : (6 Anne, c. 18, s. 4.)

CHAMBERS.

- I. JURISDICTION OF JUDGE AT CHAMBERS.
- II. JUDGE TO HAVE POWER OF JUDGE IN COURT.
- III. BUSINESS TO BE IN CONJUNCTION WITH COURT BUSINESS.
- IV. ADJOURNMENT TO AND FROM COURT.
 1. To CHAMBERS.
 2. To COURT.
- V. MATTERS DISPOSED OF IN CHAMBERS.
- VI. CHIEF CLERKS.
 1. MATTERS INVESTIGATED BY.
 2. DUTIES.
 3. POWERS.
- VII. SCIENTIFIC ASSISTANCE.
- VIII. DELAY.
 1. PARTIES REQUIRED TO SHOW CAUSE.
 2. DIRECTIONS FOR PROSECUTION.
- IX. FINALLY DISPOSING OF MATTERS.
- X. REGISTER OF PROCEEDINGS.
- XI. SUMMONS AND APPOINTMENT BOOK.
- XII. LIST OF MATTERS FOR HEARING.
- XIII. SUMMONSES.
 1. SUMMONS TO BE MODE OF PROCEEDING.
 2. DIFFERENT KINDS.
 3. RULES APPLICABLE TO ALL SUMMONSES.
 - (a) Preparation.
 - (b) Form.
 - (c) Address for Service.
 - (d) Sealing.
 - (e) Leaving Copy at Chambers.
 - (f) Entry in Summons and Appointment Book.
 - (g) Alterations.
 - (h) Substituted Service.
 - (i) Abandoned Summons.
 4. ORIGINAL SUMMONS.
 - (a) Filing Duplicate.
 - (b) Service.
 - (c) Appointing New Time for Attendance.
 - (d) Amendment.
 - (e) Affidavit of Service.
 5. ORDINARY SUMMONS.
 - (a) Service.
 - (b) Appointing New Time for Attendance.
 - (c) Affidavit of Service.
 6. CHIEF CLERK'S SUMMONS.
 - (a) Power to Issue.
 - (b) Form.
 - (c) Service.
 - (d) Effect.
- XIV. APPEARANCE.
- XV. COURSE OF PROCEEDING.

XVI. COPIES.**XVII. HEARING OF MATTERS IN CHAMBERS.**

1. PARTIES ENTITLED TO ATTEND.
2. ORDERING SEPARATE SOLICITOR.
3. COUNSEL.
4. PROCEEDING EX PARTE.
5. COSTS OF NON-ATTENDANCE.
6. SUBSEQUENT ATTENDANCES.
7. RIGHT TO SEE THE JUDGE.
8. ADJOURNMENT INTO COURT.
9. PAPERS.

XVIII. EVIDENCE.

1. AFFIDAVITS.
 - (a) *For Chamber Purposes.*
 - (b) *Previously used in Court.*
 - (c) *Exhibit.*
 - (d) *Notice of Intention to Use.*
 - (e) *Cross-examination.*
 - (f) *Previously used in another Cause.*
2. ORAL EVIDENCE.
 - (a) *Before whom taken.*
 - (b) *Before Judge.*
 - (c) *Before Chief Clerk.*
 - (d) *Before Examiner or other Person.* [See EVIDENCE.]
3. CLOSING EVIDENCE.

XIX. PRODUCTION OF DOCUMENTS.**XX. SCANDALOUS AND UNNECESSARY PROCEEDINGS.****XXI. CONDUCT OF PROCEEDINGS.****XXII. APPOINTMENTS.****XXIII. ORDERS MADE IN CHAMBERS.**

1. DRAWING UP.
2. ENTRY.
3. EFFECT.
4. APPEAL. [See APPEAL.]

XXIV. WORKING OUT JUDGMENT OR ORDER.**XXV. INQUIRIES.****XXVI. ADVERTISEMENTS.****XXVII. CHIEF CLERK'S CERTIFICATE.**

1. TO STATE RESULT OF PROCEEDINGS.
2. FORM AND ENTRY.
3. SETTLING AND SIGNING BY CHIEF CLERK.
4. APPROVAL BY JUDGE.
 - (a) *Certificate must be signed.*
 - (b) *Certificates to be acted on by Paymaster-General.*
 - (c) *Certificates on passing Receiver's Accounts.*
 - (d) *Ordinary Certificates.*
 - (e) *When dispensed with.*
5. FILING.
6. WHEN BINDING.
7. OFFICE COPIES.
8. TAKING JUDGE'S OPINION UPON DISCHARGING, VARYING, AND REVIEWING. [See APPEAL.]

I. JURISDICTION OF JUDGE AT CHAMBERS.

Any judge of the . . . High Court of Justice may, subject to any rules of court, exercise in chambers all or any part of the jurisdiction . . . vested in the said High Court, in all such causes and matters, and

in all such proceedings in any causes or matters, as before the passing of [the] Act might have been heard in chambers respectively, by a single judge of any of the courts whose jurisdiction is transferred to the said High Court, or as may be directed or authorised to be so heard by any rules of court: (J. A., 1873, s. 39.)

All or any of the powers, authorities, and jurisdiction [formerly possessed by] the Masters in Ordinary of the Court of Chancery [under] any Act or Acts in force [when the master's office was abolished] may be exercised by [the judges of the Chancery Division.]: (15 & 16 Vict. c. 80, s. 36.)

All powers and authorities which were exercisable by the Masters in Ordinary [before their office was abolished] under or by virtue of any general order or orders of the Court [of Chancery, other than the powers and authorities specially provided for by the Consolidated Orders of that court] may be exercised by the judge in chambers: (C. O. 35, r. 61.)

The power of the court and of the judge in chambers to enlarge or abridge the time for doing any act or taking any proceeding, and to give any special direction as to the course of proceeding in any cause or matter [is] not affected: (C. O. 35, r. 62.)

[The judges of the Chancery Division] for the time being are required to sit at chambers for the despatch of such part of the business of the court as can, without detriment to the public advantage arising from the discussion of questions in open court, be heard in chambers; and the times at and during which they respectively so sit shall be from time to time fixed by them respectively: (15 & 16 Vict. c. 80, s. 11.)

II. JUDGE TO HAVE POWER OF JUDGE IN COURT.

[The judges of the Chancery Division] respectively when sitting in chambers have the same power and jurisdiction in respect of the business to be brought before them as if they were respectively sitting in open court: (15 & 16 Vict. c. 80, s. 13.)

The judge at chambers may consider special material circumstances, though the decree contains no direction on the subject: (Ayck. 485.)

III. BUSINESS TO BE IN CONJUNCTION WITH COURT BUSINESS.

The chamber business of [every such judge] shall be carried on in conjunction with his court business: (15 & 16 Vict. c. 80, s. 12.)

IV. ADJOURNMENT TO AND FROM COURT.

1. TO CHAMBERS.

[Every judge of the Chancery Division] when sitting in open court [may] adjourn for consideration in chambers any matter which, in the opinion of such judge, may be more conveniently disposed of in chambers: (15 & 16 Vict. c. 80, s. 27.)

The court may adjourn the proceedings to chambers for further inquiry: (Ayck. 486.)

Whenever any matter is adjourned from the court to chambers, or any directions are given in court to be acted upon at chambers, whether upon a matter adjourned into Court from chambers or upon any other occasion, without an order being drawn up, a note signed by the registrar, stating for what purpose such matter is adjourned to chambers, or the directions given, is to be procured from the registrar and left at chambers: (Ch. Reg. Aug. 1857, r. 3.)

In the case of a petition, directions to be acted upon at chambers are (without order) endorsed by the registrar on the original petition, and a note is also given by him on a separate sheet for use in chambers: (Ch. Reg. Aug. 1857, r. 3; Seton, 4th edit. 54.)

'After the registrar's note has been left at chambers a summons to proceed is taken out and served, on the return of which the usual proceedings take place: (see *post*, XXIV.)

When the matter adjourned is to be afterwards disposed of in court, without any formal chief clerk's certificate, a minute of the result of proceedings in chambers, and the evidence there, is signed by the chief clerk, and indorsed on or annexed to the original petition, if any. The minute or office copy certificate (if required) is presented to the registrar, who then puts the case in the paper for hearing: (Dan. 1189.)

2. TO COURT.

[A judge] when sitting in chambers may direct any matter to be heard in open court which he may think ought to be so heard: (15 & 16 Vict. c. 80, s. 27.)

A note is sent to the registrar to the effect that the further consideration of the matter and cause is adjourned into court, to be set down in the cause book, after the causes already set down; and (if desired) that it may be put in the paper as a short cause: (Seton, 4th edit. 63.)

V. MATTERS DISPOSED OF IN CHAMBERS.

The business to be disposed of by the judges while sitting at chambers consists (*inter alia*) of the following applications:

- For time to plead, answer or demur;
- For leave to amend;
- For enlarging publication;
- For the production of documents;
- As to the conduct of suits or matters;
- As to guardianship and maintenance of infants;
- As to matters connected with the management of property (15 & 16 Vict. c. 80, s. 26; Ch. O., 10th Nov. 1852; 9 Ha. App. xlviii.; O. XIII., r. 1);
- For payment to any person of the dividends or interest of any stocks, funds, or securities standing to the credit of any cause or matter depending to the separate account of such person;

Under the Legacy Duty Act (36 Geo. 3, c. 52, s. 32), where the sum paid into the Bank or the stock transferred into the name of the Paymaster-General does not exceed three hundred pounds cash, or three hundred pounds stock;

Under the Trustee Relief Acts, where the trust fund does not exceed three hundred pounds cash, or three hundred pounds stock;

Under the Trustee Acts 1850 and 1852 where any decree or order has been made by the court for the sale or conveyance of any lands, manors, messuages, tenements, or hereditaments, corporeal or incorporeal, of any tenure or description, whatever may be the estate or interest therein;

On behalf of infants under 1 Will. 4, c. 65, ss. 12, 16 and 17, where the infant is a ward of the court, or the administration of the estate of the infant or the maintenance of the infant is under the direction of the court (C. O. 35, r. 1);

Under the Copyhold Acts respecting any securities or money in court, notice of application to the Copyhold Commissioners being unnecessary, unless directed by the judge (Chanc. Funds Am. O. r. 15);

Under the Drainage Acts;

For the administration of estates under 15 & 16 Vict. c. 86 ;

As to evidence (Ch. O., 10th Nov. 1852 ; O. XXXVII., r. 1) ;

For payment into court of purchase moneys under sales by order of the court, and investing the same (Ch. O., 10th Nov. 1852, and compare Ch. F. R. 1874, r. 27) ;

Such other matters as each judge may from time to time think fit (15 & 16 Vict. c. 80, s. 26 ; and see Dan. 1042) ;

Generally, whenever, under the new procedure the power to make an order is given to "a judge" simply.

VI. CHIEF CLERKS.

1. MATTERS INVESTIGATED BY CHIEF CLERKS.

[The judges of the Chancery Division have] respectively . . . the sole power (subject to . . . rules) . . . to order what matters and things shall be investigated by and before their respective chief clerks, either with or without their direction, during their progress ; and what matters and things shall be heard and investigated by themselves ; and particularly if the judge . . . so direct, his chief clerks respectively shall take accounts, and make such inquiries [as were formerly] prosecuted before the chief clerks of the . . . masters ; and the judge shall give such aid and directions in every or any such account or inquiry as he may think proper, but subject nevertheless to the right . . . for the suitor to bring any particular point before the judge himself : (15 & 16 Vict. c. 80, s. 29.)

In proceedings at chambers any party has a right to bring any question before the judge directly and not by way of appeal from the chief clerk : (Ayck. 486 ; and see APPEAL.)

The judges have ordered that all their chamber business, with very few exceptions, shall be in the first instance heard before their chief clerks : (Dan. 1045.)

The chief clerk is only the judge's deputy : (*Id.*)

2. DUTIES.

The chief clerks and junior and assistant clerks are under the control of the judge to whose court they are attached ; and must attend at such places, during such times, and for such hours in each day, and perform such duties, as such judge from time to time directs : (Dan. 1043.)

3. POWERS.

Each chief clerk [has] for the purpose of any proceedings directed to be taken before him . . . full power—

- [1] To issue advertisements,
- [2] To summon parties and witnesses,
- [3] To administer oaths,
- [4] To take affidavits and acknowledgments, other than acknowledgments by married women,
- [5] To receive affirmations, and (when so directed by the judge,) . . .
- [6] To examine parties and witnesses . . . : (15 & 16 Vict. c. 80, s. 30 ; and as to [6] see O. XXXVII., r. 4 [EVIDENCE].)

VII. SCIENTIFIC ASSISTANCE.

The court, or any judge thereof [may] in such way as they may think fit . . . obtain the assistance of accountants, merchants, engineers, actuaries, or other scientific persons, the better to enable such court or judge to determine any matter at issue in any cause or proceeding, and [may] act upon the certificate of such persons : (15 & 16 Vict. c. 80, s. 42.)

Witnesses may be ordered to be examined on oath before an expert : (O. XXXVII., r. 4 ; and see EVIDENCE.)

Written instructions on which the expert is to act are usually prepared and transmitted to him by the chief clerk : (Dan. 1048.)

The report is only material for the information of the court, and affidavits in opposition may be received : (Dan. 1048.)

VIII. DELAY.

1. PARTIES REQUIRED TO SHOW CAUSE.

In case any . . . proceeding pending at a judge's chambers is not prosecuted with due diligence, the parties, or any of them, may be required to attend at chambers at a time to be appointed for that purpose, to show cause why such proceeding [has not been] prosecuted : (C. O. 35, r. 23.)

2. DIRECTIONS FOR PROSECUTION.

Such directions may be given at chambers or by adjournment in open court as shall be proper to insure the prosecution thereof by some persons interested therein, and for the discharge of any receiver, and appointment of another, and for payment of the costs incurred by any neglect or default, or a certificate by the chief clerk of such neglect or default as aforesaid, or of any abandonment or abatement of the proceedings or otherwise, according to the facts, may be made and filed, without any fee being payable thereon ; and after such certificate shall have been so made, unless the same shall be discharged, none of the parties shall be at liberty to further prosecute the proceedings at chambers, unless and until the court or judge shall upon application make an order directing the same to be prosecuted ; and upon such certificate becoming binding, any party may apply to the court, and the court may make such order relative to costs, and to relieve any party from the effect of any decree or order before made or proceeding taken which shall not have been duly prosecuted, or otherwise, as may be thought proper : (C. O. 35, r. 23.)

For the purposes aforesaid, any party, or the [official] solicitor may be directed to summon the persons whose attendance is required, and to conduct any proceedings, and carry out any directions which may be given ; and the costs of the [official] solicitor shall be paid by such parties or out of such funds as the court or judge may direct ; and if any costs of the [official] solicitor be not otherwise paid, the same shall be paid out of the suitors' fund : (C. O. 35, r. 23.)

IX. FINALLY DISPOSING OF MATTERS.

If and when any . . . [judge is] of opinion that any cause, matter, or thing depending [before him in chambers] ought to be finally disposed of, unless the parties or some of them can show good cause to the contrary, he shall direct the same to stand in his paper in open court, giving such notice thereof, if any, as he shall deem right, and proceed to dispose thereof accordingly : (15 & 16 Vict. c. 80, s. 37.)

X. REGISTER OF PROCEEDINGS.

A register [is] kept of all proceedings in the judge's chambers, with proper dates, so that all the proceedings in each cause or matter may appear consecutively and in chronological order, with a short statement of the questions or points decided or ruled at every hearing : (C. O. 35, r. 57.)

XI. SUMMONS AND APPOINTMENT BOOK.

[A book is kept at chambers called "The Summons and Appointment Book," in which] at the time any summons or appointment is made, an entry is made [of] :

The date on which the summons is issued or appointment made ;
 The name of the cause or matter ;
 [The party by whom the summons or appointment is obtained] ;
 The purpose [for which] such summons or appointment is obtained] :
 The time [for which] such summons is returnable ;
 The time [for which] such appointment is made : (C. O. 35, r. 24.)

XII. LISTS OF MATTERS FOR HEARING.

Lists of matters appointed for each day shall be made out and affixed outside the doors of the chambers of the respective judges. And, subject to any special direction, such matters shall be heard in the order in which they appear in such lists : (C. O. 35, r. 25.)

XIII. SUMMONSES.

1. SUMMONS TO BE MODE OF PROCEEDING.

The mode of proceeding at chambers [as to matters not expressly provided for under the new procedure is] by summons : (15 & 16 Vict. c. 80, s. 28.)

Every application at chambers authorised by [the] rules shall be made in a summary way by summons : (O. LIV., r. 1.)

2. DIFFERENT KINDS.

Summonses are of three kinds :

1. Original summonses, commencing proceedings, as those for administration, and the appointment of guardians ;

2. Ordinary, where proceedings are already pending, as for time, and amendment ;

3. Chief clerk's summonses for the attendance of parties and witnesses to give evidence.

3. RULES APPLICABLE TO ALL SUMMONSES.

(a) *Preparation.*

Summonses must be prepared by the parties : (C. O. 35, r. 5.)

(b) *Form.*

The general summons for the purpose of proceedings before [judges] at chambers, whether originating in chambers or not, may be in a form similar to the form set forth in schedule K., No. I. [to the Consolidated Orders] with such variations as the circumstances of the case may require : (C. O. 35, r. 2 ; and compare form in schedule H. 1, to the Rules of April, 1880.)

This does not apply to administration summonses (as to which see ADMINISTRATION SUMMONS), or to chief clerk's summonses to parties and witnesses.

(c) *Address for Service.*

The name or firm and address of the solicitor and the agent (if any) suing out a summons, or the name and address of the party if suing or defending in person, and if the address be more than three miles from the Central Office, an address for service, must be indorsed on every summons : (C. O. 3, rr. 2, 5 ; J. A., 1879.)

(d) *Sealing.*

Summonses [are] sealed by one of the clerks at the chambers of the judge from whose chambers they are issued : (C. O. 35, r. 5.)

(e) *Leaving Copy at Chambers.*

A copy of the summons [must] be left at the judge's chambers by the party obtaining such summons : (C. O. 35, r. 5.)

(f) Entry in Summons and Appointment Book.

At the time any summons . . . is obtained, an entry thereof [must] be made in "The Summons and Appointment Book : " (see *ante*, XI.)

(g) Alterations.

Summonses are not to be altered after they are sealed, except upon application at chambers, and any alterations then made will be marked with the seal of such chambers : (Ch. Reg., Aug., 1857, r. 1.)

(h) Substituted Service.

An order may be made at chambers on *ex parte* summonses, authorising substituted service, or service out of the jurisdiction : (Dan. 1054.)

(i) Abandoned Summonses.

When a summons is abandoned by the party taking it out, the other party is entitled to his costs of preparing to oppose it : (Dan. 1055 ; Ayck. 496.)

4. ORIGINAL SUMMONS.

(a) Filing Duplicate.

In cases of applications . . . originating in chambers, a duplicate of the summons must be filed in the [Central Office] : (C. O. 35, r. 6 ; J. A., 1879.)

(b) Service.

Where proceedings originate in chambers, the original summons [must] be served seven clear days before the return thereof : (C. O. 35, r. 7.)

Where proceedings originate in chambers, and service is required, the copies served must be stamped [with a stamp of the Central Office indicating the filing thereof] : (C. O. 35, r. 6 ; 15 & 16 Vict. c. 86, s. 46 ; J. A., 1879.)

A stamped copy must be served on the party. In other respects the practice will be the same as on serving a writ of summons in an action. [See WRIT OF SUMMONS.]

(c) Appointing New Time for Attendance.

When the proceedings originate in chambers, and from any cause the summons [has] not . . . been served upon any party seven clear days before the return thereof, an indorsement may be made upon the summons, and upon a copy thereof stamped for service, appointing a new time for the parties not before served to attend at the chambers of the judge ; and the service of the copy so indorsed and sealed [has] the same force and effect as the service of an original summons ; and when any party has been served before such indorsement, the hearing thereof may, upon the return of the summons, be adjourned to the new time so appointed : (C. O. 35, r. 8.)

Clear days are reckoned exclusive of the day of service and inclusive of the last days : (C. O. 37, r. 9.)

If the summons has not been served on any party, no indorsement will be made, but the return day will be altered in the original summons, and the alteration authenticated at chambers : (Dan. 1052.)

The duplicate filed at the Central Office will be altered on production of the amended summons, and the copies may be altered and restamped without any order to amend : (*Id.*)

(d) Amendment.

(1) Before Service.

If no party has been served no order to amend is necessary, but the alteration must be authenticated by seal at chambers, and produced to the master at the Central Office with a note from the chief clerk directing the duplicate to be amended : (Dan. 1053.)

The copy stamped for service will be amended and resealed without further fee : (*Id.*)

(2) After Service.

After service on any party an order to amend must be obtained *ex parte* at chambers, when it is drawn up. The alteration must be authenticated by seal at chambers, and the amended summons and order produced to the master at the Central Office for amendment of the duplicate and cause book : (Dan. 1053.)

Copies stamped for service will be altered and resealed without further fee : (*Id.*)

(e) *Affidavit of Service.*

In case the defendant does not appear an affidavit of service in the form given in schedule 1 to the Chancery Regulations of August 1857, should be produced.

5. ORDINARY SUMMONS.

(a) *Service.*

All . . . summonses [other than those originating proceedings and] not being summonses [issued by the chief clerk for the attendance of parties and witnesses] must be served two clear days before the return thereof : (C. O. 35, r. 7.)

Ordinary summonses must be served by leaving a copy, with a clerk or servant, at the place of business, or address for service of the solicitor, if any, of the party served, or, if no solicitor, on the party personally, or with a servant or member of the family at his place of residence or address for service : (Dan. 1054; Ayck. 493, 301.)

The plaintiff [may] without special leave . . . serve any . . . summons personally or at the dwelling house or office of any defendant who having been served with [the writ] has not appeared [in due time] : C. O. 3, r. 8.)

Service of all . . . summonses . . . not requiring personal service . . . [must] be made before 7 p.m., except on Saturday, when it [must] be made before 2 p.m.; and if made after 7 p.m. on any day except Saturday, the service [is] deemed as made on the following day; and if made after 2 p.m. on Saturday . . . as made on the following Monday : (C. O. 37, r. 2.)

(b) *Appointing new Time for Attendance.*

When service cannot be effected in time to allow the two clear days, the return should be enlarged on application to chambers, the alteration as to the day being authenticated by seal : (Dan. 1052.)

If any party has been previously served, the summons must not be altered, but an adjourned appointment must be obtained at chambers, and a note indorsed on the original summons as to the adjourned time, and authenticated. The note must be included in the copy for service. At the hearing at the original time, adjournment is ordered till the new time : (Dan. 1052.)

(c) *Affidavit of Service.*

An affidavit of service should be produced in case the defendant does not appear at the hearing. The form in schedule B. 24 to the Rules of April, 1880, seems to be substituted for that in schedule 2 to the Chancery Regulations of August, 1857.

6. CHIEF CLERK'S SUMMONS.

(a) *Power to Issue.*

Each chief clerk [has] for the purpose of any proceedings directed

. . . . to be taken before him full power to summon parties and witnesses : (15 & 16 Vict. c. 80, s. 30.)

(b) *Form.*

The summons by the chief clerk may be in a form similar to the form set forth in schedule K, No. III. [to the Consolidated Orders] with such variations as the circumstances of the case may require : (C. O. 35, r. 4.)

The summons may contain the names of three witnesses : (Dan. 1059.)

If documents are to be produced the summons must so state, and describe them : (Dan. 1060.)

(c) *Service.*

A summons for the purpose of examining parties and witnesses must be served personally a reasonable time before the return (Dan. 1051; Ayck. 493), in the same manner as a *subpoena ad test.* : (Dan. 1055.)

(d) *Effect.*

Parties and witnesses summoned are bound to attend in pursuance of any such summons, and liable to process of contempt, in like manner as parties or witnesses are liable thereto in case of disobedience to any order of the court, or in case of default in attendance in pursuance of any order of the court, or of any writ of *subpoena ad test.* : (15 & 16 Vict. c. 80, s. 31.)

XIV. APPEARANCE.

Where proceedings originate in chambers, the parties served [must] before they are heard in chambers enter appearances in the Central Office, and give notice thereof [to the plaintiff's solicitor] : (C. O. 35, r. 9; J. A., 1879; and see APPEARANCE.)

XV. COURSE OF PROCEEDINGS IN CHAMBERS.

The course of proceedings in chambers is ordinarily the same as the course of proceeding in court upon motions : (C. O. 35, r. 26.)

XVI. COPIES.

No state of facts, charges, or discharges, shall be brought in. But when directed, copies, abstracts, or extracts of or from accounts, deeds, or other documents, and pedigrees and concise statements, shall be supplied for the use of the judge and his chief clerks, and, where so directed, copies shall be handed over to the other parties. But no copies shall be made of deeds or documents where the originals can be brought in, unless the judge shall otherwise direct : (C. O. 35, r. 26.)

XVII. HEARING OF MATTERS IN CHAMBERS.

1. PARTIES ENTITLED TO ATTEND PROCEEDINGS.

Upon the return of the summons to proceed with accounts and inquiries (if any) the judge, if satisfied as to parties, gives directions as to the parties who are to attend on the several accounts and inquiries : (see C. O. 35, r. 16, and ACCOUNT.)

In administration causes, unless by leave, only the executor or administrator is entitled to appear on the claim of any person not a party in respect of any debt or liability : (See O. XVI., r. 12b, April, 1880, and ADMINISTRATION ACTION.)

In other cases nobody can be prevented from attending proceedings which may affect their interest (Dan. 1086-7) per Jessel, M.R. *Sharp v. Lush*, L. Rep. 10 Ch. Div. 473; 48 L. J. 231, Ch.; 27 W. R. 428; but parties in the same interest with the summoning party, but not joining in the summons, will not be heard in support (Ayck. 494.)

Parties attending any proceeding in chambers without having obtained

the previous leave of the judge [are] not [to] be allowed any cost of such attendance, unless by special order of the court or judge: (C. O. 40, r. 28.)

Where any party appears upon any application or proceeding in court or at chambers, in which he is not interested, or upon which according to the practice of the court, he ought not to attend, he is not to be allowed any costs of such application unless the court or judge shall expressly direct such costs to be allowed: (Ad. R., Aug. 1875, Sp. All., r. 21.)

The practice of the Master of the Rolls is to give leave to one solicitor to attend on each side: (*Sharp v. Lush, sup.*)

Application for permission is by summons: (Dan. 1088.)

As to the order, see Seton, 1642.

In general a creditor will only be allowed so attend at his own expense.

Persons attending without leave will be ordered to pay extra costs occasioned by unnecessarily attending: (*Sharp v. Lush, sup.*; and see Add. R. Aug. 1875, Sp. All. R. 18, and COSTS.)

2. ORDERING SEPARATE SOLICITOR.

Whenever, in any proceeding before a judge in chambers, the same solicitor is employed for two or more parties, such judge may at his discretion require that any of the said parties shall be represented before him by a distinct solicitor, and adjourn such proceedings until such party is so represented: (C. O. 35, r. 21.)

3. COUNSEL.

As to counsel attending at judge's chambers no costs thereof shall in any case be allowed, unless the judge certifies it to be a proper case for counsel to attend: (Add. R., Aug. 1875, Sp. All. r. 14, and see *Id.* r. 26, and COSTS.)

When the matter has been adjourned into court the certificate for counsel is always given, unless they state to the contrary: (Dan. 1057.)

In the chambers of the Master of the Rolls and Hall, V.C., counsel will be heard on both sides, or on one side only, either before the judge or chief clerks, but the general rule is, that matters which require to be argued by counsel shall be adjourned into court. Counsel will not be heard by Malins, V.C. or his chief clerks, or by Bacon, V.C. They will be heard by his chief clerks only in special cases: (Seton, 4th ed. 65.)

4. PROCEEDING EX PARTE.

Where any of the parties summoned to attend the judge in chambers fail so to attend, whether upon the return of the summons or at any time appointed for the consideration or further consideration of the matter, the judge may proceed *ex parte*, if, considering the nature of the case, he thinks it expedient so to do: (C. O. 35, r. 10.)

If the failure to attend happens on the return of the summons, an affidavit of service of the summons may be required: (Dan. 1055.)

Where the judge has proceeded *ex parte*, such proceeding shall not in any manner be reconsidered in the judge's chambers, unless the judge, upon a special application made to him for that purpose by a party who was absent, shall be satisfied that he was not guilty of wilful delay or negligence. And in such case, the costs occasioned by his non-attendance shall be in the discretion of the judge, who may fix the same at the time, and direct them to be paid by the party or his solicitor before he shall be permitted to have such proceeding re-considered, or make such other order as to such costs as to such judge may seem meet: (C. O. 35, r. 11.)

5. COSTS OF NON-ATTENDANCE.

As to attendances at the judge's chambers, where by reason of the non-attendance of any party (and it is not considered expedient to proceed *ex*

parte), or where by reason of the neglect of any party in not being prepared with any proper evidence, account, or other proceeding, the attendance is adjourned without any useful progress being made, the judge may order such an amount of costs (if any) as he shall think reasonable to be paid to the party attending by the party so absent or neglectful, or by his solicitor personally; and the party so absent or neglectful, is not to be allowed any fee as against any other party, or any estate or fund in which any other party is interested : (Add. R., Aug. 1875, Sp. All. r. 11.)

6. SUBSEQUENT ATTENDANCES.

Where matters in respect of which summonses have been issued, are not disposed of upon the return of the summons, the parties shall attend from time to time without further summons, at such time or times as may be appointed for the consideration or further consideration of the matter : (C. O. 35, r. 14.)

Where the matter is not adjourned to any specified time, any party may afterwards obtain at chambers an order for its further consideration; notice of which appointment must be given to the other parties entitled to attend : (Dan. 1055.)

7. RIGHT TO SEE THE JUDGE.

Every party has a right to have his case heard and determined by the judge in person, and may require the chief clerk to adjourn the case for such purpose : (Ayck. 495, and see APPEAL.)

8. ADJOURNMENT INTO COURT.

When the chief clerk adjourns the summons from chambers into court (see *sup.*, IV.) it is merely a continuation of the hearing in chambers. The chief clerk transmits a note of the adjournment to the registrar in court on the day of adjournment, and he places it in the paper : (Ayck. 495.)

9. PAPERS.

The party or solicitor who has taken any printed or written office copy of any deposition or office copy must produce the same upon every proceeding to which the same relates : (Add. R., Aug. 1875, O. V. r. 7.)

All accounts, and other copies and papers left at chambers, must be written on foolscap paper bookwise, unless the nature of the document renders it impracticable to do so : (Ch. Reg. Aug. 1857, r. 17.)

XVIII. EVIDENCE.

1. AFFIDAVITS.

(a) *For Chamber Purposes.*

If the witnesses are willing to attend voluntarily, the evidence may be taken upon affidavit in the ordinary course : (Ayck. 500.)

The affidavits must be filed in the Central Office, and office copies duly sealed used in chambers : (See O. XXXVII., r. 3 g, April, 1880.)

(b) *Previously used in Court.*

All affidavits which have been previously made and read in court, upon any proceeding in a cause or matter, may be used before the judge in chambers : (C. O. 35, r. 28.)

Evidence taken at the hearing of a cause may be used in any subsequent proceeding in the same cause : (Ch. O. 5th Feb. 1861, r. 15.)

(c) *Exhibit.*

Every certificate on an exhibit referred to in an affidavit signed by the commissioner or officer before whom the affidavit is sworn, must have the short title of the cause or matter : (Ch. Reg. Aug. 1857, r. 12.)

Accounts, extracts from parish registers, particulars of creditors' debts, and other documents referred to by affidavit, are not to be annexed to the

affidavit, or referred to in the affidavit as annexed, but are to be referred to as exhibits: (Ch. Reg. Aug. 1857, r. 11.)

(d) *Notice of Intention to Use.*

The party intending to use any affidavit on any proceeding in chambers shall give notice to the other parties concerned of his intention in that behalf: (C. O. 35, r. 27.)

(e) *Cross-examination.*

A person who has made an affidavit and used it in chambers may be cross-examined any time before the chief clerk's certificate is signed and approved: (Dan. 1064.)

The cross-examination takes place before the chief clerk, unless directed by the judge to be taken before the examiner: (*Id.*) [See EVIDENCE.]

(f) *Previously used in another Cause.*

The evidence of a witness in another cause between the same parties may be read at chambers without an order: (Dan. 1059.)

2. ORAL EVIDENCE.

(a) *Before whom taken.*

Oral evidence may be used at chambers, being taken before

The judge,

The chief clerk,

An examiner,

Any other officer of the court or any other person or persons:

(O. XXXVII., r. 4.)

(b) *Before Judge.*

The witness is entitled to take the opinion of the judge, whether he shall be examined before him, or the chief clerk, or an examiner, the objection being taken after he is sworn: (Dan. 1060.)

(c) *Before Chief Clerk.*

[As to procuring attendance, see *ante*, XIII., 6.]

If a witness is imprisoned on civil process an order will be made on motion or petition of course, supported by an affidavit, directing a writ of *habeas corpus* for his attendance *de die in diem*, until his examination is completed: (Dan. 1060.)

Where a chief clerk is directed by the judge to examine any witness, the practice and mode of proceeding shall be the same as in the case of the examination of witnesses before an examiner, subject to any special directions which may be given in any particular case: (C. O. 35, r. 30; and see EVIDENCE.)

Parties and witnesses may be examined either upon interrogatories or *vivâ voce*, as the judge directs: (15 & 16 Vict. c. 80, s. 30.)

As to the examination on interrogatories under this section, see Dan. 1061-4.)

Interrogatories may now be administered without order, by the plaintiff, when statement of claim is delivered, or subsequently, before the close of the pleadings, and by a defendant, when the statement of defence is delivered, or subsequently, before the close of the pleadings: (O. XXXI., r. 1; and see DISCOVERY.)

If a witness refuses to answer, application should be made for his examination before the judge, who may at once commit him if he persists: (Dan. 1069; Ayck. 502.)

The original examinations and depositions of parties and witnesses taken by or before the chief clerk, authenticated by his signature, [are] transmitted by him to the [Central] Office, to be there filed; and any party to

the suit or proceeding may have a copy thereof, or of any part or portion thereof, upon payment of the proper fee: (C. O. 35, r. 31; J. A., 1879.)

(d) *Before Examiner or other Person.*

[See EVIDENCE.]

3. CLOSING EVIDENCE.

When further evidence is to be adduced as to claim, a time may be named within which the evidence on both sides is to be adduced: (C. O. 35, r. 40.)

In other cases also a time may be limited: (Dan. 1064.)

If no time has been limited an order therefor may be obtained on summons: (*Id.*)

XIX. PRODUCTION OF DOCUMENTS.

Documents may be ordered, on summons, to be produced in chambers by any party (O. XXXI., r. 11); or by any claimant coming in under a judgment: (Dan. 1065.)

The application for a party to produce document may be made by a claimant: (*Id.*)

The course of procedure in use as to the production of documents ordered to be produced before the hearing of a cause is applied to the production of documents ordered to be produced after the hearing of any cause or matter: (C. O. 42, r. 4.)

Where any deeds or other documents are ordered to be left or deposited, whether for safe custody or for the purpose of any inquiry in chambers or otherwise, the same are to be left or deposited in the [Central] Office, and are to be subject to such directions as may be given for the production thereof: (C. O. 42, r. 3; J. A., 1879.)

Where the documents are required to be produced at chambers the master of the Supreme Court will, on a written request, produce them: (Dan. 1065; J. A., 1879.)

XX. SCANDALOUS AND UNNECESSARY PROCEEDINGS.

If any party wishes to complain of any matter introduced into any statement, affidavit, or other proceeding before the judge in chambers, on the ground that it is scandalous, he [may] take out a summons for the judge to examine such matter, and the judge may cause any such matter which he [deems] to be scandalous to be expunged: (C. O. 35, r. 60.)

The . . . judge may . . . upon any application or procedure in any cause or matter in . . . chambers, and whether the same is objected to or not, direct the costs of any pleading, affidavit, evidence, notice to cross-examine witnesses, account, statement, or other proceeding, or any part thereof, which is improper, unnecessary, or contains unnecessary matter, or is of unnecessary length, to be disallowed, or may direct the taxing officer to look into the same and to disallow the costs thereof, or of such part thereof, as he shall think to be improper, unnecessary, or to contain unnecessary matter, or to be of unnecessary length; and in such case the party whose costs are so disallowed shall pay the costs occasioned to the other parties by such unnecessary proceeding, matter, or length, and in any case where such question shall not have been raised before and dealt with by the . . . judge, the taxing officer may look into the same (and as to evidence, although the same may be entered as read in any decree or order) for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so: (Add. R. Aug. 1875, Sp. All., r. 18; and see Costs.)

XXI. CONDUCT OF PROCEEDINGS.

Applications relating to the conduct of proceedings are to be made at chambers : (see *sup.*, V.)

The prosecution in chambers of a judgment generally devolves upon the plaintiff (Dan. 1082); of an interlocutory order generally upon the party obtaining it (*Id.*, 1083); of proceedings when there are concurrent suits, on the plaintiff in the first suit in point of time : (*Id.*)

If the court does not consider the person obtaining the order entitled to the conduct, it will be given to the defendants or respondents having the greatest interest : (*Id.* ; C. O. 35, r. 23.)

Where proceedings are necessary against persons who have had dealings with the testator whose estate is being administered, the executor has the right to the conduct of the proceedings in preference to the beneficiaries, unless misconduct on the part of the executor is clearly proved, or it is made out that the course of justice will be impeded thereby : (*Longbourne v. Fisher*, 40 L. T. Rep. N. S. 124; 27 W. R. 405.)

As to change of conduct of proceeding in case of delay : (see *sup.*, VIII.)

If the party having conduct of the proceedings is guilty of misconduct the conduct will be committed to some of the other parties : (Dan. 1083.)

The party to whom the conduct is transferred stands in the place of the party from whom it is transferred, and is entitled to inspect and take copies of all papers in the suit in the possession of the latter or his solicitor : (Dan. 1084.)

XXII. APPOINTMENTS.

A summons is not necessary in the case of every fresh step in chambers. Some steps may be taken by obtaining an appointment from the chief clerk for proceeding with a matter at a future day.

An entry must be made in the Summons and Appointment Book when the appointment is obtained (see *sup.* XI.); and where other parties' interests are affected, notice to them or their solicitors must be given.

XXIII. ORDERS MADE IN CHAMBERS.

1. DRAWING UP.

The orders made by the [judges] when sitting in chambers [are] ordinarily drawn up there by their respective clerks [but] each of such judges [may] direct any of such orders to be drawn up by the registrar of the . . . court in like manner as orders made by a judge . . . in open court are drawn up, for which purpose the registrars of the said court . . . [are] when required [to] attend the [judges] when sitting at chambers : (15 & 16 Vict. c. 80, s. 14.)

In practice, simple orders are drawn up and authenticated by the chief clerk's signature : (Dan. 1066.)

Other orders are drawn up by the registrar that day in court on the chief clerk's minute endorsed on the summons being sent to him by the chief clerk : (*Id.*)

2. ENTRY.

All orders made in chambers, and drawn up by the chief clerk or registrar, shall be entered in the same manner and in the same office as orders made in open court are entered : (C. O. 35, r. 32.)

3. EFFECT.

All orders . . . made . . . at chambers . . . have the force and effect of orders of the court : (15 & 16 Vict. c. 80, s. 15.)

Orders may be enforced like judgments: (O. XLII., r. 20.) [See EXECUTION.]

If a direction, without formal order, be disobeyed, an order to perform the act within a limited time after service, will be drawn up by the registrar on receipt of a minute signed by the chief clerk: (Dan. 1069.)

The minute will be issued without summons if the disobedient party was present on the direction being given: (*Id.*)

4. APPEAL.

[See APPEAL.]

XXIV. WORKING OUT JUDGMENT OR ORDER.

In drawing up judgments or orders to be left at chambers, the solicitors are to take care that every account, inquiry, sale, direction to appoint receiver, and other direction to be answered at chambers is numbered consecutively, and that the other directions are not numbered: (Ch. Reg. Aug. 1857, r. 4; O. XV., r. 1. [See ACCOUNT.])

In all cases of proceedings in chambers under any [judgment] or order, the party prosecuting the same shall leave a copy of such [judgment] or order at the judge's chambers, and shall certify the same to be a true copy of the decree or order as passed and entered: (C. O. 35, r. 15.)

A judgment or order directing accounts or inquiries to be taken or made must be brought into chambers: (C. O. 35, r. 16.) [See ACCOUNT, IX., 4.]

A print of the statement of claim should be left at chambers with the judgment or order: (See Ch. Reg. Aug. 1857, r. 5.)

A summons to proceed is then issued and served: [See ACCOUNT, IX., 6.]

The summons must be served upon all parties, including those who have not appeared (unless dispensed with); but not persons served with notice of judgment, unless they have obtained leave to attend the proceedings: (Dan. 1085.)

Upon return of the summons the judge gives his directions. [See ACCOUNT, IX., 6.]

Where, upon the hearing of the summons to proceed, it appears to the judge that by reason of absence, or for any other sufficient cause, the service of notice of the decree or order upon any party cannot be made or ought to be dispensed with, the judge may, if he [thinks] fit, wholly dispense with such service, or may, at his discretion, order any substituted service, or notice by advertisement or otherwise, in lieu of such service: (C. O. 35, r. 18.)

A copy of every certificate by a [Master of the Supreme Court] of his entry of a memorandum of service of notice of a [judgment] or order and of every order giving liberty to a person served with such notice to attend the proceedings, certified by the solicitor, is to be left at chambers: (Ch. Reg. Aug. 1857, r. 8.)

As to claims in chambers, see ADMINISTRATION; WINDING-UP.

Where, upon the hearing of the summons to proceed, or at any time during the prosecution of the decree or order, it appears to the judge, with respect to the whole or any portion of the proceedings, that the interests of the parties can be classified, he may require the parties constituting each or any class to be represented by the same solicitor; and where the parties constituting such class cannot agree upon the solicitor to represent them, the judge may nominate such solicitor for the purpose of the proceedings before him; and where any one of the parties constituting such class declines to authorise the solicitor so nominated to act for him, and insists upon being represented by a different solicitor, such party shall personally pay the costs of his own solicitor of and relating

to the proceedings before the judge, with respect to which such nomination shall have been made, and all such further costs as shall be occasioned to any of the parties by his being represented by a different solicitor from the solicitor so to be nominated: (C. O. 35, r. 20.)

XXV. INQUIRIES.

Inquiries may be directed at any time. [See INQUIRIES, ACCOUNTS, ADMINISTRATION, FORECLOSURE, PARTNERSHIP, REDEMPTION, SPECIFIC PERFORMANCE.]

XXVI. ADVERTISEMENTS.

(See *post* VI., 3.)

Where an advertisement is required for the purpose of any proceeding in chambers, a peremptory and only one [is] issued, unless for any special reason it may be thought necessary to issue a second advertisement or further advertisements; and any advertisement may be repeated as many times and in such papers as may be directed: (C. O. 35, r. 35.)

The advertisements shall be prepared by the party prosecuting the decree or order, and submitted to the chief clerk for approval; and, when approved, shall be signed by him, and such signature shall be sufficient authority to the printer of the Gazette to insert the same: (C. O. 35, r. 36.)

XXVII. CHIEF CLERK'S CERTIFICATE.

1. TO STATE RESULT OF PROCEEDINGS.

[The result of] any proceedings before [the] chief clerk . . . shall be stated in the shape of a short certificate to the judge, and shall not be embodied in a formal report, unless in any case the judge [see] fit so to direct: (15 & 16 Vict. c. 80, s. 32.)

Separate certificates may be made where the judge or chief clerk considers it is not desirable to wait till the whole proceedings are completed: (Dan. 1215.)

2. FORM AND ENTRY.

The certificate of the chief clerk . . . may be in a form similar to that given in schedule M. to the Consolidated Orders, with such variations as the circumstances of the case may require: (C. O. 35, r. 48.)

The certificates to be made by the chief clerk . . . shall not, except the special circumstances of the case shall render it necessary, set out the [judgment] or order or any documents or evidence or reasons, but shall refer to the decree or order, documents, and evidence, or particular paragraphs thereof, so that it may appear upon what the result stated in any such certificate is founded: (C. O. 35, r. 47.)

As to the certificate, where accounts are directed, see ACCOUNT.

In the Rolls Court, the certificate should recite the order, stating the names of the parties directed, or who have elected to attend proceedings: (Reg., Jan., 1879.)

Every certificate [must have] plainly written or stamped on the first page . . . the year, the letter, and the number by which the cause is distinguished in the cause books kept at the Central Office: (C. O. 1, r. 48; J. A., 1879.)

The proper Master of the Supreme Court must enter the date of the certificate in the cause book: (C. O. 1, r. 49; J. A., 1879.)

The certificate should not merely state the circumstances, but the conclusion arrived at, unless the chief clerk, at the request of all parties, reserves for the consideration of the court, on the further hearing, the conclusion to be drawn: (Dan. 1217.)

3. SETTLING AND SIGNING BY CHIEF CLERK.

The draft certificate, when prepared by the chief clerk, is obtained by the solicitor having the conduct of proceedings, who furnishes copies to the other solicitors in the action: (Ayck. 530.)

The parties attend on an appointment made by the chief clerk, and he settles it: (*Id.*)

The certificate . . . when prepared and settled, shall be transcribed by the solicitor prosecuting the proceedings, in such form and within such time as the chief clerk shall require, and shall then be signed by the chief clerk at an adjournment to be made for that purpose. But where, from the nature of the case, the certificate can be drawn and copied in chambers whilst the parties are present before the chief clerk, the same shall be then completed and signed by him without any adjournment: (C. O. 35, r. 48.)

4. APPROVAL BY JUDGE.

(a) *Certificate must be signed.*

When the judge approves of the certificate or report he signs it in testimony of his adopting it: (15 & 16 Vict. c. 80, s. 32.)

(b) *Certificates to be acted on by Paymaster-General.*

Certificates which are to be acted upon by the [Paymaster-General] without any further order . . . may be signed and adopted by the judge on the day after the same . . . have been signed by the chief clerk, unless any party desiring to take the opinion of the judge thereon, obtains a summons for that purpose before twelve o'clock on that day: (C. O. 35, r. 53.)

(c) *Certificates on passing Receivers' Accounts.*

Certificates on passing receivers' accounts may be approved and signed by the judge without delay: (C. O. 35, r. 54.)

(d) *Ordinary Certificates.*

[In cases other than those mentioned above] at the expiration of four clear days after the certificate [has] been signed by the chief clerk, if no party has in the mean time obtained a summons to take the opinion of the judge thereon, the chief clerk [submits] the certificate to the judge for his approval, and the judge may thereupon, if he approve the same, sign such certificate in testimony of his adoption thereof, as follows:—
“Approved, this day of :” (C. O. 35, r. 51.)

(e) *Where dispensed with.*

Where the court directs any computation of interest, or the apportionment of any fund, which is to be acted upon by the Paymaster-General or other person without any further order from the court, the decree or order made by the court may direct such computation or apportionment to be made by one of the chief clerks attached to the court of the judge, and may direct the certificate thereof, signed by such chief clerk, to be acted upon accordingly, without the same being signed and adopted by the judge: (C. O. 35, r. 45; Ch. Funds Act, 1872, s. 6.)

5. FILING.

When any certificate or report of the chief clerk has been signed and adopted by the judge it must be filed in the Central Office: (15 & 16 Vict. c. 80, s. 34; J. A., 1879.)

The certificate when signed by the judge, with the accounts, if any, to be filed therewith, shall be transmitted by the chief clerk to the [Central Office] to be there filed: (C. O. 35, r. 55.)

The party obtaining a certificate must file it, although unfavourable to him; but the omission to file does not render it invalid: (Ayck. 533.)

Certificates of the chief clerk [to be acted on by the Paymaster-General, though] not required to be signed and adopted by the judge, shall be transmitted and filed in the same manner as those signed and adopted by the judge: (C. O. 35, r. 56.)

Upon every proceeding [so] filed, the date of filing the same shall be printed or written: (C. O. 1, r. 45.)

The [Masters] also enter in the books kept by them for that purpose, the time when any certificate is delivered to them to be filed, with the name of the cause and the date of the certificate. And such books [are] at all times during office hours, accessible to the public, on payment of the usual fee: (C. O. 1, r. 47.)

Proper indexes or calendars to the files or bundles of the reports, certificates . . . and all other documents filed [are] kept, so that the same may be conveniently referred to when required. And such indexes or calendars and documents [are] at all times during office hours, accessible to the public on payment of the usual fee: (C. O. 1, r. 46.)

6. WHEN BINDING.

When any certificate or report of the chief clerk has been filed, it is thenceforth binding on all the parties to the proceedings, unless discharged or varied, either at chambers or in open court, according to the nature of the case, or unless opened: (15 & 16 Vict. c. 80, s. 34.)

7. OFFICE COPIES.

And all office copies thereof, or of any part thereof, that may be required, shall be ready to be delivered to the party requiring the same, within forty-eight hours after the same shall have been bespoken: (C. O. 1, r. 44.)

8. TAKING JUDGE'S OPINION ON, DISCHARGING, VARYING, AND REVIEWING.

[See APPEAL.]

CHARGE.

The raising of charges on land is one of the matters expressly assigned to the Chancery Division: (J. A., 1873, s. 34.)

CHARGING ORDER.

[See COSTS; EXECUTION.]

CHARGING STOCK.

- I. AFFIDAVIT.
- II. NOTICE.
- III. AMENDMENT OF DESCRIPTION OF STOCK IN NOTICE.
- IV. ALTERATION OF ADDRESS IN AFFIDAVIT.
- V. SERVICE OF AFFIDAVIT AND NOTICE ON COMPANY.
- VI. EFFECT OF SERVICE.

- VII. NOTICES TO DEPONENT.
- VIII. RENEWAL OF NOTICE OF CLAIM.
- IX. WITHDRAWAL OR DISCHARGE OF NOTICE OF CLAIM.

I. AFFIDAVIT.

No writ of *distringas* shall hereafter be issued under the Act 5 Vict. c. 5, s. 5: (O. XLVI., r. 2a, April, 1880.); but any person claiming to be interested in any stock standing in the books of a company may [make] an affidavit in or to the effect of the form B 28 in the schedule [to the Rules of April, 1880]: (O. XLVI., r. 4, April, 1880.)

The expression "company" includes the Governor and Company of the Bank of England and any other public company, whether incorporated or not, to which 5 Vict. c. 5, s. 5, applies; and the expression "stock" includes shares, securities, and money: (O. XLVI., r. 3, April, 1880.)

The Act was in practice applied to all such companies: (Seton, 4th edit. 285.)

There shall be appended to the affidavit a note stating the person on whose behalf it is filed, and to what address notices (if any) for that person are to be sent: (O. XLVI., r. 5, April, 1880.)

[The affidavit must be filed] in the Central Office: (O. XLVI., r. 4, April, 1880.)

II. NOTICE.

[With the affidavit there must be filed] a notice in or to the effect of the form B 23 in the schedule: (O. XLVI., r. 4, April, 1880.)

III. AMENDMENT OF DESCRIPTION OF STOCK IN NOTICE.

If the person who files a notice under this order desires to correct the description of the stock referred to in the filed notice, he may file an amended notice and serve on the company a duplicate thereof sealed with the seal of the Central Office, and in that case the service of the notice shall be deemed to have been made on the day on which the amended duplicate is so served: (O. XLVI., r. 11, April, 1880.)

IV. ALTERATION OF ADDRESS IN AFFIDAVIT.

The address so stated [in the affidavit] may, from time to time, be altered by the person by or on whose behalf the affidavit is filed, but all notices sent by post before the alteration to the address originally given or for the time being substituted therefor shall not be affected by any subsequent alteration. Any such alteration of address may be made by service of a memorandum thereof on the company in the manner required for service of a notice under this order: (O. XLVI., r. 6, April, 1880.)

V. SERVICE OF AFFIDAVIT AND NOTICE ON COMPANY.

On procuring an office copy of the affidavit and a duplicate of the filed notice authenticated by the seal of the Central Office [the deponent may] serve the office copy and duplicate notice on the company: (O. XLVI., r. 4, April, 1880.)

Under the former practice service was effected on the solicitor of the bank; or at the office, or on the secretary of another company.

VI. EFFECT OF SERVICE.

The service of the office copy of the affidavit and of the duplicate of the filed notice shall, for the period of five years from the day of service, but not longer (unless the notice is renewed as after mentioned), have the

same force and effect as if those rules had not been made, and a writ of distringas in respect of the stock had been duly issued under the Act 5 Viet. c. 5, s. 7: (O. XLVI., r. 7, April, 1880.)

The effect of a writ of distringas was merely temporary, and would not be continued after due time for filing a bill. It must be followed by a restraining order or an injunction against the bank: (Seton, 285; Dan. 1543.)

If, whilst a notice filed under this order continues in force, the company on whom it is served receive from the person in whose name the stock specified in the notice is standing, or from some person acting on his behalf or representing him, a request to permit the stock to be transferred or to pay the dividends thereon, the company shall not by force or in consequence of the service or of any renewal of the notice, be authorised, without the order of the court, to refuse to permit the transfer to be made or to withhold the payment of the dividends for more than eight days after the date of the request: (O. XLVI., r. 10, April, 1880.)

VII. NOTICES TO DEPONENT.

All such notices shall be deemed to have been duly sent if sent through the post by a prepaid letter directed to that person at the address so stated or at any such substituted address as herein mentioned, whether the person to whom the notice is sent is living or not: (O. XLVI., r. 5, April, 1880.)

VIII. RENEWAL OF NOTICE OF CLAIM.

The original notice may be kept on foot from time to time by a notice of renewal signed by the person by whom or on whose behalf the original notice was given, and served on the company, provided the notice of renewal, if only one is given, is served before the expiration of five years from the day on which the original notice was served, or, if more than one is given, then before the expiration of five years from the day on which the last previous notice of renewal was served. Each such notice of renewal shall have the effect of continuing and keeping on foot the original notice for the period of five years from the day on which the first notice of renewal or the last previous notice of renewal (as the case may be) was served: (O. XLVI., r. 8, April, 1880.)

IX. WITHDRAWAL, OR DISCHARGE OF NOTICE OF CLAIM.

A notice filed under this order may at any time be withdrawn by the person by whom or on whose behalf it was given, on a written request signed by him, or its operation may be made to cease by an order to be obtained by motion on notice or by petition duly served by any other person claiming to be interested in the stock sought to be affected by the notice: (O. XLVI., r. 9, April, 1880.)

CHARITIES.

I. JURISDICTION OF CHANCERY DIVISION.

II. CHARITIES GENERALLY.

1. CONSTRUCTION AND CITATION OF ACTS.

2. INTERPRETATION OF TERMS.

3. BOARD OF CHARITY COMMISSIONERS.

(a) Constitution.

- (b) *Saving of Powers.*
- (c) *Opinions and Advice.*
- (d) *Powers to Appoint Trustees, &c.*
- (e) *Certificates of Annual Value.*
- (f) *Validity of, and Discharging Orders.*
- (g) *Noncompliance with Board's Orders.*

4. TRUSTEES OF CHARITIES.

- (a) *As Parties.*
- (b) *Power to Refer.*
- (c) *Power to Compromise.*

5. NOTICE TO BOARD OF PROCEEDINGS.

6. CERTIFICATE OR ORDER DIRECTING PROCEEDINGS.

7. RIGHTS OF ATTORNEY-GENERAL.

8. PROCEEDINGS ON BREACH OF TRUST, &c. (Romilly's Act).

- (a) *Petition.*
- (b) *Certificate of Board.*
- (c) *Attorney-General's Rights.*
- (d) *Service of Petition.*
- (e) *Hearing and Evidence.*
- (f) *What Order may be made.*
- (g) *Summons to proceed.*
- (h) *Schemes.*
- (i) *Orders on Motion.*

9. SUMMARY PROCEEDINGS.

- (a) *In what Cases.*
- (b) *By whom Application made.*
- (c) *Notices of Intended Application.*
- (d) *Summons.*
- (e) *Powers of Judge.*
 - (1) *Generally.*
 - (2) *To direct Action, &c.*
 - (3) *To appoint Trustees, and make Vesting Orders, &c.*
- (f) *Order.*
- (g) *Appeal.*
- (h) *Fees.*

10. APPEALS.

- (a) *From Judge's Order [sup. 9 (g)].*
- (b) *From County Court [see Part II.]*
- (c) *From Orders of the Board.*
 - (1) *By whom and when.*
 - (2) *Notice to Attorney-General.*
 - (3) *Notice to Board.*
 - (4) *Respondent.*
 - (5) *Powers of Chancery Division.*
 - (6) *Costs.*

11. SUBMITTING COUNTY COURT DECISION TO CHANCERY DIVISION.

III. ROMAN CATHOLIC CHARITIES.

IV. GRAMMAR SCHOOLS.

- 1. *INTERPRETATION OF TERMS.*
- 2. *POWER TO EXTEND SYSTEM OF EDUCATION.*
- 3. *DISPENSING WITH LATIN OR GREEK.*
- 4. *ADMISSION OF CHILDREN.*
- 5. *QUALIFICATION OF MASTERS.*
- 6. *UNITING SCHOOLS.*
- 7. *VISITORS.*
- 8. *DISCHARGING MASTERS.*
- 9. *HOW APPLICATION MADE.*

V. BURIAL BOARDS TAKING CHARITY LANDS.

VI. APPORTIONMENTS UNDER CHURCH BUILDING ACTS.

1. WHERE MADE.
2. HOW APPLICATION MADE.
3. DISCRETION OF COURT.
4. DIRECTIONS AS TO DEBTS.
5. COSTS.
6. REGISTRATION OF APPORTIONMENTS AND DEPOSIT OF DUPLICATES.

VII. CHARITIES UNDER MUNICIPAL CORPORATIONS ACT.

1. WHERE ADMINISTERED.
2. HOW APPLICATION MADE.

VIII. ENROLMENT OF DEEDS.

1. OF SUBSEQUENT DEED WHERE TRUST DEED LOST OR DESTROYED.
2. IN CASE OF NON-ENROLMENT OF INSTRUMENT MADE FOR VALUABLE CONSIDERATION.
 - (a) *By Order of the Court.*
 - (b) *By the Clerk of Enrolment.*

I. JURISDICTION OF CHANCERY DIVISION.

The execution of charitable trusts is one of the matters expressly assigned to the Chancery Division: (J. A., 1873, s. 34; and see JURISDICTION.)

The Court of Chancery had an inherent jurisdiction over charities generally: (Seton, 556.)

II. CHARITIES GENERALLY.

1. CONSTRUCTION AND CITATION OF ACTS.

The Charitable Trusts Act, 1853 [16 & 17 Vict. c. 137], and the Charitable Trusts Amendment Act, 1855 [18 & 19 Vict. c. 124], and [The Charitable Trusts Act, 1860, 23 & 24 Vict. c. 136], shall be construed together as one Act: (C. T. A., 1860, s. 1.)

[The Charitable Trusts Act, 1869, 32 & 33 Vict. c. 110], so far as is consistent with the tenor thereof, shall be construed as one with the Charitable Trusts Act, 1853, the Charitable Trusts Amendment Act, 1855, and the Charitable Trusts Act, 1860; and . . . the Charitable Trusts Act, 1862 [25 & 26 Vict. c. 112]; and those Acts, together with [the Act of 1869], may be cited as the Charitable Trusts Act, 1853 to 1869: (C. T. A., 1869, s. 3.)

2. INTERPRETATION OF TERMS.

Except where the context or other provisions of the Act may require a different construction, "Charity" shall mean every endowed foundation and institution taking or to take effect in England or Wales, and coming within the meaning, purview, or interpretation of the statute of the forty-third year of Queen Elizabeth, chapter four, or as to which, or the administration of the revenues or property whereof, the [Chancery Division] has or may exercise jurisdiction: (C. T. A., 1853, s. 66.)

The statute 43 Eliz. c. 4, defines charities by the following recital: "Lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money, have been heretofore given, limited, appointed, and assigned, as well by the Queen's most excellent Majesty and her most noble progenitors, as well by sundry other well-disposed persons, some for the relief of aged, impotent, and poor people; some for maintenance of sick and maimed soldiers and mariners, school of learning, free schools, and scholars in universities; some for the repair of bridges, ports, havens, causeways, churches, sea banks, and highways; some for education and preferment of orphans; some for or towards relief, stock, or

maintenance for houses of correction; some for marriages of poor maids; some for supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed; and others for relief or redemption of prisoners or captives; and for aid or ease of any poor inhabitants, concerning payments of fifteens, setting out of soldiers, and other taxes; which lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money, nevertheless have not been employed according to the *charitable intent* of the givers and founders thereof by reason of frauds, &c., of trust, and negligence in those that should pay, deliver, and employ the same."

["Charity" includes also] every institution in England or Wales endowed for charitable purposes, but . . . not . . . any charity or institution expressly exempted from the operation of the Act of 1853: (C. T. A., 1855, s. 4.)

Cathedral, collegiate, chapter, and other schools (except the colleges of Eton and Winchester) are subject to the Acts: (C. T. A., 1853, s. 62; C. T. A., 1855, s. 49.)

This extends to charities founded and endowed in England and Wales, though the revenues are applied abroad, and *vice versâ*: (*Re Duncan*, L. Rep. 3 Ch. App. 356.)

Nothing in [the Acts] . . . subjects the funds or property of any missionary or other similar society, or the missionaries, teachers or officers of such society, or of any branch thereof, which funds or property shall not be within the limits of England or Wales, to the jurisdiction of the said board: (C. T. A., 1853, s. 62.)

The following charities are exempted from the Acts:

The Universities of Oxford, Cambridge, London, or Durham, or any College or Hall in the said Universities of Oxford, Cambridge, and Durham; any Cathedral or Collegiate Church; any buildings registered and certified as places of meeting for religious worship (where the record of the certificate has not been cancelled), and *bonâ fide* used as a place of meeting for religious worship; . . . the Commissioners of Queen's Anne's Bounty; the British Museum; any friendly or benefit society, or savings bank; any institution, establishment, or society for religious or other charitable purposes, or to the auxiliary or branch associations connected therewith, wholly maintained by voluntary contributions; any bookselling or publishing business carried on by or under the direction of any society wholly or partially exempted from the Acts so far as such business is carried on by means of voluntary contributions only, or the capital or stock of such business: (C. T. A., 1853, s. 62; 18 & 19 Vict. c. 81, s. 9.)

Where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the Acts shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity, as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said Board, or the powers or provisions of [the] Acts; and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription, which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity,

in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the . . . board or the powers or provisions of [the Acts]: (C. T. A., 1853, s. 62; and see Seton, 574.)

The board may, on application, extend the provisions of the Acts to the exempted charities: (32 & 33 Vict. c. 110, s. 14; 18 & 19 Vict. c. 81, s. 9.)

Nothing [in the Acts] contained shall diminish or detract from any right or privilege which by any rule or practice of the court . . . or by the construction of law . . . subsists for the preference or the exclusive or special benefit of the Church of England, or the members of the same Church, in settling any scheme for the regulation of any charity, or in the appointment or removal of trustees, or generally in the application or management of any charity: (C. T. A., 1853, s. 46.)

"Trustee" of any charity shall mean and include every person and corporation seised or possessed of or entitled to any real or personal estate, or any interest therein, in trust for or for the benefit of such charity, or all or any of the objects or purposes thereof, and every member of any such corporation: (C. T. A., 1853, s. 66.)

"The Board" shall mean the said charity commissioners sitting as a board under this Act: (*Id.*)

"Endowment" shall mean and include all lands and real estate whatsoever, of any tenure, and any charge thereon or interest therein, and all stocks, funds, moneys, securities, investments, and personal estate whatsoever, which shall, for the time being, belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof: (*Id.*)

"Land" shall extend to and include manors, messuages, buildings, tenements, and hereditaments, corporeal and incorporeal, of every tenure and description: (*Id.*; and see Seton, 574.)

3. THE BOARD OF CHARITY COMMISSIONERS.

(a) *Constitution.*

The . . . Commissioners . . . appointed under [the] Act shall be styled "The Charity Commissioners for England and Wales," . . . and such commissioners shall sit from time to time as a board for carrying [the] Act into execution; and any two of such commissioners may form a board, and may exercise all or any of the powers conferred on the commissioners or the board by [this] Act: (C. T. A., 1853, s. 6.)

(b) *Saving of Powers.*

No provision contained in any . . . Act of Parliament or decree or order . . . for the appointment or removal of trustees of any charity, or for or relating to the sale, exchange, leasing, disposal or improvement of any property, by or under the order or with the approval of the [Chancery Division] shall (in the absence of any express direction to the contrary, to be contained in any future Act of Parliament, order, or decree), exclude or impair any jurisdiction or authority which might otherwise be properly exercised for the like purposes by the Charity Commissioners for England and Wales: (25 & 26 Vict. c. 112.)

(c) *Opinions and Advice.*

The said board shall receive and consider all applications which may be made to them by any trustee or other person having any concern in the management or administration of any charity, for their opinion, advice, or direction respecting such charity, or the management or administration thereof, or the estates, funds, property, or income thereof, or the application thereof, or any question or dispute relating to the same respectively,

and, if they so think fit, may upon any such application give such opinion or advice as they think expedient, subject to any judicial order or direction which may be subsequently made or given by any competent court or judge: (C. T. A., 1853, s. 16.)

No such judicial order or direction subsequently made or given by any court or judge shall have any such retrospective effect as to interfere with or impair the indemnity by [the] Act given to trustees and other persons who have acted upon or in accordance with such opinion or advice of the said board: (*Id.*)

(d) *Power to Appoint Trustees, &c.*

The Board of Charity Commissioners for England and Wales, subject to the restrictions and rights of appeal provided [by the Act] shall have power from time to time, upon the application of any person or persons who, under the 43rd section of the Charitable Trusts Act, 1853, might be authorised to apply to any judge or court for the like purposes, to make such effectual orders as may . . . be made by any judge of the [Chancery Division] sitting at chambers . . . for the appointment or removal of trustees of any charity, or for the removal of any school master or mistress or other officer thereof, or for or relating to the assurance, transfer, payment or vesting of any real or personal estate belonging thereto, or entitling the official trustees of charitable funds, or any other trustees, to call for a transfer of and to transfer any stock belonging to such estate, or for the establishment of any scheme for the administration of any such charity: (C. T. A., 1855, s. 2.)

Any trustee or other person may, on obtaining an order of the board for the purpose, transfer any stock or pay any money to the official trustees of charitable funds in trust for any charity: (C. T. A., 1855, s. 22.)

No transfer of any stock, shares, or securities shall be made to the official trustees of charitable funds, nor shall any money other than the dividends or interest of any such stock, shares or securities as aforesaid, be paid to their account, except in pursuance of an order of the [Chancery Division], or of some judge thereof, or of a . . . County Court, or of the board; and no transfer of any such stock, shares, or securities shall be made by the official trustees, except under the order of such court or judge, or under the order of the board signed [and authenticated] by two commissioners; and no transfer to or by the official trustees shall be permitted by the governor and company of the Bank of England or any other company contrary to this provision: (C. T. A., 1855, s. 25.)

The secretary of the . . . board shall keep separate accounts of the annuities, stock, shares, and securities belonging to each separate charity, and the . . . official trustees shall pay the dividends or interest or income thereof to the trustees or persons acting in the administration of such charity, or otherwise dispose thereof, and transfer such annuities, stock, shares, or securities (when occasion shall require), as the [Chancery Division] or any judge of such court, or . . . County Court having jurisdiction under this Act, or other lawful authority, shall direct: (C. T. A., 1853, s. 52.)

(e) *Certificates of Annual Value.*

For the purposes of determining the jurisdiction under [the] Act with respect to any charity, or the right to appeal from the determination of a judge of the [Chancery Division], it shall be lawful for the said board to declare, according to such judgment as they may be able to form upon the returns or statements before them in relation to any charity, whether the gross annual income for the time being of such charity does or does not exceed 30*l.* or 100*l.* (as the case may require), and a statement in any certi-

ficate or order of the said board that according to such judgment as aforesaid the gross yearly income of any charity does or does not exceed 30*l.* or 100*l.* shall be sufficient evidence of the amount of the gross annual income of such charity, for the purpose of determining such jurisdiction or right to appeal as aforesaid : (C. T. A., 1853, s. 44.)

Any certificate or order made by the said board under this Act, authorising any proceeding or application concerning any charity to be taken or made to any . . . County Court or to the [Chancery Division] or any judge thereof, shall state that the gross annual income for the time being of such charity does not exceed 30*l.*, or does exceed 30*l.* (as the case may be) : provided always that where any charity, or the trustees thereof, in addition to the principal endowment for its general objects and purposes, shall be possessed of or entitled to any other endowment for any particular or special object or purpose arising out of or in its nature or application connected with the general objects or purposes of such charity, it shall be lawful for the said board, having regard to the circumstances of each such case, and to the object and extent of the proposed application and litigation, to determine whether such endowment for such particular or special object or purpose should, for the purposes of jurisdiction and proceedings under this Act, be considered and treated as forming part of the general endowment of the charity, or as a separate or independent charity, and such board shall frame their certificate or order accordingly : (C. T. A., 1853, s. 44.)

(f) *Validity of, and Discharging Orders.*

The board [has] power with or without any application to discharge, within twelve months after an order is made by them, the whole or any part of any order appearing to have been made by them by mistake or on misrepresentation, or otherwise than in conformity with the [Acts] : (C. T. A., 1869, s. 8.)

Every order made by the board in exercising their jurisdiction under the [Acts] shall, until discharged or varied by the board or by the [Chancery Division] on appeal . . . have effect according to its tenor : (*Id.*)

Every order of the board shall, subject to all powers which the [Chancery Division] has to discharge or vary it, under sect. 8 of the [Act of 1860], and subject to the power of the board to discharge it wholly or partially [as above], be deemed to have been duly and formally made, and no objection thereto on the ground only of irregularity or informality shall be entertained : (*Id.*)

(g) *Non-compliance with Board's Orders.*

If any person from whom the said board, or any inspector, is authorised to require any account or statement or answers to any questions or inquiries, or whose attendance any inspector is authorised to require, shall refuse or wilfully neglect to render to the said board such account or statement, or to make answers to such questions or inquiries, or to attend in obedience to any lawful precept of any inspector or to give evidence before him, or shall wilfully alter, destroy, withhold, or refuse to produce any deed, paper, writing, instrument, or other document, which may be lawfully required to be produced before any inspector or the said board, every person so offending shall be deemed and taken to have been guilty of a contempt of the [Chancery Division], and shall be liable to be attached and committed by such court on summary application by the commissioners to the same, and shall pay the costs of and attending such contempt as the said court shall direct : (C. T. A., 1853, s. 14.)

Nothing contained [in the Act of 1853 extends] to give to the said board or their inspectors any power of requiring from any person holding

or claiming to hold any property whatsoever adversely to any charity, or free or discharged from any charitable trust or charge, any information, or the production of any deed or document whatever in relation to the property so held or claimed adversely, or any charitable trust or charge alleged to affect the same : (C. T. A., 1853, s. 15.)

Any person refusing or wilfully neglecting to comply with any . . . requisition [of the board, as mentioned in the preceding sections of the Act], or with any order of the board made under the provisions of [the Acts], or destroying or withholding any document required to be produced or transmitted by him, shall be guilty of a contempt of the [Chancery Division], and liable to be attached and committed on summary application by the commissioners to the same court or to any judge thereof, and shall pay such costs as the court or judge shall direct: provided always, that the court may discharge on terms any person so attached or committed on any such application, or on any application, under section 14 of the Act [of 1853] : (C. T. A., 1855, s. 9.)

The provision is extended to order made under the Act of 1860 : (C. T. A., 1860, s. 20.)

The application to commit is by motion on notice : (*Re Sir Robert Peel's School*, L. Rep. 3 Ch. Div. 543.)

4. TRUSTEES OF CHARITIES.

(a) *As Parties.*

The majority of the trustees of any charity, if authorised by the board, may institute and maintain an action, suit, petition, or other proceeding in the same manner in all respects as if they were the sole trustees of the charity.

Where the trustees, or the majority of the trustees, of any charity, institute and maintain an action, suit, petition, or other proceeding under the authority of the board, such action, suit, petition, or other proceeding shall not abate or become discontinued or of no effect by reason of the death or removal from office of any of the trustees, or of the addition of any new trustee, but shall continue to have effect for and against the trustees for the time being of the charity, in the same manner as if they were actually named therein : (C. T. A., 1869, s. 13.)

In all cases of doubt or difficulty as to the administration of the fund the trustees should apply to the board before taking legal proceedings : (*Re Poplar and Blackwall Free School*, L. Rep. 8 Ch. Div. 543.)

(b) *Power to Refer.*

If any question or dispute shall arise among the members of any charity exempted from the operation of [the Act of 1853] in relation to any office, or the fitness or disqualification of any trustee or officer, or his election or removal, or generally in relation to the management of the charity, it shall be lawful for two-thirds of the members present at any special meeting, duly convened by notice for the purpose in the same manner in which meetings of such charity are by the rules thereof appointed to be held and convened, to refer such question or dispute to the arbitration of the commissioners, who shall accept such reference and act therein as arbitrators, and their award shall be final, and may be made a rule of [the Chancery Division] of Her Majesty's High Court of Justice : (C. T. A., 1853, s. 64; and see ARBITRATION.)

This section has been extended to charities exempted from the operation of the Act of 1853 : (C. T. A., 1855, s. 46.)

(c) *Power to Compromise.*

If in any case it appear to the trustees or persons acting in the administration of any charity that any claim or demand or cause of suit against

any person in relation to such charity [or against any charity or the trustees or administrators thereof], may, with advantage to the charity, or should under the special circumstances of the case, be compromised or adjusted without taking or without continuing any proceedings at law or in equity, such trustees or persons may, or the person against whom such claim, demand, or cause of suit exists or is alleged to exist, may, with the consent of the trustees or persons acting in the administration of such charity, submit to the said board a statement and proposal for such compromise or adjustment; and if it appear to the said board after such inquiry in relation thereto by one of their inspectors, as they may deem requisite, or otherwise, that such proposal, either with or without any modification, is fit and proper, and for the benefit of the charity, it shall be lawful for the said board to make such order for and in relation to such compromise or adjustment as they may think fit; and upon the due performance of the terms and conditions of such compromise or adjustment as aforesaid, such agreement shall be a final bar to all actions, suits, claims, and demands by or on behalf of the charity concerned therein, in respect to the cause of action, suit, or matter in respect to which such compromise or adjustment shall have been made: (C. T. A., 1853, s. 23; C. T. A., 1855, s. 31.)

5. NOTICE TO BOARD OF PROCEEDINGS.

Before any suit, petition, or other proceeding (not being an application in any suit or matter actually pending) for obtaining any relief, order or direction concerning or relating to any charity, or the estate, funds, property or income thereof, shall be commenced, presented or taken, by any person whomsoever, there shall be transmitted by such person to the said board notice in writing of such proposed suit, petition or proceeding, and such statement, information, and particulars as may be requisite or proper, or may be required from time to time, by the said board, for explaining the nature and objects thereof: (C. T. A., 1853, 16 & 17 Vict. c. 137, s. 17.)

The provision applies to applications to the court made under a special Act of Parliament: (Dan. 1759.)

The matter is not pending when a final order has been made, and a scheme settled: (Dan. 1760.)

1. Any person applying for an order or certificate of the board authorising the institution of any suit or other proceeding before any court or judge, should transmit to the board a notice and statement in writing, setting forth whether or not he is a trustee or person administering or claiming to administer, or interested in the charity, or an inhabitant of the parish or place within which the charity is administered or applied, the amount of the gross annual income of the charity, and all the other material facts and circumstances of the case; and explaining the nature and objects of the proposed suit or other proceeding.

2. The facts and circumstances should be stated in numbered paragraphs, as far as conveniently may be.

3. Where the object of the proposed proceeding is the removal of trustees, their names, descriptions, and residences, and the reasons for their proposed removal, should be stated.

4. The names, descriptions, and residences of the trustees proposed to be appointed, should also be stated.

5. Where the object of the proposed proceeding is a new scheme, the notice and statement should contain information as to the past administration of the charity, and its results, and the nature and provisions of the proposed scheme.

6. In proposing schemes care should be taken to deviate as little as possible from the original purposes and intention of the founder.

7. The board may require the statement to be explained and altered in point of form in such manner and as often as may be thought fit.

8. The board may also require the statement to be verified by statutory declaration or otherwise.

12. When the board shall have been satisfied that the proposed proceeding is proper, and that any required notice has been duly given, the requisite order or certificate will be issued to the applicant, or to such other persons as may be approved: (Regulations of Charity Commissioners, Ayck. 558.)

6. CERTIFICATE OR ORDER DIRECTING PROCEEDINGS.

The said board, if upon consideration of the circumstances they so think fit, may, by an order or certificate signed by their secretary, authorise or direct any suit, petition, or other proceeding to be commenced, presented, or taken with respect to such charity, either for the objects and in the manner specified or mentioned in such notice, or for other such objects, and in such manner and form, and subject to such stipulations or provisions for securing the charity against any liability to any costs or expenses, and to such other stipulations or provisions for the protection or benefit of the charity, as the said board may think proper: (C. T. A., 1853, s. 17.)

Such board, if it seems proper to them, may, by such order or certificate as aforesaid, require and direct that any proceeding so authorised by them in respect of any charity, shall be delayed during such period as shall seem proper to and shall be directed by such board: (C. T. A., 1853, s. 17.)

Every such order or certificate may be in such form and may contain such statements and particulars as such board shall think fit: (C. T. A. 1853, s. 17.)

Save as otherwise provided, no suit, petition, or other proceeding for obtaining any such relief, order, or direction as last aforesaid shall be entertained or proceeded with by the court . . . or by any . . . judge, except upon and in conformity with an order or certificate of the said board: (C. T. A. 1853, s. 17.)

This enactment shall not extend to or affect any such petition or proceeding in which any person shall claim any property or seek any relief adversely to any charity: (C. T. A., 1853, s. 17.)

And it does not interfere with the Attorney-General's rights: (s. 18, see *post*, 7.)

Where upon any report of any inspector under [the] Act or otherwise it appears to the . . . board that any suit, petition, or other proceeding concerning or relating to any charity, or the estate, funds, property, or income thereof, would be proper or expedient, it shall be lawful for the said board by their order to authorise or direct such suit, petition, or proceeding to be commenced, presented, or taken, and to give such directions in relation thereto as the said board may think proper; and thereupon such suit, petition, or proceeding may be commenced, presented, or taken accordingly, without any . . . previous notice in writing: (C. T. A., 1853, s. 19.)

7. RIGHTS OF ATTORNEY-GENERAL.

It shall be lawful for Her Majesty's Attorney-General, acting *ex officio*, to make such applications, and take and prosecute such proceedings with respect to any charity, in the [Chancery Division] or otherwise as to him may seem fit, as if [the] Act had not been passed; and that nothing in [the] Act contained shall be construed as dispensing with the fiat or allowance of Her Majesty's Attorney-General, with respect to any pro-

ceeding not being an application under the jurisdiction created by this Act, where such fiat or allowance was necessary before the passing of [the] Act: (C. T. A. 1853, s. 18.)

8. PROCEEDINGS ON BREACH OF TRUST, &C. (ROMILLY'S ACT.)

(a) *Petition.*

In every case of a breach of any trust or supposed breach of any trust created for charitable purposes, or whenever the direction or order of a court of equity shall be deemed necessary for the administration of any trust for charitable purposes, it shall be lawful for any two or more persons to present a petition to the [Chancery Division] stating such complaint and praying such relief as the nature of the case may require: (52 Geo. 3, c. 101, s. 1.)

Unless the Attorney-General is applying *ex officio*, the petition must be presented by two or more persons having a direct interest in the charity, and of whom two at least must be individuals, a corporation not being within the Act: (Dan. 1763.)

Every petition so . . . preferred . . . shall be signed by the persons preferring the same in the presence of, and shall be attested by, the solicitor concerned for such petitioners: (52 Geo. 31, c. 110, s. 2.)

A certificate must also be written on the petition and signed by the counsel who prepared it, to the effect that, in his opinion, the petition is one proper to be presented under the Act: (Dan. 1763.)

The solicitor must certify on the petition that the petitioners are able to answer the costs: (*Id.*)

Every such petition shall be submitted to and be allowed by [the] Attorney or [if that office is vacant] Solicitor-General, and such allowance shall be certified by him before any such petition is presented: (52 Geo. 3, c. 101, s. 2.)

(b) *Certificate of Board.*

Unless the petition is presented by the Attorney-General, acting *ex officio*, or in a pending matter, the order or certificate of the Charity Commissioners, authorising the application, must be produced before the petition will be answered: (Dan. 1764; and see *sup.* 5, 6.)

Their sanction is not necessary on paying a fund belonging to a charity into court under the Trustee Relief Act or Lands Clauses Act: (Seton, 563; *Re Poplar and Blackwall Free School*, L. Rep. 8 Ch. Div. 544.)

(c) *Attorney-General's Rights.*

It shall be lawful for [the] Attorney-General for the time being, acting *ex officio*, to . . . petition . . . the [Chancery Division] with respect to any charity under [52 Geo. 3, c. 101] or under the provisions of any Act, or Acts passed or to be passed authorising the application to the . . . court by petition according to the provisions of the said Act: (C. T. A., 1853, s. 43.)

Notice of payment into court by charity trustees under the Trustee Relief Acts must be given to the Attorney-General: (Ch. F. Am. O., r. 5; *Re Poplar and Blackwall Free School*, *sup.*)

(d) *Service of Petition.*

The petition ought, generally, to be served upon all persons whose interests will in any manner be affected by the order sought: (Dan. 1764.)

(e) *Hearing and Evidence.*

[The court is] required to hear such petition in a summary way, and upon affidavits or such other evidence as shall be produced upon such hearing to determine the same, and to make such order therein and with respect to the costs of such applications as . . . shall seem just: (52 Geo. 3, c. 101, s. 2.)

(f) What Orders may be made.

The Act applies only in simple cases, and where the court thinks it just and for the benefit of the charity to decide them : (Seton, 563 ; Dan. 1762). It applies where the questions to be decided arise between the trustee and *cestuis que trustent* of the charity ; or between the *cestuis que trustent* as to their proportions (Seton, 563) ; on conflicting claims of different charities depending on a mere question of construction (*Id.*) ; and orders may be made for altering a scheme settled by decree ; for deciding questions as to sites of charities ; to sell charity land ; authorising trustees to apply to Parliament, or for assisting the trustees in other ways in the administration of the charity property ; for apportioning charities ; for appointing new trustees : (Seton, 564.)

The court is not bound to exercise its jurisdiction, but may leave the party to commence an action : (see Dan. 1762.)

The Act does not apply to constructive trusts, or where different persons claim the trust property adversely to each other, or there is a dispute as to where the legal estate is : (*Id.* ; but see as to the last, *Re Fowey*, 4 Beav. 225) ; nor when the trustee disputes the title of the charity ; for setting aside lease ; or where breaches of trust affect third parties : (Seton, 563.)

Application may be made as to the internal regulation of a charity, but if the matter is within the cognizance of a visitor, the court has no jurisdiction : (Dan. 1762.)

(g) Summons to Proceed.

The Attorney-General is always directed to be served with the summons to proceed on the order ; and it is his duty to interfere in the subsequent proceedings in any manner he may think fit for the public benefit : (Dan. 1764 ; and see CHAMBERS, as to proceedings generally.)

(h) Schemes.

The petitioners and respondent have a right to attend on the settling of a scheme or taking proceedings in chambers.

When a scheme is directed it is prepared by petitioners, submitted in draft to the Attorney-General's solicitor for suggestions and alterations ; fair copied, alterations not agreed to being shown ; the fair copy is left at chambers ; the scheme is settled by judge ; a fair copy is signed by judge, and filed in the Central Office : (See Dan. 1765 ; Seton, 561.)

For forms of orders as to schemes, see Seton, 550-4.

(i) Orders on Motion.

After an order on petition, subsequent orders may be made on motion : (Seton, 563.)

9. SUMMARY PROCEEDINGS IN CHAMBERS.

(a) In what Cases.

When the appointment or removal of any trustee, or any other relief, order or direction relating to any charity of which the gross annual income for the time being exceeds thirty pounds, shall be considered desirable, and such appointment, removal, or other relief, order, or direction might [before 1853 have been] made or given by the Court of Chancery, in respect either of its ordinary or its special or statutory jurisdiction, or by the Lord Chancellor intrusted with the care and commitment of the custody of lunatics, it shall be lawful for any person authorised in this behalf by the order or certificate of the said board, or for the Attorney-General, to make application (without any information, [action] or petition) to [a judge of the Chancery Division] sitting at chambers, for such order, direction, or relief as the nature of the case may require : (C. T. A., 1853, s. 28.)

The power of the Attorney-General to proceed *ex officio* is preserved by sect. 18.

The provisions of [the Act of 1853] applicable to any charity the gross annual income whereof exceeds thirty pounds, shall extend to any charity established or administered or applicable to or for objects or purposes within the City of London the gross annual income whereof does not exceed thirty pounds, in like manner as if such income exceeded that amount: (C. T. A., 1853, s. 30.)

[Notwithstanding the jurisdiction of the County Courts under sect. 32, as amended by the Charitable Trusts Act, 1860, s. 11, the board may] direct that any application as to any charity within the jurisdiction of [such County Court] shall be made before a judge of the [Chancery Division] according to the provisions [of the Act] applicable to a charity, the gross annual income whereof exceeds 30*l.*, and in such case such application shall be made, and may be heard and determined accordingly, in the like manner as if the gross annual income of such charity exceeded thirty pounds: (C. T. A., 1853, s. 35.)

(b) *By whom Application made.*

Every application to any judge or court, under the jurisdiction created or conferred by any of the provisions of [the Act of 1853] may be made by Her Majesty's Attorney-General, or, subject to the provisions aforesaid, by all or any one or more of the trustees or persons administering or claiming to administer, or interested in, the charity which shall be the subject of such application, or any two or more inhabitants of any parish or place within which the charity is administered or applicable: (C. T. A., 1853, s. 43.)

In any case in which it shall appear to the . . . board that the institution of legal proceedings is requisite or desirable with respect to any charity, or the estates, funds, property, or affairs thereof, and that under the circumstances thereof it is desirable that such proceedings should be instituted by the Attorney-General, it shall be lawful for the said board, if they so think fit, to certify such case, in writing under the hand of the secretary of the said board, to Her Majesty's Attorney-General, together with such statements and particulars (if any) as in the opinion of the said board may be requisite or proper for the explanation of such case; and thereupon the said Attorney-General, if upon consideration of the circumstances he think fit, shall institute and prosecute such legal proceedings as he shall consider requisite or proper under the circumstances of such case, by [action] or petition in the [Chancery Division], or by application to a judge thereof at chambers, or to [an inferior court] under the jurisdiction given by this Act: (C. T. A., 1853, s. 20.)

(c) *Notices of intended Application.*

Before any application shall be made to any judge of the [Chancery Division] under any of the provisions herein contained for the establishment or alteration of a scheme or the appointment or removal of any trustees or trustee, notice in writing of such intended application shall be given in such form and manner as the said board shall have directed: (C. T. A., 1853, s. 42.)

Notice to the board must be given, and their certificate or order obtained as mentioned *sup.* 5, 6, unless the Attorney-General is the applicant.

(d) *Summons.*

Any application to a judge in chambers under the Charitable Trusts Act, 1853, s. 28, shall be made by summons, and such summons may be in

the form set out in schedule K, No. 1, or as near thereto as the nature of the case may permit: (C. O. 41, r. 10.)

The summons is intitled in the matter of the charity, as described in the board's certificate, in the matter of the Charitable Trusts Acts, and of any other special Acts: (Dan. 1768.)

Unless the application is made by the Attorney-General acting *ex officio*, when the summons and duplicate are issued, a copy, certified by the solicitor of the applicant, of the Charity Commissioners certificate or order must be left at chambers: (Dan. 1768-9.)

Unless the application is confined to the appointment of trustees, and obtaining any vesting order, or order for the transfer of stock consequent thereon, a copy, sealed for service, of the summons must be served on the Attorney-General, when he is not the applicant; and, generally, copies must be served on parties whose interests will be affected: (Dan. 1769.)

(e). *Powers of Judge.*

(1) Generally.

[The judge] to whom any such application shall be made shall and may proceed upon and dispose of such application in chambers, save where he may think fit otherwise to direct, and shall and may have and exercise thereupon all such jurisdiction, power and authority, and make such orders and give such directions in relation to the matter of such application, as might [before 1853, have been] exercised, made or given by the Court of Chancery or by the Lord Chancellor intrusted as aforesaid, in a suit regularly instituted, or upon petition, as the case [might] require: (C. T. A., 1853, s. 28.)

[The judges of the Chancery Division] respectively shall in relation to such applications as aforesaid, and the proceedings thereon (subject to [rules of court]) have all such power of directing matters to be heard in open court, and of ordering what matters shall be heard and investigated by themselves and their chief clerks respectively, and such other powers and authorities as by [15 & 16 Vict. c. 80] are vested in or authorised to be exercised by them at chambers; and the provisions of the said Act applicable to orders made by [a judge] at chambers, shall extend to all orders so made under [the] Act: (C. T. A., 1853, s. 28.)

No judge of the [Chancery Division] shall, upon any proceedings under [the] Act, have jurisdiction to try or determine the title at law or in equity to any real or personal property, or any term or interest therein, as between any charity, or the trustee thereof, and any person holding or claiming such real or personal property, term or interest adversely to such charity, or to try or determine any question as to the existence or extent of any charge or trust: (C. T. A., 1853, s. 41.)

(2) To direct Action, &c.

It shall be lawful for the [judge] where under the circumstances of any application as aforesaid he may so see fit, to direct that for obtaining the relief, order or direction sought for by such application an [action] or petition, as the case may require, shall be [commenced or] filed or presented and prosecuted as [formerly] by law required, and to abstain from further proceeding on such application: (C. T. A., 1853, s. 28.)

(3) To appoint Trustees, and make Vesting Orders, &c.

Where any land, or any term or estate therein, holden upon trust for any charity, shall be vested in any persons other than the persons acting in the administration and application of the rents; or where there shall be no trustees thereof, or the trustees, or any of them, shall be unwilling to act, or it shall be uncertain in whom such land, term or estate shall be vested, or all or any of the persons in whom such land, term or estate shall be

vested cannot be found, or shall be under age, lunatic or of unsound mind (whether found such by inquisition or not), or otherwise incapable of acting, or shall be out of the jurisdiction or not amenable to the process of the court . . . or where by reason of the reduced number of trustees or other causes a valid appointment of new trustees cannot be made, or where by reason of the expenses incident to the appointment of new trustees, and the conveyance or assignment of such land, term, or estate to such new trustees, it shall appear to the court . . . or to any judge of such court . . . desirable so to do, such court or judge may order that such land, term, or estate, be vested in [the official trustee of charity lands], and thereupon the same shall vest in such [official trustee] and his successors for all the estate and interest holden in trust for the charity as aforesaid, without any conveyance or assurance thereof. But no such vesting order as aforesaid shall be made in respect of any land, or term or estate as aforesaid, holden in trust as aforesaid, vested in a corporation, without the consent of the corporation; and no such vesting order shall take effect in respect of any copyhold land without the consent of the lord of the manor; and the court . . . or such judge, may direct such periodical or other payment as such court or judge may think fit, to be made to the lord of the manor, in compensation for fines or other profits which would have become due upon death or admittance of tenants: (C. T. A., 1853, s. 48; C. T. A., 1855, s. 15.)

It shall be lawful for any court or judge by whom respectively any such vesting order may have been made, or for any other court or judge having jurisdiction in the matter, if it shall so seem fit to such court or judge, from time to time to order that all or any part of the land, term, or estate, which shall for the time being be vested in the said [official trustee of charity lands] by virtue of any such vesting orders as aforesaid, shall be divested, and that the same shall be vested in the acting trustees or trustee for the time being of the charity; and such last-mentioned order shall operate to vest such land, term, and estate, in the trustees or trustee therein named without any conveyance or assurance: (C. T. A., 1853, s. 49.)

Subject to the orders and directions of the [Chancery Division] or of any such judge [the official trustee of charity lands] shall be deemed a bare trustee, and shall permit the persons acting in the administration of the charity to have the possession, management, and control of the trust estates, and the application of the income thereof, as if the same had been vested in them: (C. T. A., 1853, s. 50; C. T. A., 1855, s. 15.)

Where trustees or other persons having in their names or in the name of any deceased person of whom they are representatives, in the books of the Bank of England, or of the East India or South Sea Company, or of any other public company, any annuities, stock, or shares, or holding any Government or Parliamentary or other securities in trust for any charity, shall be desirous to transfer or deposit the same to or with the [official trustees of charitable funds] in trust for such charity, or where any persons shall be desirous of transferring or depositing as aforesaid any annuities, stocks, shares, or securities for discharging any legacy or charge given or made to or for the benefit of any charity, or where it shall appear to the [Chancery Division], or to any judge of such court . . . that any annuities, stock, shares, or securities held in trust for any charity ought, for the purpose of security or convenient administration, to be transferred or deposited as aforesaid, it shall be lawful for such court or judge to order the transfer or deposit of such annuities, stock, shares, or securities to or with such official trustees: (C. T. A., 1853, s. 51.)

Any court or judge having jurisdiction to order the transfer of stock in the public funds or stock or shares of any public company, to the official

trustees of charitable funds, shall have power also to authorise such trustees to call for a transfer of and to transfer such stock or shares, and may also order the payment to the same trustees of any principal moneys of any charity, under the same circumstances in which the transfer of stock to them [might before 1855 have been] ordered: (C. T. A., 1855, s. 12.)

The . . . official trustees of charitable funds and their successors, to be so appointed, shall have perpetual succession by the name of "the official trustees of charitable funds," and may hold by that name stock in the public funds, and stock and shares of any public company, securities and moneys, which shall respectively devolve to their successors, the official trustees of charitable funds for the time being, without transfer or assignment: (C. T. A., 1855, s. 18.)

Any court or judge, or the . . . board, having jurisdiction to authorise the official trustee of charitable funds to call for a transfer . . . of annuities [&c.] may empower them also to receive and recover, in trust for the charity to which the same shall belong, all dividends, interest, and income accrued from any such annuities, stock, or securities respectively, and which shall, for the time being, be in arrear: (C. T. A., 1860, s. 12.)

As to such of the above powers as may now be exercised by the board: (see *sup.* 3 (d).)

(f) Order.

On the proceeding being concluded the chief clerk sends a minute of the order to the registrar, who draws up and completes the order: (*Id.*)

When money in court is payable to . . . the official trustees of charitable funds . . . the order shall direct the amount so payable to be transferred, upon [his] requisition . . . to [his] proper account (citing it), at the bank: (Ch. F. R., 1874, r. 41.)

Service on Board.

Copies of all orders made by any court or judge for any transfer, deposit or payment of stock, shares, securities or moneys to or by the official trustees of charitable funds shall be forthwith transmitted to the board by the parties obtaining such orders: (C. T. A., 1855, s. 26.)

(g) Appeal.

Save as . . . otherwise provided by . . . [rules of court] the determinations of the . . . [judges] respectively upon and in relation to such applications as aforesaid shall not be subject to appeal in any case where the gross annual income of the charity does not exceed one hundred pounds: (C. T. A., 1853, s. 28.)

No order made under the . . . Act by the judge in chambers, shall be subject to appeal, where the gross annual income of the charity has not been declared by the Charity Commissioners for England and Wales to exceed one hundred pounds, unless the judge by whom such order may have been made, shall certify that such appeal ought to be permitted, either absolutely or on such terms as the judge may think fit to impose: (C. O. 41, r. 13.)

The right of appeal extends when the aggregate income of several charities dealt with by the order, exceeds 100*l.*, though each charity's separate income is less: (*Ex parte Christ's Hospital*, L. Rep. 8 Ch. App. 199.)

(h) Fees.

The fees payable on proceedings before a judge in chambers under the . . . Act, shall be the same as the fees payable . . . in respect of other proceedings commencing by summons, and shall also, in all other respects, be regulated by [the same] orders: (C. O. 41, r. 10.)

Where the judge directs that any matter commenced by summons under the said Act shall be heard in open court, the same fees shall be payable and the same costs shall be allowed, as would have been payable in respect of any other matter so heard : (*Id.*, r. 12.)

10. APPEALS.

(a) *From Judge's Order.* [*Sup.* 9 (g).]

(b) *From County Court.*

[See PART II.]

Appeals from County Courts now lie to the Divisional Court of Appeal : (*J. A.*, 1873, ss. 34-45.)

(c) *From Orders of the Board.*

(1) *By Whom and When.*

The Attorney-General, or any person authorised by him or by the said board . . . may, within three calendar months next after the definitive publication of any order of the said board appointing or removing a trustee or trustees, or for or relating to the assurance, transfer, payment or vesting of any real or personal estate, or establishing a scheme for the administration of the charity, present a petition to the . . . [Chancery Division] in a summary way, appealing against such order, and praying such relief as the case may require : (*C. T. A.*, 1860, s. 8 ; *C. T. A.*, 1869, s. 10.)

Any schoolmaster or schoolmistress or other officer removed by the order of the board, without the concurrence of the trustees or persons acting in the administration of the charity, or a majority of them, and without the approval of a special visitor, if any, of the charity, may, within two calendar months (next after his or her removal), appeal in like manner against the order of removal : (*Id.*)

(2) *Notice to Attorney-General.*

A petition shall not be presented to the [Chancery Division] by any person under sect. 8 of the Charitable Trusts Act, 1860, before the expiration of twenty-one days after written notice under the hand of the appellant of his intention to present such petition has been served on the Attorney-General by delivering the same to the solicitor who acts for him in *ex officio* proceedings relating to charities : (*C. T. A.*, 1869, s. 11.)

(3) *Notice to Board.*

No such petition of appeal shall be presented by any person, other than the Attorney-General, before the expiration of twenty-one days after written notice, under the hand of such appellant, of his or her intention to present such petition, shall have been delivered to the said board at their office : (*C. T. A.*, 1860, s. 8.)

(4) *Respondent.*

The Attorney-General, if he shall think fit, or any person authorised by him or by the said board, may appear as the respondent upon any such appeal : (*C. T. A.*, 1860, s. 8.)

(5) *Powers of Chancery Division on Appeal.*

The Court, upon or before the hearing of any such petition of appeal as aforesaid or at any stage of the proceedings, may require, if it shall think fit, from the said board, their reasons for making the order appealed against, or for any part of such order, and may remit the same to the board for reconsideration, with or without any declaration in relation thereto, or make any substitutive or other order in relation to the matter of the appeal, as it shall think just : (*C. T. A.*, 1860, s. 8.)

(6) Costs.

The Court may make any order respecting the costs, charges, and expenses of the Attorney-General or other defendant: (C. T. A., 1860, s. 9.)

11. SUBMITTING COUNTY COURT DECISION TO CHANCERY DIVISION.

In case any order or decision of any . . . County Court (referred to in sect. 36) shall not be approved by the said board, it shall be lawful for such board to remit the same for reconsideration and decision by such . . . County Court, with such remarks and recommendations thereon (if any) as shall seem fit and expedient to such board, or, in the discretion of the board, to order and direct that the subject-matter to which such order or decision relates, together with such order or decision, shall be submitted to the consideration and decision of a judge of the [Chancery Division], and in such last-mentioned case no further proceedings shall be had or taken in the . . . County Court with respect to the matter in question; and in case the order or decision of the . . . County Court, on the reconsideration of any order or decision so remitted for reconsideration, be disapproved as aforesaid by the said board, such board shall refer such orders and decisions, and the subject-matter thereof, to a judge of the [Chancery Division], or as to any charity within the jurisdiction of the Court of Chancery of the County Palatine of Lancaster, either to the Chancellor or the Vice-Chancellor of the same County Palatine or to a judge of the [Chancery Division]; and where any order or decision is referred to a judge of the [Chancery Division], such judge shall have and exercise all such jurisdiction, power, and authority in relation thereto as in the case of a charity the gross annual income whereof exceeds 30*l.*, and may make such order in relation to the matter of such order or decision as to him may seem proper: (C. T. A., 1853, s. 37.)

III. ROMAN CATHOLIC CHARITIES.

No existing or future gift or disposition of real or personal estate upon any lawful charitable trust for the exclusive benefit of persons professing the Roman Catholic religion shall be invalidated by reason only that the same estate has been or shall be also subjected to any trust or provision deemed to be superstitious, or otherwise prohibited by the laws affecting persons professing the same religion, but in every such case it shall be lawful for the [Chancery Division], or any judge thereof sitting at chambers, in exercise of the jurisdiction created by the Charitable Trusts Act, 1853, upon the application of Her Majesty's Attorney-General, or of any person authorised for this purpose by the certificate of the board of Charity Commissioners for England and Wales, or for the said board upon the application of the person or persons acting in the administration of such real or personal estate, or of a majority of such persons, to apportion the same estate, or the annual income or benefit thereof, so that a proportion thereof, to be fixed by such court or judge, or by the said board, as the case may require, may be exclusively subject to the lawful charitable trust declared by the donor or settlor, and that the residue thereof may become subject to such lawful charitable trusts for the benefit of persons professing the Roman Catholic religion, to take effect in lieu of such superstitious or prohibited trusts, as the said court or judge, or the said board, may consider under the circumstances to be most just: (23 & 24 Vict. c. 134, s. 1.)

It shall be lawful for the court or judge, or board, making any such apportionment by the same or any other order or orders to establish any scheme for giving effect thereto, and to appoint trustees for the admini-

stration of the several portions of such real and personal estate, according to the trusts established of the same proportions respectively, and to vest the estate to be so apportioned in the trustees so to be appointed: (23 & 24 Vict. c. 134, s. 1.)

IV. GRAMMAR SCHOOLS.

1. INTERPRETATION OF TERMS.

"Grammar School" includes all endowed schools, whether of royal or other foundation, founded, endowed, or maintained for the purpose of teaching Latin and Greek, or either of such languages, whether in the instrument of foundation or endowment, or in the statutes or decree of any court of record, or in any Act of Parliament establishing such school, or in any other evidence or documents, such instruction shall be expressly described, or shall be described by the word "grammar," or any other form of expression which . . . may be construed as intending Greek or Latin, and whether by such evidences or documents as aforesaid or in practice such instruction be limited exclusively to Greek or Latin, or extended to both such languages, or to any other branch or branches of literature or science in addition to them or either of them . . . and [the term includes] all endowed schools which are grammar schools by reputation, and all other charitable institutions and trusts, so far as the same are for the purpose of providing such instruction as aforesaid: (3 & 4 Vict. c. 77, s. 25.)

The Act does not extend to Oxford or Cambridge University, or any college or hall thereof; the University of London, or any colleges connected therewith; the University of Durham; the College of St. David's or St. Bee's; the grammar schools of Westminster, Eton, Winchester, Harrow, Charter House, Rugby, Merchant Taylor's, St. Paul's, Christ's Hospital, Birmingham, Manchester, Macclesfield, or Louth; or such schools as form part of any cathedral or collegiate church: (*Id.*, s. 24.)

"Visitor" includes any person or persons in whom shall be vested, solely or jointly, the whole or such portion of the visitatorial power, as regards the subject of the enactment or provision, or any powers in regard to the discipline or making of new statutes in any school: (*Id.*, s. 25.)

"Statutes" means all written rules and regulations by which the school, schoolmasters, or scholars are, shall, or ought to be governed, whether such rules or regulations are incorporated with, or authorised by any royal or other charter, or other instrument of foundation, endowment, or benefaction, or declared or confirmed by Act of Parliament or by decree of any court of record, and also all rules and regulations which shall be unwritten, and established only by usage or reputation: (*Id.*, s. 25.)

The terms "governors," "trustees," "schoolmaster," "under-master," "master," "discipline," and "management," are also defined by the same section.

When the patronage or the right of appointing the schoolmaster or under-master is vested in the Crown, the Lord Chancellor, or the Chancellor of the Duchy of Lancaster (as to any grammar school within the county palatine), is to be patron for the purposes of the Act: (*Id.*, s. 22.)

2. POWER TO EXTEND SYSTEM OF EDUCATION.

Whenever any question [comes] under consideration in [the Chancery Division] concerning the system of education . . . to be established in any grammar school, or the right of admission into the same . . . for whatever cause the [proceeding] may have been . . . instituted, according to the ordinary course of proceedings in [the court] or under [the] Act,

... the court [may] make such decrees or orders as . . . seem expedient . . . for extending the system of education to other useful branches of literature and science, in addition to or [subject as mentioned *post*] in lieu of the Greek and Latin languages, or such other instruction as may be required by the terms of the foundation, or the then existing statutes [and] for extending or restricting the freedom of the right of admission to such school by determining the number or the qualifications of boys . . . thereafter . . . admissible thereto, and for settling the terms of admission to and continuance in the same; and [may] establish such schemes for the application of the revenues of any such school as may be conducive to the rendering or maintaining such schools in the greatest degree efficient and useful, with due regard to the intentions of the respective founders and benefactors: (3 & 4 Vict. c. 77, s. 1.)

The court [must] regard . . . the intentions of the founders and benefactors . . . the nature and extent of the foundation and endowment, the rights of parties interested . . . the statutes . . . the character of . . . instruction . . . and . . . existing state and condition of the . . . school, and the condition, rank, and number of the children . . . capable of enjoying the privileges [thereof], and of those who may become so capable if any extended or different system of education, or any extension of the right of admission . . . or any new statutes [are] established: (*Id.*, s. 2.)

3. DISPENSING WITH LATIN OR GREEK.

Unless it [is] necessary from the insufficiency of the revenues . . . the court [cannot] dispense with the teaching of Latin [or] Greek . . . or treat such instruction otherwise than as the principal object of the foundation; or . . . dispense with any . . . provision [as] to the qualification of any schoolmaster or under-master: (*Id.*, s. 3.)

Whenever . . . the court [dispenses] with the teaching of Greek or Latin [it] shall prescribe such a course of instruction, and . . . require such qualification in the children [on] admission, as will tend to maintain the character of the school as nearly as, with reference to the amount of the revenues, it may be analogous to that which was contemplated by the founder; and whenever, on [account of insufficiency of revenues] the court [dispenses] with any statute or provision as . . . to the qualification of any schoolmaster or under-master [it] shall substitute such qualification as will provide for every object implied in the original qualification, which may be capable of being retained notwithstanding such insufficiency of . . . revenues: (*Id.*, s. 5.)

4. ADMISSION OF CHILDREN WHERE LATIN OR GREEK RETAINED.

[Where] the teaching of Greek or Latin [is] retained, the court shall not allow of the admission of children of an earlier age or of less proficiency than may be required by the foundation or existing statutes, or may be necessary to show that the children are of capacity to profit by the kind of education designed by the founder: (*Id.*, s. 4.)

Any extension of the right of admission must be so qualified that privileged boys' advantages are not prejudiced: (see s. 8.)

5. QUALIFICATION OF MASTERS.

[If] the appointment of any additional schoolmaster or under-master [is] necessary the court shall require the same qualification . . . as may be required by the existing statutes, in the present schoolmaster or under-master, except such as may be wholly referable to their capability of giving instruction in any particular branch . . . but . . . every other qualification implied in the qualification of the original schoolmaster or under master, and capable of being retained, shall be retained and required

in such new schoolmaster or under-master, and the court shall declare in whom [appointments] shall be vested, so as to preserve rights of patronage: (*Id.*, s. 6; and see ss. 11, 12; and *sup.* 3.)

6. UNITING SCHOOLS.

In case there shall be in any city, town, or place any grammar school, or grammar schools, the revenues of which shall of themselves be insufficient to admit of the purposes of their founder or founders being effected, but which revenues, if joined to the revenues of any other grammar school, or grammar schools in the same city, town, or place, would afford the means of effecting the purposes of the founders of such several schools, it shall be lawful for the court to direct such schools to be united, and the revenues of the schools so united to be applied to the support of one school to be formed by such union, and which shall be carried on according to a scheme to be settled for that purpose under the direction of the said court: (*Id.*, s. 9.)

Before application shall be made to the court to direct such union, the consent of the visitor, patron, and governors of every school to be effected thereby shall be first obtained: (*Id.*)

7. VISITORS.

The court may enlarge powers of visitors as to discipline: (*Id.*, r. 14.)

[Where] no authority of visitation is vested in any known person or persons the bishop of the diocese wherein the [school] is locally situated [may] apply to the court stating the same, and the court [may] order that the said bishop shall be at liberty to visit and regulate the said school in respect of the discipline thereof: (*Id.*, s. 15.)

[Where visitors refuse or neglect to exercise powers as to discipline within a reasonable time, or it is uncertain] in whom the right to exercise such powers is vested, such powers shall be exercised, *pro hac vice* by some person specially appointed by the court on application made by any person or persons interested in such grammar school; [but a visitor is not exempted] from being compelled by any process to which he [was before] amenable to perform any act which he is now compellable to perform: (*Id.* s. 16.)

8. DISCHARGING MASTERS.

The court [may] empower [visitors] in respect of discipline or [those] specially appointed under this Act, and the governors, or either of them, to remove any master who has been negligent or is unfit or incompetent: (*Id.*, s. 17.)

9. HOW APPLICATION MADE.

All applications may be heard and determined, and all powers given by [the] Act to the court may be exercised, in cases brought before such court, by petition only, such petitions to be presented, heard, and determined according to the provisions of [52 Geo. 3, c. 101]: (*Id.*, s. 22; and see *sup.* II., 8.)

The petition must be intituled in the matter of both Acts.

If there is any special visitor appointed by the founder, or any competent authority, opportunity shall be given to such visitor to be heard on the matters in question, in such manner as the court shall think proper, previously to the making of the decree or order: (see s. 1.)

The petition must be served on the patron and master: (Dan. 1779.)

Applications are more frequently made under the Charitable Trusts Acts: (Dan. 1780.)

V. BURIAL BOARDS TAKING CHARITY LANDS.

Any burial board, under 15 & 16 Vict. c. 85, or 16 & 17 Vict. c. 137, taking and appropriating, for the purpose of a burial ground, any land, vested in guardians, churchwardens, overseers, trustees, or others, for the general benefit of a parish or for any specific charity, and which is subject to any charitable use, must do so on such conditions only as the Chancery Division in the exercise of its jurisdiction over charitable trusts shall appoint or direct: (15 & 16 Vict. c. 85, s. 29; 16 & 17 Vict. c. 137, s. 7.)

The application is by petition or summons with the board's sanction: (see *sup.*, II.)

The court will consider the question of price: (Dan. 1782.)

VI. APPORTIONMENTS UNDER CHURCH BUILDING ACTS.

1. WHERE MADE.

Where Her Majesty's Commissioners [for building new churches] form any distinct and separate parish, district parish, or district chapelry, under [their powers] out of any parish or extra-parochial place . . . the [Chancery Division may] apportion between the remaining part of such parish or place, and the distinct and separate parish, or district parish, or district chapelry, any charitable devises, bequests, or gifts which . . . have been made or given to or for the use of any such parish or extra-parochial place, or the produce thereof, and direct that the distribution of the proportions . . . so apportioned, shall be made and distributed by the incumbent or spiritual person serving the church, or by the churchwardens of any such distinct and separate parish, district parish, or district chapelry, either jointly or severally, as the said court . . . may think expedient: (8 & 9 Vict. c. 70, s. 22.) [The court may also] apportion between the remaining part of such parish or place . . . and such separate divisions or districts, any debts or charges, before the period of such apportionment, contracted or charged upon the credit of any church-rates in such parish or place: (*Id.*)

When a ward of a parish has been divided into districts, gifts may be apportioned: (Dan. 1781.)

2. HOW APPLICATION MADE.

The application is by the petition of any two persons resident in any such parish or extra-parochial place, presented as under 52 Geo. 3, c. 101; 8 & 9 Vict. c. 70, s. 22; see *sup.* II., 8.)

The petition must be intitled in the matter of both Acts: (Dan. 1781.)

The Charity Commissioners have a similar power when the gross annual income of the charity does not exceed £30: (C. T. A. 1855, ss. 10, 11.)

3. DISCRETION OF COURT.

The court has a discretion, in exercising which it should be guided by the consideration whether the administration of the charity is affected by the division of the parish to the prejudice of the inhabitants of the new district: (Dan. 1781.)

4. DIRECTIONS AS TO DEBTS.

Such apportioned debts or charges shall be raised and paid by the parish or place in which they may be apportioned in such and the like manner as the entirety was to be raised and paid or in such manner and under such provisions and conditions as the . . . court shall direct, and when any securities may have been given for the same the court may order new securities to be given for the apportioned debts by such persons and

bodies, and in all respects as the . . . court may direct, and all securities shall be valid and binding : (8 & 9 Vict. c. 70, s. 22.)

5. COSTS.

The costs are in the court's discretion : (8 & 9 Vict. c. 70, s. 22; *Ex parte Mercer's Company*, L. Rep. 10 Ch. Div. 481.)

6. REGISTRATION OF APPORTIONMENTS AND DEPOSIT OF DUPLICATES.

All such apportionments shall be registered in the registry of the diocese in which such parish or place shall be locally situate, and duplicates thereof shall be deposited with the churchwardens of such parish or place, and of each such division or district as aforesaid : (*Id.*)

VII. CHARITIES UNDER MUNICIPAL CORPORATIONS ACT.

1. WHERE ADMINISTERED.

The court may make such orders as it shall see fit for the administration, subject to the charitable uses or trusts, of real and personal estates vested, before the passing of 5 & 6 Will. 4, c. 76, in the body corporate of a borough, or any one or more of the members thereof in his or their corporate capacity, solely, or together with any person or persons elected solely by such body corporate, or solely by any particular number, class, or description of members of such body corporate, wholly or in part in trust, or for the benefit of any charitable uses or trusts : (5 & 6 Will. 4, c. 76, s. 71; *J. A.*, 1873, ss. 34, 100.)

The legal estate in the lands was vested in the trustees appointed under 5 & 6 Will. 4, c. 76; and on their death, &c., in the trustee for the time being, by sect. 65 of the Charitable Trusts Act, 1853.

The former Act only applies to charitable trusts for purposes *dehors* the corporation; and the right of nominating to a spiritual benefice or the mastership of a hospital is within it : (*Dan.* 1782.)

2. HOW APPLICATION MADE.

The application is by petition, presented under 52 Geo. 3, c. 101, and the Municipal Corporations Act, with the Attorney-General's fiat : (*Dan.* 1783; *Sup.* II., 8.)

VIII. ENROLMENT OF DEEDS.

1. OF SUBSEQUENT DEED WHERE TRUST DEED LOST OR DESTROYED.

[When it is] impossible to enrol the original deed creating a charitable trust, by reason of the same having been lost or destroyed by time or accident, and the trusts sufficiently appear by some subsequent deed appointing new trustees, or otherwise reciting the trusts created by the original deed [and executed before or within six calendar months after the 13th May, 1864] any trustee or other person interested in such charitable trusts may apply by summons in a summary way . . . for an order authorising the enrolment of such subsequent deed : (27 & 28 Vict. c. 13, ss. 2, 3.)

The court [must be] satisfied by affidavit or otherwise that such original deed has been lost or destroyed by time or accident, but that the trusts thereof sufficiently appear by such subsequent deed : (*Id.*, s. 3.)

The court may order the enrolment of the subsequent deed, which enrolment has the same force and effect as the proper enrolment of the original deed would have had : (*Id.*)

2. IN CASE OF NON-ENROLMENT OF INSTRUMENT MADE FOR VALUABLE CONSIDERATION.

(a) By the Court.

Any trustee, governor, director, or manager of any charity, or any

other person entitled to act in the management of or otherwise interested in any charitable trust, may, by summons in a summary way, and without service thereof upon any person, apply to the [Chancery Division] for an order authorising the enrolment in the court of any deed, assurance, or other instrument whereby any hereditaments of any tenure or any estate or interest therein, have or has been or shall be given, granted, or in any way conveyed, settled, or charged for charitable uses, or of any other deed, assurance, or instrument relative to or connected with any charitable trust, and which deed, assurance, or instrument ought to have been enrolled, but has not been enrolled within the time by law limited for that purpose, or (where such deed, assurance, or instrument has been lost or destroyed by time or accident, and the trusts thereof sufficiently appear by some subsequent deed, appointing new trustees, or otherwise reciting the trusts created by the original deed, assurance, or instrument) for an order authorising the enrolment of such subsequent deed : (29 & 30 Vict. c. 57, s. 1.)

The court [must be] satisfied by affidavit or otherwise that the deed, assurance, or other instrument conveying or charging the hereditaments, estate, or interest for charitable uses was made really and *bonâ fide* for full and valuable consideration, actually paid at or before the making or perfecting thereof, or reserved by way of rentcharge or other annual payment, or partly paid at or before the making or perfecting of such deed, assurance, or other instrument, and partly reserved as aforesaid, without fraud or collusion, and that at the time of the application to the court possession or enjoyment is held under such deed, assurance, or other instrument, and that the omission to enrol the same in proper time has arisen from mere ignorance or inadvertence, or from the destruction thereof by time or accident : (*Id.* s. 2.)

The court [may] make an order authorising the enrolment in the court of the deed, assurance, or instrument to which the application relates, or of a subsequent deed, as the case may be, and the same shall thereupon be enrolled accordingly at any time within six calendar months from the date of the order, and no acknowledgment shall be necessary prior to enrolment : (*Id.*)

Nothing contained [in the Act] shall affect or apply to any deed, instrument, or assurance, as to which at the time of any such application to the court . . . any action, suit, or proceeding shall be pending for setting aside the same or for asserting any right founded on the invalidity thereof, or any decree or judgment shall have been then already obtained founded on such invalidity : (*Id.*, s. 4.)

(b) *By the Clerk of Enrolments.*

The clerk of enrolments, if satisfied by affidavit or otherwise as to the same circumstances, may enrol such a deed or subsequent deed, as mentioned *sup.* (a), without order : (35 & 36 Vict. c. 24, s. 13.)

CHOSE IN ACTION.

[See ASSIGNMENT OF DEBT.]

COMMITTAL.

[See ARREST; EXECUTION.]

COMPANIES.

- I. AS PARTIES [see PARTIES].
- II. SERVICE ON [see WRIT OF SUMMONS].
- III. DISCOVERY BY [see DISCOVERY].
- IV. EXECUTION AGAINST [see EXECUTION].
- V. CONTEMPT BY.
- VI. TAKING LAND [see LANDS CLAUSES ACT].
- VII. WINDING UP [see WINDING UP].
- VIII. REDUCTION OF CAPITAL.
 1. SPECIAL RESOLUTION.
 - (a) *Previous to Order of Court.*
 - (b) *For Return of Profits, where no Order necessary.*
 2. WHEN WORDS "AND REDUCED" ADDED.
 3. PETITION TO COURT TO CONFIRM REDUCTION.
 - (a) *Where necessary.*
 - (b) *Title.*
 - (c) *Advertisement.*
 - (d) *Placing in List.*
 4. PREPARING LIST OF CREDITORS.
 - (a) *Summons for Directions.*
 - (b) *Creditors entitled to object to Reduction.*
 - (c) *Fixing Date as to which List made.*
 - (d) *Verification.*
 - (e) *Copies for Inspection.*
 - (f) *Leaving, with Affidavit, at Chambers.*
 5. NOTICE TO CREDITORS IN LIST.
 6. ADVERTISEMENT OF LIST.
 7. COMPANY'S AFFIDAVIT AS TO CLAIMS.
 8. SETTLEMENT OF LIST.
 9. NOTICE TO CREDITORS NOT IN LIST.
 10. DISPENSING WITH CREDITOR'S CONSENT.
 11. DISPUTED CLAIMS.
 12. CHIEF CLERK'S CERTIFICATE AS TO CREDITORS.
 13. SETTING DOWN PETITION.
 14. ADVERTISEMENT OF HEARING.
 15. HEARING.
 - (a) *Creditors entitled to Appear.*
 - (b) *Directions for securing Debts, and Adjournment.*
 16. ORDER CONFIRMING REDUCTION.
 17. COSTS.
 18. REGISTRATION OF ORDER AND MINUTE.
 19. NOTICE OF REGISTRATION.
 20. CERTIFICATE OF REGISTRATION.
 21. MINUTE TO FORM PART OF MEMORANDUM OF ASSOCIATION.
- IX. DEFUNCT COMPANIES.
 1. STRIKING NAME OFF REGISTER.
 - (a) *Inquiry whether Company is in operation.*
 - (b) *Proceeding where No Answer received.*
 - (c) *To whom Letter or Notice addressed.*
 - (d) *Notice in Gazette.*
 - (e) *Striking out.*
 2. RESTORING NAME.
- X. LIFE ASSURANCE COMPANIES.
 1. DEPOSIT OF FUNDS.
 - (a) *Deposit of 20,000l. before incorporation.*
 - (b) *Payment into Court.*
 - (c) *Who may Deposit.*

- (d) *Deposit to form Part of Company's Fund.*
- (e) *Board of Trade Warrant.*
- (f) *Deposit of Annuities, Stocks, &c., in lieu of Money.*
- (g) *Deposit when Office of Paymaster-General is closed.*
- (h) *Deposit may be invested.*
- (i) *Payment out of Interest on the Deposit.*
- (k) *Payment out of Deposit when Premiums of Company amount to 40,000l.*
- (l) *Application to Court to be by Petition.*

2. AMALGAMATION OR TRANSFER.

- (a) *Petition to Court to sanction Arrangement.*
- (b) *Notice to Policyholders.*
- (c) *Inspection of Agreement.*
- (d) *Dissent of Policyholders.*
- (e) *Sanction of Court must be obtained.*
- (f) *Deposit of Documents with Board of Trade.*
- (g) *Act applies to Life Companies only.*

3. WINDING-UP (see WINDING-UP).

XI. RAILWAY COMPANIES.

1. ABANDONMENT.

- (a) *Warrant of Board of Trade.*
- (b) *Winding-up.*
- (c) *Cancellation of Bond and Payment out.*

2. ARRANGEMENT WITH CREDITORS.

- (a) *Preparation of Scheme.*
- (b) *Preparation of Declaration and Affidavit.*
- (c) *Filing Scheme, Declaration, and Affidavit.*
- (d) *Furnishing Copies.*
- (e) *Notice of Filing Scheme.*
- (f) *Certificate of Filing.*
- (g) *Staying Proceedings against Company.*
- (h) *Assent to Scheme,*
 - (1) *By Mortgagees and Bondholders.*
 - (2) *By Rent-charge Holders.*
 - (3) *By Guaranteed and Preference Shareholders.*
 - (4) *By Ordinary Shareholders.*
 - (5) *By Leasing Companies.*
 - (6) *By Outside Creditors.*
 - (7) *Where unnecessary.*
- (i) *Petition for Confirmation.*
- (k) *Summons to Appoint Hearing Day.*
- (l) *Notice of Application.*
- (m) *Entering Appearance.*
- (n) *Hearing.*
- (o) *Confirmation of Scheme.*
- (p) *Notice of Confirmation.*
- (q) *Enrolment.*
- (r) *Notice of Enrolment.*
- (s) *Effect of Enrolled Scheme.*

3. APPOINTMENT OF RECEIVER.

4. PROHIBITION TO RAILWAY COMMISSIONERS.

5. DEPOSITS IN COURT.

XII. TRAMWAYS COMPANIES.

1. DEPOSITS IN COURT BY [see PAYMENT INTO AND OUT OF COURT].

I. AS PARTIES [see PARTIES].

II. SERVICE ON [see WRIT OF SUMMONS].

III. DISCOVERY BY [see DISCOVERY].

IV. EXECUTION AGAINST [see EXECUTION].

V. CONTEMPT.

Sequestration is the proper remedy when the persons disobeying the order, from being members of a corporation aggregate, are not liable to process of attachment: (Seton, 1577, 296; and see EXECUTION.)

Individual acts of setting the order of the court at defiance by members of a public body may be punished by committal: (Seton, 297.)

VI. TAKING LAND [see LANDS CLAUSES ACT].

VII. WINDING-UP [see WINDING-UP].

VIII. REDUCTION OF CAPITAL.

1. SPECIAL RESOLUTION.

(a) *Previous to Order of Court.*

Any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum of association, if authorised so to do by its regulations as originally framed or as altered by special resolution, as to reduce its capital: (C. A. 1867, s. 9.)

The word "capital" . . . shall include paid-up capital; and the power to reduce capital . . . shall include a power to cancel any lost capital, or any capital unrepresented by available assets, or to pay off any capital which may be in excess of the wants of the company; and paid-up capital may be reduced either with or without extinguishing or reducing the liability (if any) remaining on the shares of the company, and to the extent to which such liability is not extinguished or reduced it shall be deemed to be preserved . . . : (C. A., 1877, s. 3.)

A resolution [is] special whenever a resolution has been passed by a majority not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote, as may be present, in person or by proxy (in cases where by the regulations of the company proxies are allowed) at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled according to the regulations of the company, to vote, as may be present, in person or by proxy, at a subsequent general meeting of which notice has been duly given, and held at an interval of not less than fourteen days, nor more than one month from the date of the meeting at which such resolution was first passed: (C. A., 1862, s. 51.)

At any [such] meeting, unless a poll is demanded by at least five members, a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same: (*Id.*)

In computing the majority . . . when a poll is demanded, reference shall be had to the number of votes to which each member is entitled by the regulations of the company: (*Id.*)

No such resolution for reducing the capital of any company shall come into operation until an order of the court is registered by the registrar of joint stock companies: (C. A., 1867, s. 9.)

(b) *For Return of Profits where no Order Necessary.*

When any company has accumulated a sum of undivided profits, which, with the consent of the shareholders, may be distributed among the shareholders in the form of a dividend or bonus, it shall be lawful for the com-

pany, by special resolution, to return the same, or any part thereof, to the shareholders in reduction of the paid-up capital of the company, the unpaid capital being thereby increased by a similar amount. The powers vested in the directors of making calls upon the shareholders in respect of moneys unpaid upon their shares shall extend to the amount of the unpaid capital as augmented by such reduction: (C. A., 1880, 43 Vict. c. 19, s. 3.)

As to the meaning of "special resolution" and "capital," see *sup.* (1)

No such special resolution as aforesaid shall take effect until a memorandum, showing the particulars required by law in the case of a reduction of capital by order of the court, shall have been produced to and registered by the registrar of joint stock companies: (C. A., 1880, s. 4.)

2. WHEN WORDS "AND REDUCED" ADDED.

The company shall, after the date of the passing of any special resolution for reducing its capital, add to its name, until such date as the court may fix, the words "and reduced," as the last words in its name, and those words shall, until such date, be deemed to be part of the name of company within the meaning of the [Companies Act, 1862]: (C. A., 1867, s. 10.)

. . . . Where the reduction of the capital of a company does not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital, it shall not be necessary, before the presentation of the petition for confirming the reduction, to add, and the court may, if it think expedient so to do, dispense altogether with the addition of, the words "and reduced" . . . : (C. A., 1867, s. 4.)

It is unnecessary to add the words in the case of reduction under the Companies Act, 1880: (see *sup.* (a) (2).)

3. PETITION TO COURT TO CONFIRM REDUCTION.

(a) *Where Necessary.*

A company which has passed a special resolution for reducing its capital [under the Act of 1867] may apply to the court by petition for an order confirming the reduction: (C. A., 1867, s. 11.)

(b) *Title.*

Every petition . . . and all notices, affidavits, and other proceedings under such petition shall be intitled in the matter of "The Companies Act, 1867," and of the Company in question: (G. O., 1868, s. 2.)

(c) *Advertisement.*

Notice of the presentation of the petition shall be published at such times, and in such newspapers as the judge shall direct, so that the first insertion of such notice be made not less than one calendar month before the day of the date fixed [with reference to which the list of creditors is to be made out]: (G. O., 1868, r. 5; see *post*, 4, (c).)

For the form of notice, see G. O., 1868, sched., form No. 2.

(d) *Placing in List.*

No . . . petition . . . shall be placed in the list of petitions by the secretary of the Lord Chancellor, or of the Master of the Rolls, as the case may be, until after the expiration of eight clear days from the filing of [the chief clerk's certificate as to creditors]: (G. O. 1868, r. 3; see *post*, 12.)

4. PREPARING LIST OF CREDITORS.

(a) *Summons for Directions.*

When any . . . petition . . . has been presented, application may be made, *ex parte* by summons in chambers, to the judge to whose court

the petition is attached, for directions as to the proceedings to be taken for settling the list of creditors entitled to object to the proposed reduction: (G. O. 1868, r. 4.)

(b) *Creditors entitled to Object to Reduction.*

Where a company proposes to reduce its capital, every creditor of the company who at the date fixed by the court is entitled to any debt or claim which, if that date were the commencement of the winding-up of the company, would be amenable in proof against the company, shall be entitled to object to the proposed reduction, and be entered in the list of creditors who are so entitled to object: (C. A., 1867, s. 13; and see WINDING-UP.)

Where the reduction of the capital of a company does not involve either the diminution of any liability in respect of unpaid capital, or the payment to any shareholder of any paid-up capital, the creditors of the company shall not, unless the court otherwise direct, be entitled to object or required to consent to the reduction: (C. A., 1877, s. 4.)

(c) *Fixing Date as to which List made.*

The judge may . . . fix the date with reference to which the list of [creditors entitled to object to the proposed reduction] is to be made out; and may, either at the same time or afterwards, as he shall think fit, give . . . directions [respecting the advertisement of the petition, and the affidavit as to creditors: (G. O. 1868, r. 4; and see *post*.)]

For the Form of Order, see G. O. 1868, sched., form No. 1.

(d) *Verification.*

The company shall, within such time as the judge shall direct, file in the [Central Office] an affidavit made by some officer or officers of the company competent to make the same, verifying a list containing the names and addresses of the creditors of the company at the date fixed [with reference to which the list of the creditors is to be made out], and the amounts due to them respectively: (G. O. 1868, r. 6.)

The person making [the] affidavit [verifying the list of creditors] shall state therein his belief that such list is correct, and that there was not at the date . . . fixed [with reference to which the list is made out] any debt or claim which, if that date were the commencement of the winding-up of the company, would be admissible in proof against the company, except the debt set forth in such list, and shall state his means of knowledge of the matters deposed to in such affidavit: (G. O. 1868, r. 7; and see WINDING-UP.)

For the form of affidavit, see G. O. 1868, sched., form No. 3.

(e) *Copies of, for Inspection.*

Copies of [the] list containing the names and addresses of the creditors, and the total amount due to them, but omitting the amounts due to them respectively, or (as the judge shall think fit) complete copies of such list, shall be kept at the registered office of the company and at the offices of their solicitors and London agents (if any), and any person desirous of inspecting the same may at any time during the ordinary hours of business, inspect and take extracts from the same on payment of the sum of one shilling: (G. O. 1868, r. 8; and Order of March 2, 1869.)

(f) *Leaving, with Affidavit, at Chambers.*

[The company shall, within such time as the judge shall direct], leave the . . . list [of creditors] and an office copy of [the] affidavit [verifying the same] at the chambers of the judge: (G. O. 1863, r. 6.)

5. NOTICE TO CREDITORS IN LIST.

The company shall within seven days after the filing of [the] affidavit

[verifying the list of creditors], or such further time as the judge may allow, send to each creditor whose name is entered in the said list a notice stating the amount of the proposed reduction of capital and the amount of the debt for which such creditor is entered in the said list, and the time (such time to be fixed by the judge) within which, if he claims to be a creditor for a larger amount, he must send in his name and address, and the particulars of his debt or claim, and the name and address of his solicitor (if any) to the solicitor of the company, and such notice shall be sent through the post in a prepaid letter addressed to each creditor at his last known address or place of abode: (G. O. 1868, r. 9.)

For the form of notice, see G. O. 1868, sched., form No. 4.

Service of the formal notices on creditors residing abroad will, in a proper case, be dispensed with, on the company bringing into court the amounts set opposite the names of such creditors on the list, or giving them notice that this has been done: (Buckley, 3rd edit. 438.)

6. ADVERTISEMENT OF LIST.

Notice of the list of creditors shall, after the filing of the affidavit, be published at such times, and in such newspapers, as the judge shall direct. Every such notice shall state the amount of the proposed reduction of capital, and the places where the aforesaid list of creditors may be inspected, and the time within which creditors of the company, who are not entered on the said list, and are desirous of being entered therein, must send in their names and addresses, and the particulars of their claims, and the names and addresses of their solicitors (if any) to the solicitor of the company: (G. O. 1868, r. 10.)

For the form of notice, see G. O. 1868, Sched. Form 5.

7. COMPANY'S AFFIDAVIT AS TO CLAIMS.

The company shall within such time as the judge shall direct, file in the [Central Office] an affidavit made by the person to whom the particulars of debts or claims are by [the] notices . . . required to be sent in stating the result of such notices respectively, and verifying a list containing the names and addresses of the persons (if any) who shall have sent in the particulars of their debts or claims in pursuance of such notices respectively, and the amounts of such debts or claims, and some competent officer of the company shall give in such affidavit, and shall in such list distinguish which (if any) of such debts or claims are wholly, or as to any and what part thereof, disputed by the company: (G. O. 1868, r. 11.)

For the form of affidavit, see G. O. 1868, sched., form No. 6.

[The list of creditors and an office copy of the affidavit verifying such list and made by the person to whom the particulars of debts and claims are by the notices required to be sent in] shall, within such time as the judge shall direct, be left at the chambers of the judge: (G. O. 1868, r. 11.)

8. SETTLEMENT OF LIST.

The court shall settle a list of . . . creditors [entitled to object], and for that purpose shall ascertain as far as possible, without requiring an application from any creditor, the names of such creditors, and the nature and amount of their debts or claims: (C. A., 1867, s. 13.)

9. NOTICES TO CREDITORS NOT IN LIST.

[The court] may publish notices fixing a certain day or days within which creditors of the company, who are not entered on the list [of creditors entitled to object], are to claim to be so entered or to be excluded from the right of objecting to the proposed reduction: (C. A. 1867, s. 13.)

10. DISPENSING WITH CREDITOR'S CONSENT.

Where a creditor whose name is entered on the list of creditors, and whose debt or claim is not discharged or determined, does not consent to the proposed reduction, the court may (if it think fit) dispense with such consent on the company securing the payment of the debt or claim of such creditor by setting apart and appropriating in such manner as the court may direct, a sum of such amount as is hereinafter mentioned; (that is to say)

If the full amount of the debt or claim of the creditor is admitted by the company, or, though so admitted, is such as the company are willing to set apart and appropriate, then the full amount of the debt or claim shall be set apart and appropriated;

If the full amount of the debt or claim of the creditor is not admitted by the company, and is not such as the company are willing to set apart and appropriate, or if the amount is contingent or not ascertained, then the court may, if it think fit, inquire into and adjudicate upon the validity of such debt or claim, and the amount for which the company may be liable in respect thereof, in the same manner as if the company were being wound up by the court, and the amount fixed by the court on such inquiry and adjudication shall be set apart and appropriated: (C. A., 1867, s. 14; and see WINDING-UP.)

A creditor who "does not consent" does not mean a creditor who remains perfectly passive, having the opportunity of opposing. Creditors who neither assented to nor dissented from the proposed reduction were held not to be considered creditors who did "not consent," but be taken to have assented: (Buckley, 3rd edit., 439.)

Where certain debenture holders, who had not consented to the proposed reduction, and had not attended to object, did not appear at the hearing of the petition, it was held that they could not be taken to have consented to the reduction, but that a consent brief on their behalf must be produced, or the amount of their debentures must be deposited in court: (*Re Patent Ventilating Company*, L. Rep. 12 Ch. Div. 254; 41 L. T. Rep. N. S. 82.)

11. DISPUTED CLAIMS.

If any debt or claim, the particulars of which are . . . sent in, shall not be admitted by the company at its full amount, then and in every such case, unless the company are willing to set apart and appropriate as the judge shall direct the full amount of such debt or claim, the company shall, if the judge . . . so direct, send to the creditor a notice that he is required to come in and prove such debt or claim, or such part thereof as is not admitted by the company by a day to be therein named, being not less than four clear days after such notice, and being the time appointed by the judge for adjudicating upon such debts and claims, and such notice shall be sent in [a prepaid letter addressed to each creditor at his last known address or place of abode]: (G. O., 1868, r. 12.)

For the form of notice, see G. O. 1868, sched., form No. 7.

Such creditors as come in to prove their debts or claims in pursuance of [the] notice shall be allowed their costs of proof against the company, and be answerable for costs, in the same manner as in the case of persons coming in to prove debts under a decree in a cause: (G. O., 1868, r. 13.)

12. CHIEF CLERKS' CERTIFICATE AS TO CREDITORS.

The result of the settlement of the list of creditors shall be stated in a certificate by the chief clerk, and such certificate shall state what debts or claims (if any) have been disallowed, and shall distinguish the debts

or claims the full amount of which the company are willing to set apart and appropriate, and the debts or claims (if any) the amount of which has been fixed by inquiry and adjudication in manner provided by . . . the Act, and the debts or claims (if any) the full amount of which is not admitted by the company, nor such as the company are willing to set apart and appropriate, and the amount of which has not been fixed by inquiry and adjudication as aforesaid; and shall show which of the creditors have consented in writing to the proposed reduction, and the total amount of the debts due to them, and the total amount of the debts or claims the payment of which has been secured in manner provided by the [Act], and the person to or by whom the same are due or claimed; but it shall not be necessary to show in such certificate the several amounts of the debts or claims of any persons who have consented in writing to the proposed reduction, or the payment of whose debts or claims has been secured as aforesaid: (G. O., 1868, r. 14, and Ord. March 2nd, 1869.)

13. SETTING DOWN PETITION.

After the expiration of eight clear days from the filing of [the chief clerk's certificate] the petition may be placed in the list of petitions upon a note from the chief clerk to the secretary of the Lord Chancellor or of the Master of the Rolls, as the case may be, stating that the certificate has been filed and become binding: (G. O., 1868, r. 15.)

14. ADVERTISEMENT OF HEARING.

Before the hearing of the petition, notices stating the day on which the same is appointed to be heard shall be published at such times and in such newspapers as the judge shall direct: (G. O., 1868, r. 16.)

For the form of notice, see G. O., 1868, sched., form No. 8.

15. HEARING.

(a) *Creditors entitled to Appear.*

Any creditor settled on the . . . list whose debt or claim has not, before the hearing of the petition, been discharged or determined, or been secured in manner provided by the . . . Act, and who has not before the hearing signed a consent to the proposed reduction of capital, may, if he think fit, upon giving two clear day's notice to the solicitor of the company of his intention so to do, appear at the hearing of the petition, and oppose the application: (G. O. 1868, r. 17.)

Where a creditor who appears at the hearing . . . is a creditor the full amount of whose debt or claim is not admitted by the company, and the validity of such debt or claim has not been inquired into, and adjudicated upon under . . . the Act, the costs of and occasioned by his appearance shall be dealt with as to the court shall seem just, but in all other cases a creditor appearing . . . shall be entitled to the costs of such appearance, unless the court shall be of opinion that in the circumstances of the particular case his costs ought not to be allowed: (G. O. 1868, r. 18.)

(b) *Direction for Securing Debts and Adjournment.*

When the petition comes on to be heard, the court may, if it shall so think fit, give such directions as may seem proper with reference to the securing in manner mentioned in . . . the Act, the payment of the debts or claims of any creditors who do not consent to the proposed reduction; and the further hearing of the petition may, if the court shall think fit, be adjourned for the purpose of allowing any steps to be taken with reference to the securing in manner aforesaid the payment of such debts or claims: (G. O. 1868, r. 19.)

16. ORDER CONFIRMING REDUCTION.

On the hearing of the petition, the court, if satisfied that with respect to every creditor of the company who under the provisions of [the] Act is entitled to object to the reduction, either his consent to the reduction has been obtained, or his debt or claim has been discharged or has determined, or has been secured, may make an order confirming the reduction on such terms and subject to such conditions as it deems fit: (C. A. 1867, s. 11.)

Where the court makes an order confirming a reduction, such order shall give directions in what manner, and in what newspapers, and at what times, notice of the registration of the order and of such minute as mentioned in the . . . Act [see *post*, 18], is to be published; and shall fix the date until which the words "and reduced," are to be deemed part of the name of the company as mentioned in the . . . Act: (G. O. 1868, r. 20.)

Three weeks from the date of the order is a common period to be fixed for the discontinuance of the term "and reduced": (*Re Sharpe, Stewart and Co.*, L. Rep. 5 Eq. 155; *Re Estate Company*, L. Rep. 5 Ch. 407.) But a fortnight has sometimes been considered sufficient: (*Re Telegraph Construction Company*, L. Rep. 10 Eq. 384; *Re Credit Foncier Company*, L. Rep. 11 Eq. 356.)

In any case that the court thinks fit so to do, it may require the company to publish in such manner as it thinks fit, the reasons for the reduction of its capital or such other information in regard to the reduction of its capital as the court may think expedient, with a view to give proper information to the public in relation to the reduction of its capital by a company, and if the court think fit, the causes which led to such reduction: (C. A. 1877, s. 4.)

17. COSTS.

The court may in any proceedings under [the] Act make such order as to costs as it deems fit: (C. A. 1867, s. 12.)

18. REGISTRATION OF ORDER AND MINUTE.

The registrar of joint stock companies upon the production to him of an order of the court confirming the reduction of the capital of the company, and the delivery to him of a copy of the order and of a minute (approved by the court), showing with respect to the capital of the company, as altered by the order, the amount of such capital, the number of shares into which it is to be divided, and the amount of each share, shall register the order and minute; and on registration the special resolution confirmed by the order so registered shall take effect: (C. A. 1867, s. 15.)

The minute required to be registered in the case of reduction of capital shall show, in addition to the other particulars required, the amount (if any), at the date of the registration of the minute, proposed to be deemed to have been paid upon each share: (C. A., 1877, s. 4.)

As to the registration required on reduction by returning profits, see *sup.* 1 (b).

19. NOTICE OF REGISTRATION.

Notice of [the registration of the minute] shall be published in such manner as the court may direct: (C. A., 1867, s. 15.)

20. CERTIFICATE OF REGISTRATION.

The registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requisitions of this Act with respect to the reduction of capital have been complied with, and that the capital of the company is such as is stated in the minute: (*Id.*)

21. MINUTE TO FORM PART OF MEMORANDUM OF ASSOCIATION.

The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of association of the company, and shall be of the same validity and subject to the same alterations as if it had been originally contained in the memorandum of association: (C. A., 1867, s. 16.)

IX. DEFUNCT COMPANIES.

1. STRIKING NAMES OFF REGISTER.

(a) *Inquiry whether the Company is in operation.*

Where the registrar of joint stock companies has reasonable cause to believe that a company, whether registered before or after the passing of this Act, is not carrying on business or in operation, he shall send to the company by post a letter inquiring whether the company is carrying on business or in operation: (C. A. 1880, s. 7. (1).)

(b) *Proceedings when no answer received.*

If the registrar does not within one month of sending the letter receive any answer thereto, he shall within fourteen days after the expiration of the month send to the company by post a registered letter referring to the first letter, and stating that no answer thereto has been received by the registrar, and that if an answer is not received to the second letter within one month from the date thereof, a notice will be published in the *Gazette* with a view to striking the name of the company off the register: (*Id.* (2).)

(c) *To whom Letter or Notice addressed.*

A letter or notice authorised or required . . . to be sent to a company may be sent by post addressed to the company at its registered office, or, if no office has been registered, addressed to the care of some director or officer of the company, or if there be no director or officer of the company whose name and address are known to the registrar, the letter or notice (in identical form) may be sent to each of the persons who subscribed the memorandum of association, addressed to him at the address mentioned in that memorandum: (*Id.* (6).)

(d) *Notice in Gazette.*

If the registrar either receives an answer from the company to the effect that it is not carrying on business or in operation, or does not within one month after sending the second letter receive any answer thereto, the registrar may publish in the *Gazette* and send to the company a notice that at the expiration of three months from the date of that notice the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved: (*Id.* (3).)

(e) *Striking out.*

At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shown by such company, strike the name of such company off the register, and shall publish notice thereof in the *Gazette*, and on the publication in the *Gazette* of such last-mentioned notice the company whose name is so struck off shall be dissolved: Provided that the liability (if any) of every director, managing officer, and member of the company shall continue and may be enforced as if the company had not been dissolved: (*Id.* (4).)

2. RESTORING NAME.

If any company or member thereof feels aggrieved by the name of such company having been struck off the register in pursuance of this section, the company or member may apply to the . . . court . . .

and [the] court, if satisfied that the company was at the time of the striking off carrying on business or in operation, and that it is just so to do, may order the name of the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence as if the name thereof had never been struck off; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had never been struck off: (*Id.* (5).)

X. LIFE ASSURANCE COMPANIES.

1. DEPOSIT OF FUNDS.

(a) *Deposit of 20,000*l.* before Incorporation.*

Every company established after the [9th August, 1870] within the United Kingdom, and every company established or to be established out of the United Kingdom which shall after the [said date] commence to carry on the business of life assurance within the United Kingdom, shall be required to deposit the sum of twenty thousand pounds with the [Paymaster] General of the Court . . . to be invested by him in one of the securities usually accepted by the court for the investment of funds placed from time to time under its administration, the company electing the particular security and receiving the income therefrom, and the registrar shall not issue a certificate of incorporation unless such [Paymaster] deposit shall have been made: (L. A. C. A., 1870, s. 3.)

(b) *Payment into Court.*

Every sum required . . . to be deposited with the [Paymaster] General of the Court . . . shall be paid into the Court . . . and orders with respect to the payment of such company into and out of court, and the investment and return thereof, and the payment of the dividends and interest thereof, may be from time to time made, altered, and revoked by the like authority and in the like manner as orders with respect to the payment into and out of court, and the investment of other money, and the application of the dividends and interest thereof: (L. A. C. A., 1871; see PAYMENT INTO AND OUT OF COURT.)

No request to or directions by the Chancery Paymaster is necessary: (See Ch. F. R., 1874, r. 25.)

(c) *Who may Deposit.*

The said deposit may be made by the subscribers of the memorandum of association of the company, or any of them, in the name of the proposed company, and such deposit upon the incorporation of the company shall be deemed to have been made by and to be part of the assets of the company: (L. A. C. A., 1872, s. 1.)

(d) *Deposit to form part of Company's Fund.*

The said deposit shall, until returned to the company, be deemed to form part of the life assurance fund of the company, and shall be subject to the provisions of sect. 4 of the Life Assurance Companies Act, 1870, accordingly: (*Id.*)

(e) *Board of Trade Warrant.*

Where any company is required . . . to deposit the sum of 20,000*l.* with the [Paymaster] General of the Court . . . the said company, or the subscribers of the memorandum of association of the said company, or any of them, as the case may be . . . (referred to as the promoters), may make application to the Board of Trade, [who] may thereupon issue their warrant to the promoters for such payment into court, which warrant shall be a sufficient authority for the company or

persons therein named to pay the money therein mentioned into the Bank of England, in the name and with the privity of the said [Paymaster] General, and for that officer to issue directions to such bank to receive the same, to be placed to his account there *ex parte* the company mentioned in such warrant, according to the method . . . for the time being in force respecting the payment of money into the said court, and without fee or reward: (B. T. R., 1872, r. 2; and see PAYMENT INTO AND OUT OF COURT.)

(f) *Deposit of Annuities, Stocks, &c., in lieu of Money.*

. . . . In lieu, wholly or in part, of the payment of money, the promoters may bring into court, as a deposit, an equivalent sum of bank annuities, or of any stocks, funds, or securities, in which cash under the control of the court is for the time being permitted to be invested, or of exchequer bills (the value thereof being taken at the price at which the promoters originally purchased the same, as appearing by the broker's certificate of that purchase); and in that case the Board of Trade shall vary their warrant accordingly by directing the transfer or deposit of such amount of stocks, funds, securities, or exchequer bills by the persons therein named, into the name or to the account of the said [Paymaster] General in trust to attend the orders of the court *ex parte* the company mentioned in such warrant: (B. T. R., 1872, r. 2.)

(g) *Deposit when Office of Paymaster is Closed.*

At any time when the office of the [Paymaster] General of the Court . . . is closed, a deposit . . . may nevertheless be made, in the manner and subject to the regulations provided with respect to deposits by companies by sect. 88 of the Lands Clauses Consolidation Act, 1855: (B. T. R., r. 3; and see LANDS CLAUSES ACT.)

(h) *Deposit may be Invested.*

Where money is so paid into the court . . . the court may, on the application of the company or the persons named in the warrant of the Board of Trade, or of the majority or survivors of such persons, order that the same be invested in such stocks, funds, or securities as the applicants desire, and the court thinks fit: (B. T. R., 1872, r. 4.)

(i) *Payment out of Interest on the Deposit.*

The depositors shall be entitled to receive payment of the interest or dividends from time to time accruing on or in respect of the deposit while in court. And the court may, from time to time on the application of the depositors, make such order as may seem fit respecting the payment of the interest or dividends accordingly: (B. T. R., 1872, r. 7.)

(k) *Payment out of Deposit when Premiums of Company Amount to 40,000l.*

. . . . The [Paymaster] General shall return [the] deposit to the company so soon as its life assurance fund accumulated out of the premiums shall have amounted to forty thousand pounds: (L. A. C. A., 1870, s. 3.)

The court shall, on the application of the depositors, order the deposit fund to be paid, transferred, or delivered out to the applicants, or as they direct, so soon as it is proved to the satisfaction of the court that the life assurance fund of the company in respect of which the deposit is made, accumulated out of premiums paid to the said company, amounts to the sum of forty thousand pounds: (B. T. R., 1872, r. 6.)

Application to Court to be by Petition.

9. Any application . . . to the court . . . shall be made in a summary way by petition: (B. T. R., 1872, r. 9.)

II. AMALGAMATION OR TRANSFER.

(a) *Petition to Court to sanction Arrangement.*

Where it is intended to amalgamate two or more companies, or to transfer the life assurance business of one company to another, the directors of any one or more of such companies may apply to the court, by petition, to sanction the proposed arrangement, notice of such application being published in the *Gazette*, and the court, after hearing the directors and other persons whom it considers entitled to be heard upon the petition, may confirm the same if it is satisfied that no sufficient objection to the arrangement has been established : (L. A. C. A., 1870, s. 14.)

(b) *Notice to Policy-holders.*

Before any such application is made to the court a statement of the nature of the amalgamation or transfer, as the case may be, together with an abstract containing the material facts embodied in the agreement or deed under which such amalgamation or transfer is proposed to be effected, and copies of the actuarial or other reports upon which such agreement or deed is founded, shall be forwarded to each policy holder of both companies in case of amalgamation, or to each policy holder of the transferred company in case of transfer, by the same being transmitted in manner provided by section one hundred and thirty-six of The Companies Chauses Consolidation Act, 1845, for the transmission to shareholders of notices not requiring to be served personally : (*Id.*)

As to the notice to policy-holders when resident abroad, see *Re London and Southwark Insurance Corporation* (W. N. 1880, p. 65).

(c) *Inspection of Agreement.*

The agreement or deed under which [the] amalgamation or transfer is effected shall be open for the inspection of the policy holders and shareholders at the office or offices of the company or companies for a period of fifteen days after the issuing of the abstract herein provided : (L. A. C. A., 1870, s. 14.)

(d) *Dissent of Policy-holders.*

The court shall not sanction any amalgamation or transfer in any case in which it appears to the court that policy holders representing one-tenth or more of the total amount assured in any company which it is proposed to amalgamate, or in any company the business of which it is proposed to transfer dissents from such amalgamation or transfer : (*Id.*)

(e) *Sanction of Court must be Obtained.*

No company shall amalgamate with another, or transfer its business to another, unless such amalgamation or transfer is confirmed by the court : (*Id.*)

(f) *Deposit of Documents with Board of Trade.*

When an amalgamation takes place between any companies, or when the business of one company is transferred to another company, the combined company or the purchasing company, as the case may be, shall, within ten days from the date of the completion of the amalgamation or transfer, deposit with the Board of Trade certified copies of statements of the assets and liabilities of the companies concerned in such amalgamation or transfer, together with a statement of the nature of the amalgamation or transfer, and a certified copy of the agreement or deed under which such amalgamation or transfer is effected, and certified copies of the actuarial or other reports upon which such agreement or deed is founded ; and the statement and agreement or deed of amalgamation or transfer shall be accompanied by a declaration under the hand of the chairman of each company and the principal managing officer of each company, that to the best of their belief every payment made or to be made to any person

whatsoever on account of the said amalgamation or transfer is therein fully set forth, and that no other payments beyond those set forth have been made or are to be made either in money, policies, bonds, valuable securities, or other property by or with the knowledge of any parties to the said amalgamation or transfer: (L. A. C. A., 1870, s. 15.)

(g) *Act Applies to Life Companies Only.*

[These provisions] shall not apply in any case in which the business of any company which is sought to be amalgamated or transferred does not comprise the business of life assurance: (L. A. C. A., 1870, s. 14.)

3. WINDING-UP [see WINDING-UP].

XI. RAILWAY COMPANIES.

1. ABANDONMENT.

(a) *Warrant of Board of Trade.*

If any company authorised by Act of Parliament [passed before the Session of 1867] to make a railway, desire that the making and carrying on of such railway, or some part thereof, whether commenced or not, be abandoned, the Board of Trade may grant a warrant for the abandonment of the railway, on the written application of

(1.) The company, acting by the authority and with the consent of the holders of three-fifths of the shares or stock of such company, represented at a general meeting of shareholders [convened as directed by 13 & 14 Vict. c. 83] (13 & 14 Vict. c. 83, s. 1), or

(2.) Without the preliminary consent of a meeting of shareholders, if no part, or a part less than three-fifths of the share capital of the company has been subscribed, of,

Any person named in the special Act incorporating the company as a member or director thereof, or of

Any person named in the warrant or order directing payment of any deposit under any standing order of either House of Parliament, or of

Any person who has lent the amount of such deposit, or any part thereof, or has entered into any bond conditioned for the completion of the railway, or for payment of any money in default thereof (30 & 31 Vict. c. 127, s. 32), or

(3.) Where no part of the railway is open for traffic, and the company has made default in payment of a sum of money to any person or body corporate required by any judgment or order of any court, of such person or body corporate: (32 & 33 Vict. c. 114, s. 8.)

(b) *Winding-up.*

When a warrant has been granted for the abandonment of the whole railway of any railway company, a petition for winding-up the affairs of such company may be presented under the Companies Acts, 1862 and 1867, by the company, or by any person who, under the last mentioned Acts, is authorised to present a petition for winding-up a company, or by any person upon whose application the Board of Trade may proceed in pursuance of sect. 32 of the Railway Companies Act, 1867 and for that purpose the railway company, whose railway is so authorised to be abandoned, shall be deemed to be an unregistered company, which may be wound up under the Companies Acts, 1862 and 1867: (32 & 33 Vict. c. 114, s. 4; and see WINDING-UP.)

The petition need not be entitled in the matter of the Abandonment Acts: (Seton, 1457.)

If the warrant for the abandonment was made on condition that the money deposited as security for the completion of the railway, or the stocks, funds, or securities, in which the same is invested, or the money

secured by any bond conditioned for the completion of the railway, or for payment of money in default shall be applied as part of the assets of the company, the court may, if it think fit, direct that such money, stock, funds, and securities, shall not be applicable for the payment of any debt, or part of a debt, which, regard being had to what is fair and reasonable as between all the parties interested under all the circumstances of the case, appears to the court to have been incurred on account of the promotion of the company: (32 & 33 Vict. c. 114, s. 5.)

Claims by parliamentary agents and solicitors as to expenses incurred in getting the Bill passed, and claims in respect of moneys advanced by the intending contractor for the same purpose are within the sections: (Seton, 1459.)

Where the warrant for abandonment is made on condition that the money deposited as security for the completion of the railway, or the stocks, funds, or securities in which the same is invested, or the money secured by any bond conditioned for the completion of the railway, or for payment of money in default thereof, shall be applied as part of the assets of the company, the following provisions shall have effect:

(1.) The court in which the company is being wound up may order such money, stocks, funds, or securities, or so much thereof as is required to be applied as assets of the company, to be paid, transferred, or delivered out to the official liquidator, and unless the court is satisfied that the same or any part thereof are not required to be applied as assets shall not order the same or any part thereof to be paid, transferred, or delivered out to any other person.

(2.) The Commissioners of Her Majesty's Treasury, upon the application of the official liquidator, made with the sanction of the court, may, if they think fit, assign the bond to the official liquidator, and upon such assignment the bond shall be deemed to have been entered into with the official liquidator in his official name, and with his successors in that office, and may, subject to the sanction of the court, be enforced accordingly.

(3.) Any bond so assigned may, after a sufficient sum has been paid thereunto as assets of the company be cancelled by the court: (32 & 33 Vict. c. 114, s. 6.)

Nothing in the [Act] shall affect any right to that part of the money deposited as security for the completion of the railway or of the stocks, funds, or securities, on which the same is invested, or of the money secured by any bond conditioned for the completion of the railway, which is not applied in payment of the debts and liabilities of the company, or required for that purpose: (*Id.* s. 7.)

Where a company, no part of the railway of which is open for traffic, has been required by any judgment or order of any court to pay a sum of money to any person or body corporate, and has made default in such payment, the Board of Trade may proceed under the . . . Acts, upon the application of such person or body, in the same manner as if such person or body were mentioned in that behalf in the section: (*Id.*, s. 8.)

(c) Cancellation of Bond and Payment out.

Where a warrant for abandonment is granted under the Abandonment of Railways Act, 1850, as extended by [the Act of 1869] the Commissioners of Her Majesty's Treasury may cancel and deliver up any bond entered into by or on behalf of a railway company for securing the completion of a railway, or, in case the abandonment be of part of the railway only, may cancel and deliver up such bond on receiving another bond in lieu thereof conditioned for payment of a due proportionate part of the amount secured by such former bond; and any money remaining deposited

as security for the completion of the railway or the stocks, funds, or securities in which the same is invested, or any bank annuities, stocks, funds, securities, or exchequer bills remaining deposited as such security, or in case the abandonment authorised is of part only of a railway, then such proportionate part as the Board of Trade thinks fit of such money, stocks, funds, securities, annuities, or Exchequer bills, shall be paid, transferred, or delivered out to the persons who would be entitled to receive the same if the railway had been completed and opened for public traffic; and the Court shall, on the application of those persons, order payment, transfer, or delivery out thereof accordingly, on a certificate of the Board of Trade certifying that such a warrant for abandonment has been granted: (R. C. A. 1867, s. 34.)

The certificate of the Commissioners under the Act of 1850 is evidence of publication of the warrant of abandonment: (13 & 14 Vict. c. 83, s. 18.)

As to costs on petition for transfer out, see *Re Laugharne Railway Company* (L. Rep. 12 Eq. 454).

2. ARRANGEMENT WITH CREDITORS.

(a) *Preparation of Scheme.*

Where a company are unable to meet their engagements with their creditors the directors may prepare a scheme of arrangement between the company and their creditors (with or without provisions for settling and defining any rights of shareholders of the company as among themselves, and for raising, if necessary, additional share and loan capital, or either of them) and may file the same in the [Chancery Division]: (Railway Companies Act, 1867, s. 6.)

Every scheme to be filed [under] sect. 6 . . . shall be intituled in the matter of "The Railway Companies Act, 1867," and in the matter of the company in question: (Ch. O., 24th Jan. 1868, r. 1.)

Every such scheme shall be marked, either with . . . the name of one of the [judges of the Chancery Division] and the matter of such scheme (unless removed . . .) shall accordingly be attached to the court of such [judge] as the case may be, in like manner and for the same purposes as causes are attached to a particular court: (*Id.*, r. 2.)

Every schema to be filed as aforesaid shall be printed on paper of the same size and description, and in the same style and manner, as [pleadings] are required to be printed, or shall be written bookwise upon paper of the same size and description as last aforesaid: (*Id.*, r. 3.)

Every fifth line of each page of a printed scheme shall be numbered: (*Id.*, r. 9.)

There shall be indorsed upon every scheme so filed as aforesaid the name and address of the solicitor and London agent (if any) of the company, and also the address for service of such solicitor in cases where an address for service is required by the . . . orders of the court: (*Id.*, r. 6.)

(b) *Preparation of Declaration and Affidavit.*

[With the scheme there must be filed] a declaration in writing under the common seal of the company to the effect that the company are unable to meet their engagements with their creditors, and . . . an affidavit of the truth of such declaration made by the chairman of the board of directors and by the other directors, or the major part in number of them, to the best of their respective judgment and belief: (R. C. A. 1867, s. 6.)

[The] declaration and affidavit must be intituled in the matter of "The Railway Companies Act, 1867," and in the matter of the company in question: (O. of January, 1868, r. 1.)

The declaration and affidavit must be marked with the division and judge's name in the same manner as the scheme : (*Id.*, r. 2.)

Every declaration and affidavit to be filed as mentioned in the 6th section of the said Act, shall be written bookwise upon paper of the same size and description as that on which [pleadings] are printed : (*Id.*, r. 4.)

(c) *Filing Scheme, Declaration, and Affidavit.*

Where a written scheme is filed, the person bringing the same to be filed, shall, at the same time, leave with the [master] a fair copy thereof, and the [master is] to examine such copy with the scheme filed, and return it so examined with a certificate thereon that it is correct and proper to be printed : (*Id.*, r. 7.)

The directors are then to cause the scheme to be printed from such certified copy, on paper of the same size and description, and in the same type, style, and manner, as [pleadings] are required to be printed, and, before the expiration of four days from the filing of the scheme are to leave a printed copy thereof with the [master] with a written certificate thereon by the solicitor of the company that such print is a true copy of the scheme so certified, and after the expiration of such four days no evidence of the scheme having been filed shall be admissible until such printed copy thereof has been filed : (*Id.*, r. 8.)

Every . . . scheme shall be filed in the [Central Office] : (*Id.*, r. 5.)

This applies where a company, whose principal office is situate in England, have a railway or part of a railway in Scotland : (R. C. A., 1867, s. 21.)

The declaration and affidavit required by sect. 6 of the said Act shall be annexed to such scheme and filed at the same time therewith, and the [Master] shall not file any such scheme, unless accompanied by such declaration and affidavit : (*Id.*, r. 5.)

(d) *Furnishing Copies.*

At any time after the expiration of four days from the filing of a scheme, whether printed or written, any person may demand, by a requisition in writing, delivered at the principal office of the company, or at the office of their solicitor, or of his London agent (if any) any number, not exceeding ten, of the printed copies of the scheme, and the copies so required shall on such demand be delivered to the person so requiring the same, with a written certificate thereon by the solicitor of the company that they are true copies of the scheme filed : (Ch. O. Jan. 1868, r. 10.)

Every such copy is on delivery to be paid for at the rate of one half-penny per folio, except in the case provided for by the 20th section of the said Act, in which case it is to be paid for at the rate prescribed by the said Act : (*Id.*, r. 11.)

The company shall at all times keep at their principal office printed copies of the scheme, when confirmed and enrolled, and shall sell such copies to all persons desiring to buy the same at a reasonable price, not exceeding sixpence for each copy : (R. C. A. 1867, s. 20. A penalty for disobedience is entailed by the same section.)

(e) *Notice of Filing Scheme.*

Notice of the filing of the scheme shall be published in the *Gazette* : (*Id.*, s. 8.)

The notice, to be published in the *Gazette*, of the filing of the scheme shall be signed by the solicitor of the company, or his London agent, and shall state whether the scheme contains any provisions for settling and defining any rights of shareholders among themselves, or for raising any and what amount of share or loan capital, and which, and shall set forth the name and address of the solicitor and London agent (if any) of the

company, and may be in the Form No. 1 in the 3rd schedule [to the order] with such variations as the circumstances of the case may require: (Ch. O., January, 1868, r. 12.)

Where a company, whose principal office is situate in England have a railway, or part of a railway in Scotland . . . notice of the filing of the scheme shall be published in the *Edinburgh Gazette*, and after such publication no diligence against the property of the company in Scotland shall be available for any person who is not amenable to the jurisdiction of the Court of Chancery in England without the leave of the court of session to be obtained on petition in a summary way: (R. C. A. 1867, s. 21.)

(f) *Certificate of Filing.*

When a scheme has been filed [a master] shall, at the request of any person, give and sign a certificate of the filing thereof, or of the filing of a printed copy thereof; and such certificate may be in the form, with such variations as the circumstances of the case may require, [in rule 13 of the Order]: (Ch. O., January, 1868, r. 13.)

(g) *Staying Proceedings against Company.*

After the filing of the scheme [and before the enrolment thereof] . . . on the application of the company . . . any action against the company [may] on such terms as the court thinks fit [be stayed by the court in which such action is brought]: (R. C. A. 1867, s. 7; *Re Cambrian Railways Company*, L. Rep. 3 Ch. App. 278; J. A. 1873, s. 24, sub-s. 5; and see STAYING PROCEEDINGS.)

Proceedings by creditors or unpaid landowners may be stayed during the maturing of the scheme: (*Re Cambrian Railways Company*, *sup.*)

But will not be, unless the scheme makes reasonable provision for the payment of their claims: (*Id.*)

No order, under sect. 7 of the . . . Act, for [staying proceedings] against the company, by reason of a scheme having been filed, shall be made, except on an undertaking by the company to be answerable in such damages (if any) as the court, or the judge in chambers, may think fit to award in the event of the plaintiff being ultimately held entitled to proceed with such action; and on such further terms (if any) as the court or judge may think reasonable: (Ch. O. Jan. 1868, r. 14.)

Where a company whose principal office is situate in England have a railway or part of a railway in Scotland, and after a scheme is filed any person not amenable to the jurisdiction of the Chancery Division brings an action against the company in Scotland, the Court of Session may stay proceedings: (R. C. A. 1867, s. 21.)

After such publication of notice [and before enrolment] no execution, attachment, or other process against the property of the company shall be available without leave of the court, to be obtained on summons or motion in a summary way: (R. C. A. 1867, s. 9; *Re Cambrian Railways Company*, *sup.*)

Execution will not be allowed on a *scire facias* against shareholders in respect of unpaid capital: (*Re Devon and Somerset Railway Company* (1), L. Rep. 6 Eq. 610.)

(h) *Assent to Scheme.*

(1) By Mortgagees and Bondholders.

The scheme shall be deemed to be assented to by the holders of mortgages or bonds issued under the authority of the company's special Acts when it is assented to in writing by three-fourths in value of the holders of such mortgages or bonds, and shall be deemed to be assented to by the holders of Debenture Stock of the company when it is assented to in

writing by three-fourths in value of the holders of such stock: (R. C. A. 1867, s. 10.)

A debenture holder who has recovered judgment is within the section: (*Potteries, &c., Company v. Minor*, L. Rep. 6 Ch. App. 621.)

After such assent the scheme is binding on the minority unless it can be shown that the vote of the majority was obtained by fraud: (*Re East and West Junction Railway Company*, L. Rep. 8 Eq. 87.)

(2) By Rentcharge Holders.

Where any rentcharge or other payment is charged on receipts of or is payable by the company in consideration of the purchase of the undertaking of another company, the scheme shall be deemed to be assented to by the holders of such rentcharge or other payment when it is assented to in writing by three-fourths in value of such holders: (*Id.*, s. 11.)

(3) By Guaranteed and Preference Shareholders.

The scheme shall be deemed to be assented to by the guaranteed or preference shareholders of the company when it is assented to in writing as follows:—If there is only one class of guaranteed or preference shareholders, then by three-fourths in value of that class, and if there are more classes of guaranteed or preference shareholders than one, then by three-fourths in value of each such class: (*Id.*, s. 12.)

(4) By Ordinary Shareholders.

The scheme shall be deemed to be assented to by the ordinary shareholders of the company when it is assented to at an extraordinary general meeting of the company specially called for that purpose: (*Id.*, s. 13.)

(5) By Leasing Company.

Where the company are lessees of a railway the scheme shall be deemed to be assented to by the leasing company when it is assented to as follows:

In writing by three-fourths in value of the holders of mortgages, bonds, and debenture stock of the leasing company:

If there is only one class of guaranteed or preference shareholders of the leasing company, then in writing by three-fourths in value of that class, and if there are more classes of guaranteed or preference shareholders in the leasing company than one, then in writing by three-fourths in value of each such class:

By the ordinary shareholders of the leasing company at an extraordinary general meeting of that company specially called for that purpose: (*Id.*, s. 14.)

(6) By Outside Creditors.

When a scheme contains a clause seriously affecting the rights of outside creditors, the court will require the assent in writing of every such outside creditor before it confirms the scheme: (*Re Bristol and North Somerset Railway Company*, L. Rep. 6 Eq. 448.)

(7) When Unnecessary.

The assent to the scheme of any class of holders of mortgages, bonds, or debenture stock, or of any class of holders of a rent-charge or other payment as aforesaid, or of any class of guaranteed or preference shareholders, or of a leasing company, shall not be requisite in case the scheme does not prejudicially affect any right or interest of any such class or company: (*Id.* s. 15.)

(i) *Petition for Confirmation of Scheme.*

If at any time within three months after the filing of the scheme, or within such extended time as the court from time to time thinks fit to allow, the directors of the company consider the scheme to be assented to as by

this Act required, they may apply to the court by petition in a summary way for confirmation of the scheme: (R. C. A., 1867, s. 16.)

Every petition for confirmation of a scheme shall be presented by the directors or the major part of them. Such petition shall not set forth the scheme, but only refer thereto; and may be in the form No. 2, in the third schedule [to the order of January, 1868] with such variations as the circumstances of the case may require: (Ch. O. Jan. 1868, r. 15.)

(k) *Summons to appoint Hearing Day.*

When any petition to confirm a scheme is presented, the directors shall apply to the judge in chambers to appoint the day on which the same is to come into the paper for hearing, such day not to be before the expiration of three weeks from the time of such application: (Ch. O., Jan. 1868, r. 17.)

(l) *Notice of Application.*

Notice of any such application, when intended, shall be published in the *Gazette*: (R. C. A., 1867, s. 16.)

The directors . . . shall cause a notice of the presentation [of the petition] to be inserted as follows (that is to say):

(1) In the case of a company whose principal office is within ten miles from the General Post Office, in the *London Gazette*, and in such two London daily morning newspapers as the judge in chambers shall direct.

(2) In the case of any other company, in the *London Gazette*, and in such two local newspapers circulating in the district where the principal office of such company is situate, as the judge in chambers shall direct.

Such notice shall state the day on which the scheme was filed, and the day on which the petition was presented, and the day on which the same is directed to come into the paper for hearing, and the name and address of the solicitor and London agent (if any) of the company, and may be in the form No. 3 in the third schedule [the order of January, 1868] with such variations as the circumstances of the case may require: (Ch. O., Jan. 1868, r. 17.)

Such notice shall, at least once in every entire week, reckoned from Sunday morning to Saturday evening, which shall have elapsed between the time of the first insertion thereof, and the day on which such petition is directed to come into the paper for hearing, be again inserted in such two London or local newspapers as aforesaid on such day or days as the judge in chambers shall direct: (*Id.*, r. 18.)

(m) *Entering appearance.*

Any creditor, shareholder, or other party whose rights or interests are affected by such scheme, and who shall be desirous to be heard in opposition to the confirmation thereof, shall, at least two clear days before the day on which the petition for confirmation is directed to come into the paper for hearing, enter an appearance at the [Central] Office: (Ch. O., Jan. 1868, r. 19.)

Any person so entering an appearance shall be deemed to have submitted himself to the jurisdiction of the court as to the payment of costs and otherwise: (*Id.*, r. 20.)

(n) *Hearing.*

The petition shall not come on to be heard until at least fourteen clear days after the insertion of such notice [*sup.*] as aforesaid: (*Id.*, r. 19.)

The petitioners presenting such petition as aforesaid shall, for the purposes of such petition, be treated as representing the company, and the company shall not otherwise appear on the hearing of such petition: (*Id.*, r. 16.)

[Other persons, required to enter appearance (*sup.*)] in default of so

doing, shall not be entitled to be heard, unless by the special leave of the court: (*Id.*, r. 19.)

(o) *Confirmation of Scheme.*

After hearing the directors, and any creditors, shareholders, or other parties whom the court thinks entitled to be heard on the application, the court, if satisfied that the scheme has been within three months after the filing of it, or such extended time (if any) as the court has allowed, assented to as required by this Act, and that no sufficient objection to the scheme has been established, may confirm the scheme: (R. C. A. 1867, s. 17.)

Dissenting debenture holders are entitled to appear and oppose the scheme: (*Re East and West Junction Railway Company*, L. Rep. 8 Eq. 87.)

Outside creditors ought not to appear to oppose the petition, as their rights will be unaffected by the scheme when enrolled: (*Re Kingston and Eardisley Railway Company*, W. N. 1877, p. 33.)

Schemes have been confirmed enabling companies to issue debenture stock in excess of their statutory powers, and pay their creditors with such stock; and to convert mortgages into irredeemable debenture stock: (Seton, 1454.)

But the court cannot confirm a scheme altering the constitution of the company: (*Re Stafford and Uttoxeter Railway Company*, 41 L. J. 777, Ch.)

(p) *Notice of Confirmation.*

Notice of the confirmation . . . of the scheme shall be published in the *Gazette*: (R. C. A. 1867, s. 19.)

A scheme under that Act shall not be enrolled unless notice of the order confirming it has at least once in every entire week, reckoned from Sunday morning to Saturday evening, which elapses between the pronouncing of the order and the expiration of thirty days from the pronouncing thereof, been inserted in such two newspapers as shall have been appointed by the judge for the insertion of advertisements under the order made pursuant to that Act: (O. LXIV., April, 1880.)

(q) *Enrolment.*

The scheme when confirmed shall be enrolled in the court: (R. C. A. 1867, s. 18.)

A scheme under the Railway Companies Act, 1867, shall be enrolled in the enrolment department of the Central Office: (O. LXIV., April, 1880.)

(r) *Notice of Enrolment.*

Notice of the . . . enrolment of the scheme shall be published in the *Gazette*: (R. C. A. 1867, s. 19.)

(s) *Effect of Enrolled Scheme.*

[After enrolment the scheme] shall be binding and effectual to all intents, and the provisions thereof shall, against and in favour of the company and all parties assenting thereto or bound thereby, have the like effect as if they had been enacted by Parliament: (R. C. A. 1867, s. 18.)

The only persons bound are the majority and minority of classes whose votes are to be taken, and the scheme is not binding on unpaid land-owners, or outside, that is general, creditors: (*Re Cambrian Railways Company*, L. Rep. 3 Ch. App. 278.)

But such creditors do not gain any rights of priority over those who have assented to the scheme, and had previously rights prior to such creditors: (*Stevens v. Mid-Hants Railway Company*, L. Rep. 8 Ch. App. 1064.)

3. APPOINTMENT OF RECEIVER.

The court may appoint a receiver, at the instance of a mortgagee, of tolls of a company or corporation, independently of any Act of Parliament: (Seton, 434.)

As to the appointment of a receiver on behalf of debenture holders, see 46 & 47 Vict. c. 118, ss. 25—6, and Seton, 435.

The court had power, under the 4th section of the Railway Companies Act, 1867, to appoint a receiver or manager of the undertaking of a railway company, on the application by petition of a judgment creditor issuing execution; but it is doubtful whether the power still exists under that statute. The practice was under rules 29, 30, and 31, of the Chancery Order of the 24th January, 1868.

4. PROHIBITION TO RAILWAY COMMISSIONERS.

The court has jurisdiction to issue a writ of prohibition restraining the Railway Commissioners from making and enforcing improper orders as to railway companies: (*Toomer v. London, Chatham, and Dover Railway Company*, L. Rep. 2 Ex. Div. 450; *Warwick, &c., Navigation v. Birmingham Canal Navigation*, 40 L. T. Rep. N. S. 846; *South Eastern Railway Company v. Railway Commissioners*, 41 L. T. Rep. N. S. 760; *Hedley v. Bates*, L. Rep. 13 Ch. Div. 498; 42 L. T. Rep. N. S. 41; 28 W. R. 365.)

5. DEPOSITS IN COURT.

See, generally, PAYMENT INTO AND OUT OF COURT.

As to application of deposit on the abandonment of a railway, see *sup.* 1.

XII. TRAMWAY COMPANIES.

Deposits in court by. [See PAYMENT INTO AND OUT OF COURT.]

COMPROMISE.

I. WHO MAY ENTER INTO.

II. HOW ENTERED INTO.

III. WITHDRAWAL FROM AND SETTING ASIDE.

IV. ENFORCING.

I. WHO MAY ENTER INTO.

The directors of an unlimited company may enter into a compromise: (*Dixon v. Evans*, L. Rep. 5 E. & I. App. 606.)

A limited company has the same power, as incident to its existence: (*Bath's Case*, L. Rep. 8 Ch. Div. 334.)

A married woman cannot bind her real estate by a mere agreement for compromise: (*Nicholl v. Jones*, L. Rep. 3 Eq. 196); but she may bind even the *corpus* of her separate property, although restrained from anticipation (*Wilton v. Hill*, 26 L. T. Rep. O. S. 253; 25 L. J. 156, Ch.); and she may with the sanction of the court compromise a suit to make trustees liable for a breach of trust as to a fund in which she has a reversionary interest: (*Wall v. Rogers*, L. Rep. 9 Eq. 58.)

A trustee in bankruptcy or liquidation having power to sue either in his own name, or in his official name under sect. 83, sub-sect. 7, of the Bankruptcy Act, 1869, possesses a power to compromise an action instituted by him in his capacity of trustee, as, for instance, by consenting to an order being made in the action giving him less than he originally claimed, with-

out the sanction of the committee of inspection: (*Leeming v. Lady Murray*, L. Rep. 13 Ch. Div. 123; 28 W. R. 338.)

The court may compromise the rights and claims of infants and persons under disability, where those rights are merely equitable, and may direct the trustees to deal with the trust property in whatever mode it may consider to be for the benefit of the *cestuis que trustent* under disability: (*Brooke v. Lord Mostyn*, 2 D. J. & S. 373, 415; L. Rep. 4 E. & I. App. 304; and see *Stainton v. Carron Company*, 6 Jur. N. S. 360; 7 Jur. N. S. 360.)

Counsel and solicitors may enter into a binding compromise on behalf of their client, of matters within the scope of the proceedings, unless expressly prohibited from doing so: (*Strauss v. Francis*, L. Rep. 1 Q. B. 379; 14 L. T. Rep. N. S. 326; *Prestwich v. Poley*, 18 C. B. N. S. 806; 34 L. J. 189, C. P.; 12 L. T. Rep. N. S. 390; *Swinfen v. Swinfen*, 27 L. J. 35, 491, Ch.; *Fray v. Voules*, 1 El. & El. 839.)

A compromise entered into *bonâ fide* by the other side is not invalid if the client's dissent has not been brought to the opposite party's knowledge at the time: (*Strauss v. Francis*, *sup.*); *Brady v. Curran*, Ir. Rep. 2 C. L. 314; *Berry v. Mullen*, Ir. Rep. 5 Eq. 368.)

II. HOW ENTERED INTO.

The compromise may be effected, in ordinary cases, by an agreement between the parties (*Eden v. Naish*, L. Rep. 7 Ch. Div. 781); or by an order made by consent (*Attorney-General v. Tomline*, L. Rep. 7 Ch. Div. 388; *Davis v. Davis*, L. Rep. 13 Ch. Div. 861; 41 L. T. Rep. N. S. 790; 49 L. J. 241, Ch.; *Holt v. Jesse*, L. Rep. 3 Ch. Div. 177) at the trial, or on an interlocutory application, or an appeal, embodying the terms of the agreement (*Seton*, 1536), whether previously come to or then arranged.

If the terms are embodied in an agreement, an interlocutory application for a consent order may be made by motion or summons.

If the facts are complicated, or infants or other persons under disability are interested, the application should be by petition: (*Dan*. 1434; *Seton*, 1536, 716.)

A married woman should be made a respondent to such a petition, and should appear thereon separately from her husband: (*Wall v. Rogers*, *sup.*)

In the case of a person under disability, the court will order an inquiry whether the compromise is beneficial: (*Seton*, 1536.)

III. WITHDRAWAL FROM AND SETTING ASIDE.

A consent to an order if given through inadvertence may be withdrawn before the order is drawn up (*Holt v. Jesse*, *sup.*; *Attorney-General v. Tomline*, *sup.*); but not when the compromise has been entered into after discussion of the case, with the concurrence of counsel and solicitors and the approval of the court: (*Davis v. Davis*, *sup.*)

After judgment by consent has been passed and entered, it cannot be set aside on the ground of mistake, except for reasons sufficient to set aside an agreement: (*Attorney-General v. Tomline*, *sup.*; and *quære*, whether it can be set aside on any ground but fraud, 2 D. J. & S. 416; *Stainton v. Carron Company*, *sup.*)

Where a judgment by consent embodying a compromise has been obtained by misrepresentation or concealment of material facts, a new action must be commenced to set it aside: (*Gilbert v. Endean*, L. Rep. 9 Ch. Div. 259; 39 L. T. Rep. N. S. 404.)

Where the order by consent has been made on an interlocutory application, the court may discharge it for mistake, though on one side only,

by motion in the action, although the order has been passed and entered : (*Mullins v. Howell*, L. Rep. 11 Ch. Div. 763.)

It is doubtful whether a compromise sanctioned on behalf of an infant can be set aside for grounds which would be sufficient as between parties *sui juris* (per Turner, L. J., *Brooke v. Lord Mostyn*, *sup.*)

IV. ENFORCING.

Where an agreement for compromise has been entered into, but no consent order has been obtained, and one party repudiates the agreement, the court may stay proceedings in the action on summons or motion : (*Eden v. Naish*, L. Rep. 7 Ch. Div. 781 ; *Potter v. Jackson*, W. N. 1878, p. 134 ; *Prestwich v. Poley*, *sup.*)

Where the compromise involves matters in an action pending in another division, the Chancery Division may, on motion, make an order on the party repudiating the compromise, enforcing the whole compromise : (*Scully v. Lord Dundonald*, L. Rep. 8 Ch. Div. 658 ; 39 L. T. Rep. N. S. 116.)

Where a party attempted to withdraw from a compromise before the consent order embodying it was drawn up, an order was made on motion that such party "do, within four days' service of this order, leave, or cause to be left, at the office of the registrar, the counsel's briefs mentioned in the notice of motion, and further that the registrar do draw up the order accordingly" : (*Davis v. Davis*, *sup.*)

Where a person has submitted to have his rights determined in a winding-up, an order for payment may be made on him, in the winding-up, in the terms of an agreement for compromise entered into by him with the liquidator : (*Re Gaudet Frères Steamship Company*, L. Rep. 12 Ch. Div. 882.)

Where an undertaking has been embodied in a consent order, the court may enforce it by attachment : (*Mullins v. Howell*, *sup.*)

CONDITIONS OF SALE.

[See PROPERTY.]

CONFIRMATION OF SALES, &c.

I. DISPOSITION OF LAND OR MINERALS.

1. POWER TO DISPOSE OF, WITH COURT'S SANCTION.
2. PETITION FOR SANCTION.
3. ORDER.

II. SALE OF LAND WITH TIMBER.

I. DISPOSITION OF LAND OR MINERALS SEPARATELY.

1. POWER TO DISPOSE OF, WITH COURT'S SANCTION.

Every trustee and other person [on the 7th August, 1862, or thereafter] to become authorised to dispose of land by way of sale, exchange, partition, or enfranchisement may, unless forbidden by the instrument creating the trust or power, so dispose of such land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of such minerals, or may (unless forbidden as aforesaid) dispose of by way of sale, exchange, or partition the minerals with or without such rights or powers separately from the residue of the land, and in either case without prejudice to any future

exercise of the authority with respect to the excepted minerals, or (as the case may be) the undisposed-of land; but this enactment shall not enable any such disposition as aforesaid without the previous sanction of the [Chancery Division]: (25 & 26 Vict. c. 108, s. 2; and see SETTLED ESTATES.)

As to what are minerals, see cases cited Dart, 69.

2. PETITION FOR SANCTION.

[The sanction must] be obtained on petition, in a summary way, of the trustee or other person authorised as aforesaid: (*Id.*)

Mortgagees may petition: (*Re Beaumont's Mortgage Trusts*, L. Rep. 12 Eq. 86); although they are in possession, and have commenced a foreclosure action and set down the action for hearing on motion for judgment (*Re Wilkinson's Mortgaged Estates*, L. Rep. 13 Eq. 634.)

The petition must be intituled in the matter of the Act: (*Id.*)

When the petition is presented by trustees, the *cestuis que trustent* ought to be made parties: (*Re Palmer's Will*, L. Rep. 13 Eq. 408, where they were made co-petitioners); but when the trustees have a power of sale with consent of the tenant for life, the persons entitled in remainder need not be served: (*Re Pryse's Estates*, L. Rep. 10 Eq. 531; *Re Nagle's Trusts*, L. Rep. 6 Ch. Div. 104.)

Where mortgagees with a power of sale are petitioners, subsequent mortgagees need not be served: (*Re Beaumont's Mortgage Trusts*, *sup.*): nor need the mortgagor: (*Re Wilkinson's Mortgaged Estates*, *sup.*)

3. ORDER.

[The] sanction once obtained shall extend to the enabling from time to time of any disposition within this enactment of any part or parts of the land comprised in the order to be made on such petition, without the necessity of any further or other application to the court: (25 & 26 Vict. c. 108, s. 2.)

The court may give a general direction that persons having powers of sale or exchange in a settlement or will may exercise the powers as if they authorised the reservation or separation of mines: (*Re Wynn's Devised Estates*, L. Rep. 16 Eq. 237; 28 L. T. Rep. N. S. 615; *Re Willway*, 32 L. J. 226, Ch.)

II. SALE OF LAND WITH TIMBER.

Where under a power of sale a *bonâ fide* sale shall be made of an estate with the timber thereon, or any other articles attached thereto, and the tenant for life or any other party to the transaction shall by mistake be allowed to receive for his own benefit a portion of the purchase money as the value of the timber or other articles, it shall be lawful for the court upon any [action] or application in a summary way, as the case may require or permit, to declare that upon payment by the purchaser, or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the court shall direct, and the settlement of the said principal moneys and interest under the direction of the court upon such parties as in the opinion of the court shall be entitled thereto, the said sale ought to be established: (22 & 23 Vict. c. 35, s. 13; and see SETTLED ESTATES.)

Upon such payment and settlement being made accordingly the court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed: (*Id.*)

The costs of the . . . application as between solicitor and client shall be paid by the purchaser or the claimant under him (*Id.*); unless the court in its discretion thinks fit to order otherwise: (see COSTS.)

CONSOLIDATION.

- I. WHERE ORDERED.
- II. APPLICATION.
 1. WHEN MADE.
 2. BY WHOM MADE.
 3. HOW MADE.
- III. HOW ACTIONS CONSOLIDATED.
 1. WHERE AGAINST ONE DEFENDANT.
 2. WHERE AGAINST SEVERAL DEFENDANTS.
- IV. EFFECT OF CONSOLIDATION.
- V. OPENING CONSOLIDATION ORDER.

I. WHERE ORDERED.

Actions in any division or divisions may be consolidated by order of the court or a judge in the manner heretofore in use in the superior courts of common law (O. L.I., r. 4); that is to say, where two or more actions are commenced by the same plaintiff—

(1) Against the same defendant for what was substantially the same cause of action, or for causes of action, that might have been conveniently joined in one action, if the double proceedings were vexatious or oppressive; or

(2) Against different defendants; where the questions in issue were substantially the same: (*Chitty's Arch. Pract.*, 13th edit. 1085-6.)

The Chancery Division possesses the general discretion possessed by the Court of Chancery over the conduct of proceedings, and will find some means of exercising it: (*Amos v. Chadwick*, L. Rep. 4 Ch. Div. 872.)

Actions may be consolidated though pending in different divisions of the court.

II. APPLICATION.

1. WHEN MADE.

The application may be made at any time after appearance (*Hollingsworth v. Brodrick*, 4 A. & E. 646); and even after notice of trial given: (*Ch. Arch.* 1087.)

2. BY WHOM MADE.

The application can only be made on the defendants' application (*Amos v. Chadwick*, L. Rep. 4 Ch. Div. 869).

But where a number of different plaintiffs bring actions against the same defendants, the court may allow the plaintiffs time to take the next step in all the actions but one, on condition that if they fail in that one, the others shall be dismissed: (*Id.*; and see *Bennett v. Lord Bury*, 42 L. Rep. N. S. 480.)

3. HOW MADE.

The application may be by motion or summons, and is generally by summons intituled in all the actions: (*Smith v. Whichcord*, 24 W. R., 900; *Ch. Arch.* 1087.)

III. HOW ACTIONS CONSOLIDATED.

1. WHERE AGAINST ONE DEFENDANT.

Where all the actions are against the same defendant, all of them but one may be stayed absolutely, and the plaintiff ordered to join the whole of his claims in that one: (*See Ch. Arch.*; *Wilson*, 304.)

2. WHERE AGAINST DIFFERENT DEFENDANTS.

Proceedings in all actions but one are stayed, the defendants under-

taking to be bound by the ultimate result of that action (Ch. Arch., 1087), that is, such a verdict or judgment as the court thinks ought to stand as a final determination of the matter: (*Hodson v. Richardson*, 3 Bur. 1478.)

IV. EFFECT OF CONSOLIDATION.

The order, when there are several defendants, binds the defendants, but not the plaintiff. The plaintiff may, unless he has agreed to be bound by the result of the first action, if unsuccessful, proceed with another, but he thereby loses the benefit of the consolidation, and if he succeeds in the second action, the result does not bind the other defendants: (*Doyle v. Douglas*, 4 B. & Ad. 544.)

When the plaintiff in an action which had been made a test action, refused to proceed, the action was dismissed: (*Robinson v. Chadwick*, L. Rep. 7 Ch. Div. 878; 39 L. T. Rep. N. S. 50; 47 L. J. 607, Ch.; 26 W. R. 556.)

But in such a case the court may substitute another of the actions as a test action: (*Amos v. Chadwick*, L. Rep. 9 Ch. Div. 459.)

V. OPENING CONSOLIDATION ORDER.

The court will not generally open a consolidation order. If it does, it will only be on such terms as are requisite for attaining the merits: (*Foster v. Alvez*, 3 Bing. N. C. 896; *Cohen v. Bulkeley*, 5 Taunt. 165.)

[And see ADMINISTRATION, STAYING PROCEEDINGS, TRANSFER.]

CONTEMPT OF COURT.

[See ARREST.]

CONVEYANCING COUNSEL.

- I. POWER TO REFER MATTERS TO.
- II. DISTRIBUTION OF BUSINESS.
- III. HOW MATTERS REFERRED.
- IV. OBJECTING TO OPINION.
- V. FEES.
- VI. EXPENSES OF EMPLOYING OTHER COUNSEL.

I. POWER TO REFER MATTERS TO.

It shall be lawful for the court or for any judge thereof when sitting at chambers to receive and act upon the opinion of [the] conveyancing counsel [of the court] in all cases in which, according to the practice [prior to 1852, it was] usual for the master to require or receive the opinion of conveyancing counsel for his aid and assistance in the investigation of the title to an estate, with a view to an investment of money in the purchase or on mortgage thereof, or with a view to a sale thereof or in the settlement of a draft of a conveyance, mortgage, settlement, or other instrument or otherwise, and in such other cases as [Orders of Court] direct: (15 & 16 Vict. c. 80, s. 40.)

The court may, in its discretion, require the assistance of such counsel, or act without it: (*Dan.* 1046.)

II. DISTRIBUTION OF BUSINESS.

The business to be referred to the conveyancing counsel shall be

distributed among such counsel in rotation by the first clerk to the registrars for the time being, and during the occasional or necessary absence by the second clerk to the registrars for the time being, and during the occasional or necessary absence of both such clerks, then by such one of the other clerks to the registrars as the senior registrar for the time being may nominate for that purpose: (C. O. 2, r. 1.)

[This does not] interfere with the power of the court, or of the judge at chambers, to direct or transfer a reference to any one in particular of the said conveyancing counsel, where it appears to the court or the judge to be expedient: (C. O. 2, r. 5.)

The court will not generally direct a reference to one counsel in particular: (Morg. & Chute, 134.)

When the reference is to a particular counsel the minutes need not be taken to the registrar's clerk: (Dan. 1047.)

The clerk making such distribution shall be responsible for the business being distributed according to regular and just rotation, and in such manner as to keep secret from all persons the rota or succession of conveyancing counsel to whom such business may be referred; and it shall be his duty to keep a record of such references, with proper indexes, and to enter therein all such references, with the dates when the same are made: (C. O. 2, r. 2.)

In case the conveyancing counsel in rotation shall from illness or from any other cause be unable or decline to accept any such reference, the same shall be offered to the other conveyancing counsel . . . successively, according to their seniority at the Bar, until some one of them shall accept the same: (C. O. 2, r. 4.)

III. HOW MATTERS REFERRED.

When the court or a judge at chambers directs any business to be referred to any such conveyancing counsel, a short memorandum or minute of such direction shall be prepared and signed by the registrar if the same shall have been given in court, or by the judge's chief clerk, if given in chambers; and the party prosecuting such direction, or his solicitor, shall take such memorandum or minute to the registrar's clerk whose duty it is to make such distribution as aforesaid; and such clerk shall add at the foot thereof a note specifying the name of the conveyancing counsel in rotation to whom such business is to be referred; and such memorandum or minute shall be left by the party prosecuting such direction, or his solicitor, with such conveyancing counsel, and shall be a sufficient authority for him to proceed with the business so referred: (C. O. 2, r. 3.)

No order is necessary, but the case will be adjourned in order that the opinion may be procured: (Ayck. 503.)

[See also DEEDS, PROPERTY.]

IV. OBJECTING TO OPINION.

It shall be . . . competent for any party to object to any opinion of any such counsel when he shall deem it open to objection, and thereupon the point in dispute shall be disposed of by the court, or by the judge sitting in chambers, according to the nature of the case: (15 & 16 Vict. c. 80, s. 40.)

Although the conveyancing counsel is in a sense the officer of the court, the party employing him is responsible for his mistakes: (*Re Banister*, L. Rep. 12 Ch. Div. 131.)

V. FEES.

The allowances in respect of fees to such conveyancing counsel . . .

shall be regulated by the taxing master of the said court, subject to an appeal to the judge to whose court the cause or matter shall be attached, whose decision shall be final: (15 & 16 Vict. c. 80, s. 43.)

VI. EXPENSES OF EMPLOYING OTHER COUNSEL.

Where, in pursuance of any direction by the court or a judge in chambers, drafts are settled by any of the conveyancing counsel of the court, the expense of procuring such drafts to be previously or subsequently settled by other counsel on behalf of the same parties on whose behalf such drafts are settled by the conveyancing counsel of the court, shall not be allowed on taxation as between party and party, or as between solicitor and client, unless the court or the judge in chambers shall otherwise direct: (C. O. 40, r. 30; and see *Re Morgan Jones*, 6 W. R. 762; *Nicholson v. Jeyes*, 1 Sm. & G. App. xiii.; cited Morg. & Chute, 136.)

COPIES.

I. OFFICE COPIES.

1. PREPARATION.

2. FURNISHING TO OTHER PARTIES [see *post*, II.].

3. PRODUCTION ON PROCEEDINGS.

II. FURNISHING COPIES TO OTHER PARTIES.

1. WRITTEN COPIES.

(a) Documents in Possession.

(b) Documents Filed or Prepared.

(1) Who furnishes.

(2) Application for.

(3) Delivery.

(4) Particulars as to Copies.

(5) Neglect to Furnish.

(6) Charges.

2. PRINTED COPIES.

(a) Who furnishes.

(b) Demand for, and Number Furnished.

(c) Payment.

(d) Particulars as to Copies.

I. OFFICE COPIES.

1. PREPARATION.

The party by or on whose behalf any deposition, affidavit, or certificate is filed, shall leave a copy with the officer with whom the same is filed, who shall examine it with the original and mark it as an office copy; such copy shall be a copy printed where such deposition or affidavit is to be printed: (Add. R., Aug. 1875, O. V., r. 6; and see EVIDENCE.)

The folios of all printed and written office copies . . . shall be numbered consecutively in the margin thereof, and such written copies shall be written in a neat and legible manner on the same paper as in the case of printed copies: (Add. R., Aug. 1875, O. V.), r. 13; and see *post*, II. 1, (b), (4).)

2. FURNISHING TO OTHER PARTIES.

[See *post*, II.]

3. PRODUCTION ON PROCEEDINGS.

The party or solicitor who has taken any printed or written office copy of any deposition or affidavit is to produce the same upon every proceeding to which the same relates: (Add. R., Aug. 1875, O. V., r. 7.)

II. FURNISHING COPIES TO OTHER PARTIES.

1. WRITTEN COPIES.

(a) *Documents in Possession.*

As to taking copies of documents in possession of another party, or extracts therefrom, under Rules of Court or any special order, the party entitled to take the copy or extract is to pay the solicitor of the party producing the document for such copy or extract as he may by writing require, at the rate of 4*d.* per folio; and if the solicitor of the party producing the document refuses or neglects to supply the same, the solicitor requiring the copy or extract is to be at liberty to make it, and the solicitor for the party producing is not to be entitled to any fee in respect thereof: (Add. R., Aug. 1875, Sp. All., r. 16.)

(b) *Documents Filed or Prepared.*

(1) Who Furnishes.

Where any party is entitled to a copy of any deposition, affidavit, proceeding or document, filed or prepared by or on behalf of another party, which is not required to be printed, such copy shall be furnished by the party by or on whose behalf the same has been filed or prepared: (Add. R., Aug. 1875, O. V., r. 8.)

(2) Application for.

The party requiring any such [written] copy, or his solicitor, is to make a written application to the party by whom the copy is to be furnished, or his solicitor, with an undertaking to pay the proper charges: (Add. R., Aug. 1875, O. V., r. 9.)

(3) Delivery.

[On such application] such copy is to be made and ready to be delivered at the expiration of twenty-four hours after the receipt of such request and undertaking, or within such other time as the court or judge may in any case direct, and is to be furnished accordingly upon demand and payment of the proper charges: (Add. R., Aug. 1875, O. V., r. 9.)

This applies to office copies.

As to affidavits, on an *ex parte* application for an injunction or writ of *ne exeat regno*, see INJUNCTION; ARREST II., 2, (*d.*).

(4) Particulars as to Copies.

The name and address of the party or solicitor by whom any copy is furnished is to be indorsed thereon in like manner as upon proceedings in court, and such party or solicitor is to be answerable for the same being a true copy of the original, or of an office copy of the original, of which it purports to be a copy, as the case may be: (Add. R., Aug., 1875, O. V., r. 12.)

The folios of all . . . written office copies, and copies delivered or furnished to a party, shall be numbered consecutively in the margin thereof, and such written copies shall be written in a neat and legible manner on the same paper as in the case of printed copies: (Add. R., Aug. 1875, O. V., r. 13.)

The paper is cream wove machine drawing foolscap folio paper, 19lb. per mill ream, or thereabouts, and there must be an inner margin of about three-quarters of an inch wide, and an outer margin of about two inches and a half wide: (O. LVI., r. 2.)

[The note at the foot of every affidavit filed, stating on whose behalf it is so filed] shall be copied on every office copy and copy furnished to a party: (Add. R., Aug. 1875, O. V., r. 11.)

(5) Neglect to Furnish.

In case any party or solicitor who shall be required to furnish any

such written copy as aforesaid shall either refuse or, for twenty-four hours from the time when the application for such copy has been made, neglect to furnish the same, the person by whom such application shall be made shall be at liberty to procure an office copy from the office in which the original shall have been filed, and in such case no costs shall be due or payable to the solicitor so making default in respect of the copy or copies so applied for: (Add. R., Aug. 1875, O. V., r. 14.)

(6) Charges.

The party entitled to be furnished with a print shall not be allowed any charge in respect of a written copy unless the court or judge shall otherwise direct: (Add. R., Aug. 1875, O. V., r. 5.)

2. PRINTED COPIES.

(a) *Who Furnishes.*

Where, by any order of the court (whether of appeal or otherwise), or a judge, any pleading, evidence, or other document is ordered to be printed, the court or judge may order . . . printed copies to be furnished, by and to such parties and upon such terms as shall be thought fit: (Add. R., Aug. 1875, O. V., r. 15.)

(b) *Demand for, and Number Furnished.*

The party printing shall, on demand in writing, furnish to any other party or his solicitor any number of printed copies, not exceeding ten: (Add. R., Aug. 1875, O. V., r. 3.)

(c) *Payment.*

[The copies will be furnished] upon payment therefor at the rate of 1*d.* per folio for one copy, and $\frac{1}{2}$ *d.* per folio for every other copy: (*Id.*)

The solicitor of the party printing shall give credit for the whole amount payable by any other party for printed copies: (Add. R., Aug. 1875, O. V., r. 4.)

(d) *Particulars as to Copies.*

The name and address of the party or solicitor must be indorsed, as in the case of written copies: (see *sup.* 1 (b) (4).)

The folios of all printed . . . copies delivered or furnished to a party, shall be numbered consecutively in the margin thereof: (Add. R., Aug. 1875, O. V., r. 13.)

[The note at the foot of every affidavit filed, stating on whose behalf it is so filed] shall be printed on every printed copy of an affidavit or set of affidavits . . . furnished to a party: (Add. R., Aug. 1875, O. V., r. 11.)

COPYHOLD ACTS.

I. PAYMENT OF ENFRANCHISEMENT MONEY INTO COURT.

1. IN WHAT CASES.

2. TO WHAT ACCOUNT.

II. INVESTMENT.

III. PAYMENT OF DIVIDENDS.

IV. HOW MONEY APPLIED.

V. APPLICATIONS.

VI. MONEY NOT TO BE PLACED ON DEPOSIT.

I. PAYMENT OF ENFRANCHISEMENT COMPENSATION INTO COURT.

1. IN WHAT CASES.

[The Commissioners may direct the enfranchisement consideration to be paid into court]:

(1) If [they] consider that [the evidence as to the lord's title] does not fully and truly disclose all such particulars as are necessary; or if no declaration [as to such title] shall be made; or if the lord shall refuse or decline or fail to give such information and evidence as they shall deem proper and necessary to show a satisfactory *prima facie* title in the lord, or in persons claiming under or in trust for him;

And the Commissioners shall consider either that the title of the lord is not satisfactory, or that the incumbrancers should be protected; and they think that the justice of the case requires it (15 & 16 Vict. c. 51, s. 22);

(2) In all cases in which the person for the time being entitled to any rentcharge subject to be redeemed or sold under the Act, or entitled to any gross sum payable by way of compensation or enfranchisement, shall be only entitled thereto for a limited estate or interest therein; or as trustee for sale, or otherwise, without power to give an effectual discharge for the same, or under disability, or a corporation not authorised to make an absolute sale of such rentcharge, otherwise than under [the Act] (15 & 16 Vict. c. 51, s. 39); or

(3) If the lord refuse to receive the enfranchisement money: (21 & 22 Vict. c. 94, s. 13; and see 15 & 16 Vict. c. 51, s. 39, and 21 & 22 Vict. c. 94, ss. 15, 16, 17, as to payment to trustees or other persons instead of payment into court.)

Any manor vested in Her Majesty in right of her crown in remainder or reversion expectant on an estate of inheritance, and any hereditaments held of such manor, may, with the consent in writing of the Commissioners of Woods, Forests, and Land Revenues, or any one of them, be dealt with under the Copyhold Acts: (21 & 22 Vict. c. 94, s. 42.)

2. TO WHAT ACCOUNT.

Money paid into court pursuant to the Copyhold Acts shall be placed in the books at the Chancery Pay Office to the credit of "*ex parte* the Copyhold Commissioners," as directed by the said Acts, and in addition thereto to the account of the particular manor in respect of which the money is paid in: (Ch. F. R., 1874, r. 33.)

In the case of Crown manors, the money was directed to be paid "*ex parte* the Queen's Most Excellent Majesty," and the person for the time being entitled to the receipt of the rents and profits: (21 & 22 Vict. c. 94, s. 43.)

In the request for a direction to receive such money, the name and locality of such particular manor shall be stated: (Ch. F. R., 1874, r. 33.)

II. INVESTMENT.

By order of the court, the money paid in, until applied, may be invested in the purchase of Consols, 3l. per cent. Reduced Annuities, or in Government or real securities: (15 & 16 Vict. c. 51, s. 39.)

In the case of Crown manors, the money may be ordered to be invested in Government or real securities: (21 & 22 Vict. c. 94, s. 44.)

Notice of the application must be given to the Commissioners of Woods and Forests: (*Id.*)

III. PAYMENT OF DIVIDENDS.

The dividends or other income may be ordered to be paid to the person for the time being entitled: (*Id.*; 15 & 16 Vict. c. 39.)

IV. HOW MONEY APPLIED.

[The money may] be applied to some one or more of the following purposes:

- (1) The purchase or redemption of the land tax, and the discharge of any rent or incumbrance affecting the rentcharge in respect of which [the money was paid in], or the material incidents for which the same [has] been substituted, or affecting other hereditaments settled therewith to the same or the like uses, &c.;
- (2) The purchase of other lands, to be conveyed, limited, and settled upon the like uses, &c., as the rentcharge for the redemption of which such money has been paid ;
- (3) Payment to any party becoming absolutely entitled to such money : (15 & 16 Vict. c. 51, s. 39.)

In the case of Crown manors, the money is to be applied to the purchase or redemption of land tax, or the purchase of land of fee simple tenure, and convenient to be held with the settled estates; and any land purchased is to be settled to such uses, &c., as will most nearly correspond with the former uses, &c. : (21 & 22 Vict. c. 94, ss. 44 and 45.)

The application in the case of Crown manors must be by the person entitled to the rents and profits, notice being given to the Commissioners of Woods and Forests : (*Id.*, s. 43.)

In other cases the application may be made by the person who would have been entitled to the receipt of the rentcharge : (15 & 16 Vict. c. 51, s. 39.)

V. APPLICATIONS.

Applications under the Copyholds Acts respecting any securities or money in court, shall be made by summons at . . . chambers; but notice of any such application is not to be given to the Copyhold Commissioners, except when the judge may so direct : (Ch. F. Am. O. 1874; r. 15.)

VI. MONEY NOT TO BE PLACED ON DEPOSIT.

Money paid in under the Copyhold Acts is within the exception as to placing on deposit : (see Ch. F. R., 1874, r. 68; and Seton, 1470.)

COSTS.

I. SECURITY FOR.

1. IN THE CHANCERY DIVISION.

(a) *In what Cases.*

- (1) Married Woman.
- (2) Next Friend of Married Woman.
- (3) Plaintiff misdescribing himself.
- (4) Plaintiff out of Jurisdiction.
- (5) Company.
- (6) Liquidating Plaintiff.
- (7) In Place of Remitting to County Court.
- (8) On Transfer from County Court.
- (9) On Removal by *Certiorari* [see CERTIORARI].
- (10) In Action for Recovery of Land.
- (11) Petition to wind up Life Assurance Company.

(b) *For what Costs.*

(c) *When Application made.*

(d) *How Application made.*

(e) *What Security ordered.*

(f) *How Security prepared.*

(g) *Proceedings in default.*

2. IN THE COURT OF APPEAL [see APPEAL].

3. IN THE HOUSE OF LORDS [see APPEAL].

II. PROCEEDING FOR COSTS ALONE.

III. AWARDING COSTS.

1. GENERAL RULES.

- (a) *Discretion of the Court.*
- (b) *Costs out of the Estate.*
- (c) *Issue or Action tried by Jury.*
- (d) *Actions of Contract and Tort.*
- (e) *Application of Former Procedure.*
- (f) *On Appeal [see APPEAL].*
- (g) *Orders.*
- (h) *Scales on which allowed.*
 - (1) Lower Scale.
 - (2) Higher Scale.
 - (3) Power to Direct as to Scale allowed.
 - (4) Certificate.

2. SPECIAL RULES AND ALLOWANCES (Alphabetically arranged).

IV. TAXATION.

- 1. ON WHAT PRINCIPLE CONDUCTED.
- 2. PREPARATION OF BILL OF COSTS.
- 3. TO WHAT TAXING MASTER REFERRED.
- 4. LEAVING DOCUMENTS WITH TAXING MASTER.
 - (a) *Where there has been previous Taxation.*
 - (b) *Where no previous Taxation.*
- 5. WARRANT TO TAX.
- 6. FURNISHING COPIES OF BILL.
- 7. GOING THROUGH BILLS BEFORE TAXATION.
- 8. THE TAXATION.
 - (a) *Directions as to Attendance.*
 - (b) *Refusal to bring in Costs.*
 - (c) *Failure to attend.*
 - (d) *General Powers and Duties.*
 - (e) *Signature of Bill.*
 - (f) *Certificate of Taxation.*
 - (g) *Proceedings on Direction in case Parties differ.*
- 9. REVIEW OF TAXATION.
 - (a) *By Taxing Master.*
 - (b) *By Judge [see APPEAL].*
- 10. IN DISTRICT REGISTRY [see *sup.* III., 2].
 - (4) *After Payment.*
 - (5) *"Special Circumstances."*
 - (6) *Special Directions.*
 - (c) *Evidence.*
 - (d) *What Costs allowed.*
 - (e) *The Taxation.*
 - (1) *Refusal to Attend.*
 - (2) *Assistance of other Taxing Officers.*
 - (3) *Certificate of Taxation.*
 - (4) *Special Certificate.*
 - (f) *Costs of Reference.*
 - (g) *Ordering Judgment to be entered.*

V. DELIVERY OF BILL AND TAXATION UNDER 6 & 7 VICT. c. 73.

1. DELIVERY OF BILL.

- (a) *To be One Month before Action.*
- (b) *Authorising Action before the Month.*
- (c) *Signature to Bill.*
- (d) *Ordering Delivery.*

2. REFERENCE FOR TAXATION.

- (a) *Application to Tax.*
 - (1) *How made.*
 - (2) *By Whom made.*

(b) *Order of Reference.*

- (1) Generally.
- (2) After Verdict or Writ of Inquiry.
- (3) After Twelve Months.

VI. CHARGE FOR COSTS [see SOLICITOR].

VII. RECOVERY OF.

VIII. APPEAL FROM ORDER AS TO [see APPEAL.]

I. SECURITY FOR COSTS.

1. IN THE CHANCERY DIVISION.

- (a) *In what Cases.*
- (1) Married Woman.

[When married women are allowed to sue or defend without their husbands, and without a next friend they must give] such security (if any) for costs as the court or a judge may require: (O. XVI., r. 8.)

When the married woman has ample means she will not be required to give security: (*Noel v. Noel*, L. Rep. 13 Ch. Div. 510; 42 L. T. Rep. N. S. 352.)

(2) Next Friend of Married Woman.

If the next friend of a married woman is in insolvent circumstances, the court may order the proceedings to be stayed until he gives security for costs: (*Dan.* 104.)

(3) Plaintiff Misdeshribing Himself.

Security has been ordered.

Where the plaintiff had left his residence, and no information could be obtained as to his abode;

Where the plaintiff was not to be met with at the place described, and was keeping out of the way to avoid process;

Where the plaintiff wilfully misrepresented his address: (*Ayck.* 433.)

(4) Plaintiff out of Jurisdiction.

If a sole plaintiff, or all the plaintiffs, reside out of the jurisdiction of the court, the defendant is entitled to an order for security for costs, and that until it is given all proceedings may be stayed: (*Dan.* 28; *Ayck.* 432; 1 Tidd's Practice, 575; *Republic of Costa Rica v. Erlanger*, L. Rep. 3 Ch. Div. 62; 45 L. J. 743, Ch.)

Generally, if any one of the plaintiffs is within the jurisdiction, security will not be ordered: (*Walker v. Easterley*, 6 Ves. 612; but see *Hanmer v. Mangles*, 12 M. & W. 313.)

Since the passing of the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54) a plaintiff in Scotland is not required to give security (*Raeburn v. Andrews*, L. Rep. 9 Q. B. 120); nor is a plaintiff in Ireland: (See Day, C. L. P. Acts.)

The residence abroad must be of more than a temporary nature: (*Cole v. Beale*, 7 Moore, 613; *Taylor v. Fraser*, 2 Dowl. 622; *Sturla v. Freccchia*, W. N. 1877, pp. 166, 188.)

Security will not be ordered where the plaintiff is serving abroad in the army or navy: (*Evelyn v. Chippendale*, 9 Sim. 497; *Evering v. Chiffenden*, 7 Dowl. 536.)

Service in the Indian Civil Service, or as a sessions judge in India, will not disentitle the defendant to his order: (*Plowden v. Campbell*, 23 L. J. 384, Q. B.)

A peer who is out of the jurisdiction may be called upon to give security: (*Aldbrough v. Burton*, 2 M. & K. 401; 6 T. R. 597; cited *Ayck.* 433.)

A merely nominal plaintiff, in reality a defendant, who is abroad, will

not be ordered to give security : (*Belmonte v. Aynard*, L. Rep. 4 C. P. Div. 221, 351 ; 27 W. R. 789.)

A foreigner, domiciled abroad, who has come into this country for the purpose of suing, and intends returning after judgment, will not be ordered to give security : (*Redondo v. Chaytor*, L. Rep. 4 Q. B. Div. 453 ; 40 L. T. Rep. N. S. 797 ; 27 W. R. 470.)

The rule requiring the person abroad to give security only applies to a person instituting proceedings, and not to a defendant or respondent brought into court to defend himself : (*Re Percy, &c., Company*, L. Rep. 2 Ch. Div. 531 ; 45 L. J. 526, Ch.)

A shareholder, resident abroad, appearing to oppose a winding-up petition, cannot be ordered to find security : (*Id.*)

Where the defendant, a foreigner, set up a counter-claim in an action of collision, he was ordered to give security for costs generally (*The Julia Fisher*, L. Rep. 2 P. Div. 115 ; 36 L. T. Rep. N. S. 257 ; 25 W. R. 756) ; but where the defendant, a foreigner, set up a counter-claim with respect to the contract sued on by the plaintiff, the court refused to order him to find security : (*Mapleson v. Masini*, L. Rep. 5 Q. B. Div. 144 ; 28 W. R. 488.)

Where a defendant admits a foreign plaintiff's cause of action, and sets up a counter-claim on a distinct claim, he is not entitled to security : (*Winterfield v. Bradnum*, L. Rep. 3 Q. B. Div. 324 ; 38 L. T. Rep. N. S. 250 ; 47 L. J. 270, Q. B. ; 26 W. R. 472.)

Security will be ordered in the case of applications by parties abroad—

For conduct of the cause, although a defendant : (Ayck. 433).

For taxation of a solicitor's bill (*Id.*) ;

By petition, though not a party : (*Id.*) ;

To vary chief clerk's certificate : (*Polini v. Gray*. Malins, V.C., 27th June, 1878.)

But a defendant, although out of the jurisdiction, is entitled to present a petition without giving security : (Ayck. 433, citing *Cochrane v. Fearon*, 18 Jur. 568.)

(5) Company.

When a limited company is plaintiff . . . in any action, suit, or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given : (25 & 26 Vict. c. 89, s. 69.)

The fact that the company is in liquidation is sufficient : (*Northampton Coal Company v. Midland Waggon Company*, L. Rep. 7 Ch. Div. 500 ; 38 L. T. Rep. N. S. 82 ; 26 W. R. 485.)

Security will not be ordered in the case of companies counter-claiming or taking proceedings in the nature of a cross action : (*Accidental and Marine Insurance Company v. Macarty*, L. Rep. 3 Eq., 200 ; *Washoe Mining Company v. Ferguson*, L. Rep. 2 Eq., 271 ; *Western of Canada, &c., Company v. Walker*, L. Rep. 10 Ch. App. 628.)

Whenever an order absolute for winding-up a company has been made, if the company appeals without anyone else being made responsible for costs, the Court of Appeal will entertain an application for security : (*Re Diamond Fuel Company*, L. Rep. 13 Ch. Div. 400 ; 49 L. J. 301, Ch.)

(6) Liquidating Plaintiff.

When a plaintiff has, after action brought, taken proceedings in liquidation, he will be ordered to give security : (*Brocklebank v. King's*

Lynn Steamship Company, L. Rep. 3 C. P. Div. 365; 38 L. T. Rep. N. S. 489; 47 L. J. 321, C. P.; 27 W. R. 94; *Malcolm v. Hodgkinson*, L. Rep. 8 Q. B. 209.)

(7) In Place of Remitting to County Court.

The 10th section of the County Courts Act, 1867, shall apply to all actions in the High Court of Justice in which any relief is sought which can be given in a County Court: (J. A., 1873, s. 67.)

[On affidavit by any defendant in an action of tort] that the plaintiff has no visible means of paying the costs of the defendant should a verdict be not found for the plaintiff a judge of the court in which the action is brought [may] order that unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs, or satisfy the judge that he has a cause of action fit to be prosecuted in the [High] Court, [proceedings] shall be stayed, or, in the event of failure, to satisfy the court or give security that the cause be remitted to a County Court: (30 & 31 Vict. c. 142, s. 10.)

The time for giving security may be extended at any time before the defendant has lodged the writ and order at the County Court: (*Welphy v. Buhl*, L. Rep. 3 Q. B. Div. 80, 253.)

(8) On Transfer from County Court.

Any [judge of the Chancery Division on granting an order at chambers for transfer of an equitable matter from a County Court may impose] such terms, if any, as to security for costs or otherwise, as he may think fit: (28 & 29 Vict. c. 99, s. 3.)

Security may also be ordered on the transfer of other actions: (See 9 & 10 Vict. c. 95, s. 90; 19 & 20 Vict. c. 108, s. 38.)

(9) On Removal by *Certiorari*.

[See CERTIORARI.]

(10) In Actions for Recovery of Land.

If any person shall bring an action [for the recovery of land] after a prior action of ejectment for [or recovery of] the same premises has been or shall have been unsuccessfully brought by such person, or by any person through or under whom he claims, against the same defendants, or against any person through or under whom he defends, the court or a judge may, if they or he think fit, on the application of the defendant at any time after such defendant has appeared to the writ, order that the plaintiff shall give to the defendant security for the payment of the defendant's costs, and that all further proceedings in the cause shall be stayed until such security be given, whether the prior action has been or shall have been disposed of by discontinuance, or by nonsuit, or by judgment for the defendant: (17 & 18 Vict. c. 125, s. 93.)

Security may be ordered for costs both of the former proceedings and future costs: (Day, 3rd edit., 289.)

(11) Petition to Wind-up Life Assurance Company.

The court is not to give a hearing to a petition of one or more policy holders or shareholders under the Act of 1862 until security for costs shall be given: (33 & 34 Vict. c. 61, s. 21; *Re British Alliance Corporation*, 38 L. T. Rep. N. S. 600; 26 W. R. 628.)

(b) For what Costs.

Security will generally be ordered for future costs only. If application is made promptly, the order will be for costs also already incurred: (*Brocklebank v. King's Lynn Steamship Company*, *sup.*; *Massey v. Allen*, L. Rep. 12 Ch. Div. 807.)

(c) *When Application Made.*

The application for security should be made by the defendant as soon after appearance as possible, and if he take any step after he has ascertained that he is entitled to security, he is, generally, deemed to have waived his right: (Ayck. 434; Dan. 30; Ch. Arch., 12th edit., 1406; *Re Home Assurance Association* (2), L. Rep. 12 Eq. 112; 19 W. R. 947.)

But although a suit may have proceeded to a late stage without security for costs being applied for, yet where the statement of claim has been amended so as to introduce an entirely new case which requires additional and more expensive evidence, an application for security for costs will be entertained: (*Northampton Coal, &c., Company v. Midland Waggon Company*, L. Rep. 7 Ch. Div. 500; and see O. L.V., r. 2, cited *post* (c), and *Arkwright v. Newbold*, W. N. 1880, p. 59.)

(d) *How Application made.*

The application is by motion or summons.

(e) *What Security Ordered.*

In any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such time or times, and in such manner and form as the court or a judge shall direct: (O. L.V., Feb., 1876.)

The amount of security for costs is in the discretion of the court, and is no longer limited to 100*l.*, even in case of the plaintiff being out of the jurisdiction: (*Republic of Costa Rica v. Erlanger*, L. Rep. 3 Ch. Div. 62; 45 L. J. 743, Ch.)

Malins, V.C. laid it down that 100*l.* security ought to be ordered in cases of plaintiffs being out of the jurisdiction (*Paxton v. Bell*, W. N. 1876, p. 221); and, with this exercise of discretion, the Court of Appeal refused to interfere (*Id.* 249); but when the judge, in the exercise of his discretion, proceeded on a principle which the Court of Appeal thought wrong, it exercised its own discretion: (*Sturla v. Freccchia*, W. N. 1877, pp. 166, 188.)

(f) *How Security Prepared.*

If security is ordered to be by bond, with a surety, the solicitor of the party ordered to give security furnishes the other party or his solicitor with the name and residence of the proposed surety, and if no objection is taken within two days the first-named solicitor prepares the bond: (Ayck. 434; Dan. 35.)

Where a bond is to be given as security for costs, it shall, unless the court or a judge otherwise directs, be given to the party or person requiring the security, and not to an officer of the court: (O. L.V., r. 3, April, 1880.)

(g) *Proceedings in Default.*

If a plaintiff fails to comply with an order to give security for costs, it is in the discretion of the court or a judge to dismiss the action, on motion to dismiss for want of prosecution: (*De La Grange v. McAndrew*, L. Rep. 4 Q. B. Div. 210; 39 L. T. Rep. N. S. 500; 48 L. J. 315, Q. B.; 27 W. R. 413.)

2. IN THE COURT OF APPEAL.

[See APPEAL.]

3. IN THE HOUSE OF LORDS.

[See APPEAL.]

II. PROCEEDING FOR COSTS ALONE.

Where the principal relief in an action has been conceded after action brought, the plaintiff may go on for costs alone: (*Stow v. Corporation*

of *Maidstone*, W. N. 1878, p. 218; per Fry, J., *Rankin v. Longbourne*, unreported.)

III. AWARDING COSTS.

1. GENERAL RULES.

(a) *Discretion of the Court.*

Subject to the provisions of the [Judicature] Acts, the costs of and incidental to all proceedings in the High Court shall be in the discretion of the court: (O. LV.)

The proceedings must have actually come into court: (*Re Brandreth's Trade Mark*, L. Rep. 9 Ch. Div. 618; 47 L. J. 816, Ch.)

The costs are in the court's discretion in matters regulated by a statute which is silent, or provides otherwise, as to costs: (*Ex parte Mercers' Company*, L. Rep. 10 Ch. Div. 481.)

(b) *Costs out of the Estate.*

Nothing . . . contained [in the Judicature Acts or Rules] shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in courts of equity: (O. LV.)

Trustees who have been guilty of impropriety of conduct may be deprived of costs in the discretion of the court: (*Re Hoskins' Trusts*, L. Rep. 6 Ch. Div. 281; 46 L. J. 814, Ch.)

(c) *Issue or Action tried before Jury.*

Where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shown the judge before whom such action or issue is tried or the court shall otherwise order: (O. LV.)

All statutes passed prior to the Judicature Acts, 1873, relating to costs, other than those expressly reserved by the 67th section, but including the 21 Jac. 1, c. 16, and 3 & 4 Vict. c. 24, are repealed: (*Garnet v. Bradley*, L. Rep. 3 App. Cas. 944; 39 L. T. Rep. N. S. 261; 48 L. J. 186, Ex.; 26 W. R. 698.)

A successful party may be deprived of his costs (*Siddons v. Lawrence*, L. Rep. 4 Ex. Div. 459), and ordered to pay the costs of the other side: (*Harris v. Petherick*, L. Rep. 4 Q. B. Div. 611; 41 L. T. Rep. N. S. 147; 48 L. J. 521, Q. B.)

The application to the judge must be made at, or immediately after, the trial: (*Bowey v. Bell*, L. Rep. 4 Q. B. Div. 95; 39 L. T. Rep. N. S. 607; 48 L. J. 161 Q. B.; *Kynaston v. MacKinder*, 37 L. T. Rep. N. S. 390; 47 L. J. Q. B. 16.)

A mere negative proceeding on the part of the judge is not sufficient to deprive the party of costs: (*King v. Hawkesworth*, L. Rep. 4 Q. B. Div. 373.)

As to what is a sufficient application, see *Turner v. Heyland*, L. Rep. 4 C. P. Div. 432; 41 L. T. Rep. N. S. 556; 48 L. J. 533, C. P.; *Collins v. Welch*, L. Rep. 5 C. P. Div. 27; 41 L. T. Rep. N. S. 785.

After the trial, unless immediately (e.g., one hour) after, neither the judge who tried the cause, nor a judge at chambers, can make the order, but the application, if any, must be made to a Divisional Court (*Baker v. Oakes*, L. Rep. 2 Q. B. Div. 171; *Bowey v. Bell*, *sup.*) which has an original jurisdiction in the matter: (*Myers v. Defries*, *Siddons v. Lawrence*, L. Rep. 4 Ex. Div. 176.)

The event is the result of all the proceedings incidental to the litigation: (*Field v. Great Northern Railway Company*, L. Rep. 3 Ex. Div. 261; 39 L. T. Rep. N. S. 80; 47 L. J. 662, Ex.; 26 W. R. 817; *Green v. Wright*, L. Rep. 2 C. P. Div. 354; 46 L. J. 427, C. P.)

When in the same action the plaintiff obtains a verdict and judgment as to one cause of action, and the defendant obtains a verdict and judgment as to other and distinct causes of action, the word "event," is to be read distributively, and the defendant is entitled to tax his costs of the issues found for him, provided no order otherwise is made by the judge who tried the cause or the court: (*Myers v. Defries*, L. Rep. 5 Ex. Div. 15, 180; 42 L. T. Rep. N. S. 137; 48 L. J. 446, Ex.; 28 W. R. 406.)

(d) *Actions of Contract and Tort.*

The provisions contained in the fifth . . . section of the County Court Act, 1867, shall apply to all actions commenced or pending in the . . . High Court of Justice in which any relief is sought which can be given in a County Court: (J. A., 1873, s. 67.)

If in any action commenced . . . in [the High Court] the plaintiff shall recover a sum not exceeding twenty pounds if the action is founded on contract, or ten pounds if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such superior Court, or unless the court or a judge at chambers shall by rule or order allow such costs: (30 & 31 Vict. c. 142, s. 5.)

This section does not apply so as to deprive a person of costs when his claim has been properly brought, as to amount, and only reduced by counterclaim to a sum below 10*l.* or 20*l.* . (*Blake v. Appleyard*, L. Rep. 3 Ex. Div. 195; 47 L. J. 407, Ex.; 26 W. R. 592; *Potter v. Chambers*, L. Rep. 4 C. P. Div. 457; 39 L. T. Rep. N. S. 350; *Neale v. Clarke*, L. Rep. 4 Ex. Div. 286; 41 L. T. Rep. N. S. 438.)

The amount indorsed on the writ does not affect the question, the Act applying to all actions seeking relief of a *kind* which can be brought in a County Court: (*Chatfield v. Sedgwick*, L. Rep. 4 C. P. Div. 457.)

When an order of reference made by consent, in an action founded on contract, provided that the costs of the certificate and award should be in the discretion of the arbitrator, who should award or certify by whom or to whom the same should be paid, and the arbitrator awarded 10*l.* 3*s.* 4*d.* to the plaintiff, and directed that the defendant should pay to the plaintiff the costs of the reference and award, but did not certify that there was sufficient reason for bringing the action in a Superior Court, it was held that the plaintiff was entitled to these costs without such a certificate: (*Galatti v. Wakefield*, 40 L. T. Rep. N. S. 30; 48 L. J. 70, Ex.; and see *Rutherford v. Wilkie*, 41 L. T. Rep. N. S. 435.)

(e) *Application of Former Procedure.*

The rules, orders, and practice of any court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal, relating to costs, and the allowance of the fees of solicitors and attorneys, and the taxation of costs, existing prior to the commencement of the Act, shall, in so far as they are not inconsistent with the Act, and the Rules of Court in pursuance thereof, remain in force and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court and the taxation of costs in the High Court of Justice and Court of Appeal: (Add. R., Aug. 1875, Sp. All. r. 28.)

This rule when applied to the Chancery Division does not mean that the old common law rules as to costs shall prevail in the Chancery as well as the other divisions, but that the rules of the old Court of Chancery as to costs shall, except where altered by the new rules,

remain in force in the Chancery Division: (*Pringle v. Gloag*, L. Rep. 10 Ch. Div. 676.)

(f) *On Appeal.*

[See APPEAL.]

(g) *Orders.*

In orders in the Chancery Division awarding costs of action, the registrars are to insert, without any special directions, the words "including costs of all applications ordered to stand over till the trial, and all costs reserved to be disposed of at the trial:" (W. N. 1876, p. 271.)

(h) *Scales on which allowed.*

(1) *Lower Scale.*

Solicitors shall be entitled to charge and be allowed the fees set forth in the column headed "lower scale" :

In all actions [for a debt or liquidated demand, whether the indorsement on the writ is general, or special, or for damages].

In all causes and matters assigned to the Queen's Bench, ... Common Pleas, ... Exchequer, ... or Probate, Divorce, and Admiralty Divisions;

And also in causes and matters by the 34th section [of the Judicature Act, 1873] assigned to the Chancery Division in the following cases

1. By creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs at law or next-of-kin, in which the personal or real or personal and real estate for or against or in respect of which or for an account or administration of which the demand may be made shall be under the amount or value of 1000*l.*;
2. For the execution of trusts or appointment of new trustees in which the trust estate or fund shall be under the amount or value of 1000*l.*;
3. For dissolution of partnership or the taking of partnership or any other accounts in which the partnership assets or the estate or fund shall be under the amount or value of 1000*l.*;
4. For foreclosure or redemption, or for enforcing any charge or lien in which the mortgage whereon the suit is founded, or the charge or lien sought to be enforced shall be under the amount or value of 1000*l.*. [*Cotterill v. Stratton*, L. Rep. 9 Ch. App. 514].
5. And for specific performance in which the purchase money or consideration shall be under the amount or value of 1000*l.*;
6. In all proceedings under the Trustees Relief Acts, or under the Trustees Acts, or under any of such Acts, in which the trust estate or fund to which the proceeding relates shall be under the amount or value of 1000*l.*;
7. In all proceedings relating to the guardianship or maintenance of infants, in which the property of the infant shall be under the amount or value of 1000*l.*;
8. . . . In all proceedings relating to funds carried to separate accounts, and in all proceedings under any railway or private Act of Parliament, or under any other statutory or summary jurisdiction, and generally in all other cases where the estate or fund to be dealt with shall be under the amount or value of 1000*l.*: [*Rogers v. Jones*, L. Rep. 7 Ch. Div. 345; 38 L. T. Rep. N. S. 17.] (Add. R., Aug. 1875, O. VI., r. 1.)

In an action claiming 360*l.* and costs brought in the Chancery Division,

arising out of the doctrine of election, claiming damages and compensation from the estate of a deceased person of the value of 1000*l.*, and if necessary for the administration of his estate, it was held that the lower scale only applied: (*Rogers v. Jones*, L. Rep. 7 Ch. Div. 345.)

The lower scale applies when a sum exceeding 1000*l.* has been reduced below that amount by payments before action: (*Judd v. Plumm*, 30 L. J. 94, Ch.);

And to interpleader proceedings where the value of the matter in dispute is under 1000*l.*: (*Gibbs v. Gibbs*, 27 L. J. 577, Ch.)

(2) Higher Scale.

Solicitors shall be entitled to charge and be allowed the fees set forth in the column headed "higher scale"

In all actions for special injunctions to restrain the commission or continuance of waste, nuisances, breaches of covenant, injuries to property, and infringement of rights, easements, patents, and copyrights, and other similar cases where the procuring such injunction is the principal relief sought to be obtained; and

In all cases other than those to which the fees in the column headed "lower scale" are . . . made applicable: (Add. R., Aug. 1875, O. VI., r. 2; and see *Reade v. Bentley*, 3 K. & J. 271.)

The court considers the amount or value of the whole subject matter, not merely the amount recovered: (*Grimes v. Harrison*, 28 L. J. N. S. 828; and comp. *Cotterell v. Stratton*, L. Rep. 9 Ch. 514.)

The injunction must be the principal relief claimed to entitle to costs on the higher scale: (*Chapman v. Midland Railway Company*, L. Rep. 5 Q. B. Div. 167.)

(3) Power to Direct as to Scale allowed.

Notwithstanding [the] rules, the court or judge may in any case direct the fees set forth in either of the said two columns to be allowed to all or either or any of the parties, and as to all or any part of the costs: (Add. R., Aug. 1875, O. VI., r. 3.)

The columns are broken up and divided among the particular matters referred to *post*, 2.

(4) Certificate.

The solicitor or party acting in person shall, on any proceeding in which he claims to pay fees according to the lower scale, file with the proper officer a certificate [that to the best of his judgment and belief the lower scale is applicable], of which certificate the officer is, at the request of any solicitor or any party acting in person in the cause or matter to mark a copy without a fee: (Order as to Fees of 28th Oct., 1875.)

The form of certificate is given by the same order.

In any case in which the fees [of court] have been paid upon the higher scale, and in which it shall happen that the solicitor shall become entitled to charge and be allowed only according to the lower scale of solicitors' fees, the excess of fees so paid may be allowed upon the taxation of costs if the circumstances of the case shall, in the judgment of the taxing officer, justify such allowance: (*Id.*)

2. SPECIAL RULES AND ALLOWANCES (Alphabetically Arranged).

Accounts.—See *post*, *Copies*, *Drawing*, and *Improper Proceedings*.

Adjournment into Court.—The party obtaining an adjournment into court is not made to pay the costs thereof, even if the question is unarguable, unless the court thinks there has been misconduct in requiring the judge's opinion: (*Dan.* 1056.)

When an adjourned summons is refused with costs, the costs in chambers, as well as of adjournment, are included: (*Id.*)

Admitting Documents.—See *post*, *Evidence*.

Agency Correspondence.—As to agency correspondence, in country agency causes and matters, if it be shown to the satisfaction of the taxing officer that such correspondence has been special and extensive, he is to be at liberty to make such special allowance in respect thereof as in his discretion he may think proper: (Add. R., Aug. 1875, Sp. All. r. 9.)

Alternative Relief.—The defendant, though unsuccessful, shall be entitled to his costs occasioned by . . . joining any person or persons [as plaintiffs] who shall not be found entitled to relief, unless the court in disposing of the costs of the action shall otherwise direct: (O. XVI., r. 1.)

Amendment.—On an application to disallow an amendment made without leave in a statement of claim, or defence, or counter-claim, the court may allow the amendment subject to such terms as to costs as may seem just: (See O. XXVII., rr. 2, 3, 4.)

The court or a judge may at any time [impose] such terms as to costs or otherwise, as to such court or judge may seem just [on amending] any defect or error in any proceedings: (O. LIX., r. 2, April, 1880.)

A defendant who has put in a defence with another will, on obtaining an order to put in a separate and amended defence, be made to pay the costs occasioned by not doing so sooner: (*Cargill v. Bower*, L. Rep. 4 Ch. Div. 78.)

[Amendment in pleadings not specially provided for, leave to make which is applied for by either party in chambers or at the trial] may be allowed upon such terms as to costs . . . as may seem just: (O. XXVII., r. 6.)

Where an application to amend a pleading is made by motion, the costs given will not exceed those of a summons attended by counsel: (*Marriott v. Marriott*, 26 W. R. 416.)

While a demurrer to the whole or any part of a pleading is pending . . . no [order to amend such pleading] shall be made except on payment of the costs of the demurrer: (O. XXVIII., r. 7.)

[And see *post*, *Copies*.]

Appeal.—The omission [by a respondent to give notice of his intention to contend that the decision below may be varied] may in the discretion of the court, be ground for . . . a special order as to costs: (O. LVIII., r. 6.)

Appearance.—The following fees are allowed to solicitors:—

	Lower Scale.	Higher Scale.
£ s. d.	£ s. d.	£ s. d.
Entering any appearance	0 6 8	0 6 8
If entered at one time, for more than one person, for every defendant beyond the first	0 1 0	0 2 0
If a person appearing to a writ of summons to recover land limits his defence by his memorandum of appearance, in addition to the above	0 6 8	0 6 8

Arbitration.—If an order of reference made by consent is silent as to the costs of the reference, each party must pay his own costs: (*Bullen v. King*, 36 L. T. Rep. N. S. 732.)

When a cause has been referred compulsorily as a matter of account,

and the order of reference is silent as to costs, the court will not give costs: (*Wimshurst and Co. v. Barrow Shipbuilding Company*, L. Rep. 2 Q. B. Div. 335; 46 L. J. 477, Q. B.; 25 W. R. 557.)

[And see ARBITRATION.]

Attachment of Debts.—The costs of any application for an attachment of debts, and of any proceedings arising from or incidental to such application, shall be in the discretion of the court or a judge: (O. XLV., r. 10.)

When an order directed an account of what was due to a party in respect of costs of proceedings taken by him to enforce judgment in a previous action in the Exchequer Division, and the chief clerk referred the bill of costs for taxation to the taxing master of the Exchequer Division, who disallowed the costs of abortive garnishee summonses, the Master of the Rolls held that the costs of the abortive proceedings were not excluded from taxation by the terms of the order, and were properly disallowed by the taxing master: (*Simmons v. Storer*, L. Rep. 14 Ch. Div. 154; 42 L. T. Rep. N. S. 291; 28 W. R. 408.)

Attachment, Writ of.—See EXECUTION, and *post*, *Writ*.

Attendances.—As to attendances at the judges' chambers, where, from the length of the attendance, or from the difficulty of the case, the judge . . . shall think the highest of the fees [allowed in the schedule] an insufficient remuneration for the services performed, or where the preparation of the case or matter to lay it before the judge . . . in chambers, or on a summons, shall have required skill and labour for which no fee has been allowed, the judge . . . may allow such fee in lieu of the fee of 1*l.* 1*s.* . . . provided, not exceeding 2*l.* 2*s.* or where the higher scale is applicable 3*l.* 3*s.*, or in proceedings to wind up a company 5*l.* 5*s.*, as in his discretion he may think fit; and where the preparation of the case or matter to lay it before a judge at chambers on a summons shall have required and received from the solicitor such extraordinary skill and labour as materially to conduce to the satisfactory and speedy disposal of the business, and therefore shall appear to the judge to deserve higher remuneration than the ordinary fees, the judge may allow to the solicitor, by a memorandum in writing expressly made for that purpose, and signed by the judge, specifying distinctly the grounds of such allowance, such fee, not exceeding ten guineas, as in his discretion he may think fit, instead of the above fees of 2*l.* 2*s.*, 3*l.* 3*s.*, and 5*l.* 5*s.*: (Add. R., Aug. 1875, Sp. All. r. 10.)

Parties attending any proceeding in chambers, without having obtained the previous leave of the judge to attend the same, shall not be allowed any costs of such attendance, unless by special order of the court or judge: (C. O. 40, r. 28; and see CHAMBERS.)

Where any party appears upon any application or proceeding in court or at chambers, in which he is not interested, or upon which, according to the practice of the court, he ought not to attend, he is not to be allowed any costs of such appearance unless the court or judge shall expressly direct such costs to be allowed: (Add. R., Aug. 1875, Sp. All. r. 21.)

As to attendances at the judges' chambers, where by reason of the non-attendance of any party (and it is not considered expedient to proceed *ex parte*), or where by reason of the neglect of any party in not being prepared with any proper evidence, account, or other proceeding, the attendance is adjourned without any useful progress being made, the judge may order such an amount of costs (if any) as he shall think reasonable to be paid to the party attending by the party so absent or neglectful, or by his solicitor personally; and the party so absent or

neglectful is not to be allowed any fee as against any other party, or any estate or fund in which any other party is interested: (Add. R., Aug. 1875, Sp. All. r. 11.)

The fees allowed to solicitors are as follows:

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
Admissions—						
To examine and sign admissions	0	6	8	0	13	4
Advertisements—						
On printer to insert advertisement in <i>Gazette</i> ...	0	6	8	0	6	8
On printer to insert same in other papers, each printer	—			0	6	8
Or every two	0	6	8	—		
Appearance—						
To obtain or give an undertaking to appear	0	6	8	0	6	8
Chambers—						
On a summons at Judges' Chambers	0	6	8	0	6	8
Or according to circumstances not to exceed	1	1	0	1	1	0
In the Chancery Division, all allowances for attending at the Judges' Chambers are to be by the judge or chief clerk as heretofore.						
To file chief clerk's certificate, and get copy marked as an office copy	0	6	8	0	6	8
For an order drawn up by chief clerk, and to get same entered	0	6	8	0	6	8
For preparing and drawing up an order made at chambers in proceedings to wind up a company and attending for same, and to get same entered ...	0	13	4	0	13	4
And for engrossing every such order, per folio ...	0	0	4	0	0	4
Consents—						
To obtain or give any necessary or proper consent ...	0	6	8	0	6	8
To obtain consent of next friend to sue in his name...	0	6	8	0	13	4
Counsel—						
On counsel with brief or other papers—						
If counsel's fee one guinea	0	3	4	0	6	8
If more and under five guineas	0	6	8	0	6	8
If five guineas and under twenty guineas ...	0	6	8	0	13	4
If twenty guineas	0	13	4	1	1	0
If forty guineas or more	—			2	2	0
On consultation or conference with counsel	0	13	4	0	13	4
On counsel to procure certificate that cause proper to be heard as a short cause, and on registrar to mark same	0	6	8	0	6	8
To mark conveyancing counsel... ..	0	6	8	0	6	8
Documents—						
To inspect, or produce for inspection, documents pursuant to a notice to admit	0	6	8	0	13	4
Or per hour	0	6	8	0	6	8
To inspect, or produce for inspection, documents referred to in any pleading or affidavit, pursuant to notice under O. XXXI., r. 14	0	6	8	0	6	8
Or per hour	0	6	8	0	6	8
Entry and setting down—						
To enter or set down action, demurrer, special case, or appeal, for hearing or trial	0	6	8	0	6	8
Evidence—						
To obtain an appointment to examine witnesses ...	0	6	8	0	6	8
On examination of witnesses before an examiner, commissioner, officer, or other person	0	13	4	0	13	4
Or according to circumstances, not to exceed ...	2	2	0	2	2	0
Or if without counsel, not to exceed	—			3	3	0

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
Evidence—continued.						
On deponent's being sworn, or by a solicitor or his clerk to be sworn, to an affidavit in answer to interrogatories or other special affidavit	0	6	8	0	6	8
Hearing and Trial—						
In Court on every special motion, each day	0	6	8	0	13	4
On same when heard each day	0	13	4	0	13	4
Or according to circumstances	1	1	0	2	2	0
On demurrer, special case, or special petition, or application adjourned from the Judges' Chambers, when in the special paper for the day, or likely to be heard	0	6	8	0	10	0
On same when heard	0	13	4	1	1	0
Or according to circumstances, not to exceed	1	1	0	2	2	0
On hearing or trial of any cause or matter, or issue of fact, in London or Middlesex, or the town where the solicitor resides or carries on business, whether before a judge, with or without a jury, a commissioner, or referee, or assessment of damages when in the paper	0	10	0	0	10	0
When heard or tried	0	13	4	1	1	0
Or according to circumstances	2	2	0	2	2	0
When not in London or Middlesex, nor in the town where the solicitor resides or carries on business, for each day (except Sundays) he is necessarily absent	2	2	0	3	3	0
And expenses (besides actual reasonable travelling expenses) each day, including Sundays	1	1	0	1	1	0
Or if the solicitor has to attend on more than one trial or assessment at the same time and place, in each case	1	1	0	1	11	6
The expenses in such case to be rateably divided.						
To hear judgment when same adjourned	0	6	8	0	13	4
Or according to circumstances	0	13	4	1	1	0
To deliver papers (when required) for the use of a judge prior to a hearing	0	6	8	0	6	8
If more than one judge... ..	0	13	4	0	13	4
Motion—						
In Court on motion of course and on counsel and for order	0	10	0	0	13	4
Petition—						
To present petition for order of course and for order	0	6	8	0	13	4
To present a special petition, and for same answered	0	6	8	0	6	8
Pleading—						
To deliver or file any pleading (not being a petition or summons)	0	3	4	0	6	8
Registrar—						
On registrar to certify that a cause set down is settled, or for any reason not to come into the paper for hearing	0	6	8	0	6	8
Special case—						
To deliver and file	0	3	4	0	6	8
Taxation—						
On taxation of a bill of costs	0	6	8	0	6	8
Or according to circumstances, not to exceed... ..	2	2	0	2	2	0
In causes for purposes within the cognizance of the Court of Chancery before the Act passed, such further fee as the taxing officer may think fit, not exceeding the allowances heretofore made.						
To file taxing master's certificate, and get copy marked as an office copy	0	6	8	0	6	8
To mark taxing master	0	6	8	0	6	8

Bills of costs.—See *post*, *Copies*.

Brief.—See *sup.*, *Attendance*, and *post*, *Copies*, *Drawing*, *Evidence*, *Instructions*.

Cesser of interest.—A defendant whose interest has ceased pending the action cannot obtain payment of his costs: (*Wymer v. Dodds*, L. Rep. 11 Ch. Div. 436; 40 L. T. Rep. N. S. 420.)

Change of parties.—[An order making the husband, personal representative, trustee, or other successor in interest of a married, deceased, or bankrupt party, or party whose estate has devolved by operation of law, a party to the action, or directing notice of action to be served on such husband, &c., may be made] on such terms [as to costs] as the court or judge shall think just: (O. L., r. 2; and see *post*, *Executor*.)

Co-defendant.—A defendant who is the cause of the litigation may be made to pay the costs of a plaintiff who is successful as against him, but unsuccessful as against his co-defendant, and to pay the co-defendant's costs: (*Child v. Stenning*, L. Rep. 11 Ch. Div. 82.)

Confession of defence.—[When the plaintiff delivers a confession of a defence which has arisen since action brought] he may thereupon sign judgment for his costs up to the time of the pleading of such defence, unless the court or a judge shall, either before or after the delivery of such confession, otherwise order: (O. XX., r. 3.)

Copies.—The fees allowed to solicitors are as follows:—

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
Accounts required at judges' chambers—						
Fair copy, to leave per folio (of seventy-two words, every figure com. risen in a column being counted as one word)	0	0	8	0	0	8
Amendments—						
Inserted in a printed copy of any pleading, special case, or petition of right, when not reprinted ...	0	1	0	0	5	0
Or per folio	0	0	4	0	0	4
Bills of costs—						
Copy for taxing officer. Per folio	0	0	8	0	0	8
Breaches—						
One copy to deliver included in fee for breaches.						
If more than one copy delivered, for each other copy, per folio	0	0	4	0	0	4
Brief—						
Per folio	0	0	4	0	0	4
Close copies—						
Whether printed or written, not to be allowed as of course, but the allowance to depend on the propriety of making or sending the copies, which in each case is to be shown and considered by the taxing officer.						
Documents—						
Where no other provision is made per folio	0	0	4	0	0	4
Furnished to another party, per folio: (Add. R., Aug. 1875, Sp. All. r. 16)	0	0	4	0	0	4
Required at judges' chambers, fair copy to leave, per folio	0	0	8	0	0	8
Copy made for use of solicitor, agent, or client, or for counsel to settle, included in fee for drawing: (Add. R., Aug. 1875, Sp. All. r. 2.)						
Engrossing—						
Order at chambers in winding-up proceedings, per folio	0	0	4	0	0	4

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
Evidence—						
Copy for printer (when not made by officer), per folio	0	0	4	0	0	4
Fair copies—						
Account, statements, and other documents for judges' chambers, when required, to leave, per folio ...	0	0	8	0	0	8
Interrogatories—						
Copies for service, and of orders with necessary notice (if any) to accompany, per folio ...	0	0	4	0	0	4
Notice wherever necessary or proper not specially provided for—						
Each copy for service, per folio, beyond first three folios	0	0	4	0	0	4
Notice (if any) to accompany interrogatories or petitions, per folio ...	0	0	4	0	0	4
Notice to Admit—						
Fee for first copy included in preparing fee.						
For each copy beyond the first, as taxing officer thinks proper, not exceeding, per folio ...	0	0	4	0	0	4
Notice of Meeting—						
To be served on contributories or creditors, per folio	0	0	4	0	0	4
Notice of Motion—						
Copy for service ...	0	1	0	0	1	0
Or per folio ...	—			0	0	4
Notice to Produce—						
Fee for first copy included in preparing fee.						
For each copy beyond the first, as taxing officer thinks proper, not exceeding per folio ...	0	0	4	0	0	4
Objections—						
One copy, to deliver, included in fee for objections.						
If more than one copy to be delivered, for each other copy, per folio ...	0	0	4	0	0	4
Orders—						
At chambers in winding-up proceedings, engrossing, per folio...	0	0	4	0	0	4
Copies for service of, to accompany interrogatories, per folio...	0	0	4	0	0	4
Copies for service of, to accompany petition, per folio	0	0	4	0	0	4
Particulars—						
One copy to deliver included in fee for particulars.						
If more than one copy to be delivered, for each other copy, per folio ...	0	0	4	0	0	4
Petition—						
Copies, for service of, and of orders with necessary notices (if any) to accompany, per folio ...	0	0	4	0	0	4
Petition of right—						
Copy for printer (when not made by officer), per folio	0	0	4	0	0	4
Pleadings—						
When no express provision made, per folio ...	0	0	4	0	0	4
Copy for printer (when not made by officer), per folio	0	0	4	0	0	4
Copy made for solicitor, agent, or client, or for counsel to settle included in fee for drawing: (Add. Rules, Aug. 1875, Sp. All., r. 2.)						
Printed copies—						
Where, pursuant to rules of court, any pleading, special case, or petition of right, or evidence is printed, the solicitor of the party printing shall be allowed for a copy for the printer (except when made by the officer of the court), at per folio ...	0	0	4	0	0	4

		Lower Scale.			Higher Scale.		
		£	s.	d.	£	s.	d.
Printed copies—continued.							
And for examining the proof print, at per folio ...		0	0	2	0	0	2
(a)	And for printing, the amount actually and properly paid to the printer, not exceeding per folio ...	0	1	0	0	1	0
	And in addition for every twenty beyond the first twenty copies, at per folio... ..	0	0	1	0	0	1
And where any part shall properly be printed in a foreign language, or as a <i>facsimile</i> , or in any unusual or special manner, or where any alteration in the document being printed becomes necessary after the first proof, such further allowance shall be made as the taxing officer shall think reasonable.							
These allowances are to include all attendances on the printer.							
The solicitor for a party entitled to take printed copies shall be allowed, for such number of copies as he shall necessarily or properly take, the amount he shall pay therefor.							
In addition to the allowances for printing and taking printed copies, there shall be allowed for such printed copies as may be necessary or proper for the following, but for no other purposes (<i>videlicet</i>) :—							
Of any pleading for delivery to the opposite party, or filing in default of appearance :							
Of any special case for filing :							
Of any petition of right for presentation, if presented in print, and for the solicitor of the Treasury, and service on any party :							
Of any pleading, special case, or petition of right, for the use of the court or judge :							
Of any affidavit to be sworn to in print :							
And of any pleading, special case, petition of right, or evidence for the use of counsel in court, and in country agency causes when proper to be sent as a close copy for the use of the country solicitor, at per folio		0	0	2	0	0	3
Such additional allowances for printed copies for the court or judge, and for counsel, are not to be made where written copies have been made previously to printing, and are not in any case to be made more than once in the progress of the cause.							
Close copies, whether printed or written, are not to be allowed as of course, but the allowance is to depend on the propriety of making or sending the copies, which in each case is to be shown and considered by the taxing officer.							
Service—							
Except as specially provided the allowance for copies for service is included in the allowance for service.							
Special case—							
Copy for printer (when not made by officer), per folio		0	0	4	0	0	4

(a) This is altered as follows :

The allowance for printing a document not exceeding ten folios, shall be 10s. ; and, in addition, for every twenty beyond the first twenty copies of any document not exceeding twenty-four folios, 2s. 6d. (Rules of June, 1876, r. 20.)

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
Statements—						
For judges' chambers, when required, fair copy to leave, per folio...	0	0	8	0	0	8
Summons—						
At judges' chambers, when required	0	2	0	0	2	0
Or per folio	—	—	—	0	0	4
For each copy to serve	0	1	0	0	1	0
Or per folio	0	0	4	0	0	4
Original, for proceedings at chambers in Chancery Division—For judge	0	2	0	0	2	0
Or per folio	—	—	—	0	0	4
Copies under Cons. Ord. 35, r. 8, included in endorsement fee.						
Winding-up—						
Usual charges in relation to printing allowed in lieu of copies for service, where the fee for copies would exceed charges for printing, and amount to more than 3 <i>l</i> .						
Engrossing orders made at chambers during proceedings, per folio	0	0	4	0	0	4
Writs—						
Costs of copy of writ of any description are included in the special fee for each writ.						
If exceeding two folios, for copy for service, per folio beyond such two	0	0	4	0	0	4

The taxing officer is not to allow any costs in respect of any copy unless the same appears to him to have been requisite and to have been made with due care both as to the contents and writing thereof: (C. O. 36, r. 13.)

A solicitor concerned for two or more parties is not allowed to charge for supplying himself with copies of documents which he has himself prepared (*Sharp v. Wright*, L. Rep. 1 Eq. 634) unless in cases where it is necessary for an affidavit of service, and a fee for copy for service is specially allowed: (Add. R., Aug. 1875, Sp. All., r. 6.)

Chambers.—See *sup.*, *Attendances*; *post*, *Counsel*; and CHAMBERS.

Counsel.—Such costs of procuring the advice of counsel on the pleadings, evidence, and proceedings in any cause or matter as the taxing officer shall in his discretion think just and reasonable, and of procuring counsel to settle such pleadings and special affidavits as the taxing officer shall, in his discretion, think proper to be settled by counsel, are to be allowed; but as to affidavits, a separate fee is not to be allowed for each affidavit, but one fee for all the affidavits proper to be so settled, which are or ought to be filed at the same time: (Add. R., Aug. 1875, Sp. All., r. 13.)

As to counsel attending at judges' chambers, no costs thereof shall in any case be allowed, unless the judge certifies it to be a proper case for counsel to attend: (Add. R., Aug. 1875, Sp. All., r. 14.)

In the chambers of the Master of the Rolls the attendance of counsel need only be specially allowed in applications for time: (*Webb v. Fitzgerald*, W. N. 1875, p. 244.)

When costs are to be taxed as between party and party, the taxing officer may allow to the party entitled to receive such costs all such just and reasonable expenses as appear to have been properly incurred in . . . procuring the attendance of counsel in judge's chambers . . . where the judge . . . has certified the case to be proper for counsel to attend: (C. O. 40, r. 32.)

Where the matter has been adjourned from chambers into court, the

court will always certify for counsel, unless it states to the contrary: (Dan. 1057.) In other cases the practice differs before the different judges. [See CHAMBERS.]

Fees to counsel for attendance before the chief clerks are only allowed on the certificate of the chief clerk that the case was proper for counsel: (Seton, 65.)

Three counsel will only be allowed in cases of great complication, as where serious charges of fraud are involved (*Kirkwood v. Webster*, L. Rep. 9 Ch. Div. 239; 26 W. R. 812), or the number of witnesses is large: (*Millard v. Burroughes*, W. N. 1880, p. 4.)

When the costs of a third and additional counsel were disallowed by the taxing officer, the court refused to interfere: (*Wegmann v. Corcoran*, 42 L. T. Rep. N. S. 792.)

Generally the same fees only will be allowed on appeal as have been allowed in the court below, but there is no hard and fast rule: (*Id.*)

The costs of a second consultation held pending the appeal have been disallowed: (*Id.*)

In taxing the costs of an action in the Chancery Division tried on oral evidence, the taxing master should allow refreshers to counsel for every day occupied by a trial beyond one day's time; but where the action is tried on affidavit evidence no refreshers should be allowed; and the amount of the refreshers lies in the discretion of the taxing master, and depends on the fee originally marked on the brief and the nature of the case: (*Harrison v. Wearing*, L. Rep. 11 Ch. Div. 206; 41 L. T. Rep. N. S. 376; 48 L. J. 365, Ch.; 27 W. R. 526.)

[And see *sup.* *Attendances, Copies*; and *post, Instructions*.]

Counter-claim.—[On an application to exclude a counter-claim the court or judge may] make such order as shall be just: (O. XXII., r. 9.)

As to the order where the counter-claim of a co-defendant was excluded, see *McLay v. Sharp*, W. N. 1877, p. 216.

Where the plaintiff claimed about 50*l.*, and the defendants counter-claimed for about 10*l.*, paying the remaining 40*l.* into court, and on the action being remitted to a County Court the registrar certified a verdict for the plaintiff for 16*s.*, the court altered the certificate by distributing the findings on the issues, so as to enable the defendant to be allowed the costs of the counter-claim: (*Davidson v. Gray*, 40 L. T. Rep. N. S. 192.)

Where the plaintiff sued for 404*l.* 7*s.* 9*d.* in contract, and the defendants paid 8*l.* 11*s.* into court, pleaded that the work had been improperly done, and counter-claimed for loss of trade profits, through defects in the article supplied by the plaintiffs, and the action and the counter-claim were referred to a district registrar, the costs of cause and counter-claim to follow the event, the party in whose favour the award was made to be at liberty to sign judgment for the sum found due, and the costs to which he should be entitled under the order of reference and award, and the arbitrator awarded a balance of 4*l.* in favour of the defendants, it was held that the defendants must pay the costs of proving the claim, and the plaintiffs must pay the costs of proving the counter-claim: (*Cole v. Firth*, 40 L. T. Rep. N. S. 851.)

When the plaintiff brought an action to recover 90*l.* in contract, and the defendant counter-claimed for an account book alleged to be improperly retained by the plaintiff, and a sum of 15*l.* for fixtures, and the judge at the trial directed the book to be returned to the defendant, which the plaintiff agreed to do, and, in order to insure its return, the learned judge assessed its value at 150*l.*, and a verdict was found by the jury for the plaintiff for 90*l.* damages on his claim, and for the defendant for 15*l.*

on his counter-claim, with 1s. damages for the detention of the book. but there was no distinct finding by the jury as to its value, and the judge directed the verdict to be entered for the plaintiff for 75*l.* (the difference between 90*l.* and 15*l.*), and ordered the book to be returned to the defendant, or 150*l.*, its value, and 1s. paid to him for its detention, and the book was returned to the defendant within a week after the trial, it was held that the plaintiff was entitled to the general costs of the cause, and the defendant to the costs of the particular issues which had been found in his favour: (*Hallinan v. Price*, 41 L. T. Rep. N. S. 627.)

Where the action and counter-claim are both dismissed with costs, the general costs of the proceedings are not to be apportioned, but the plaintiff must pay the general costs of the action, and the defendant must only pay that sum by which the costs of the proceedings have been increased by the counter-claim: (*Saner v. Bilton*, L. Rep. 11 Ch. Div. 416; 40 L. T. Rep. N. S. 314; 48 L. J. 545, Ch.)

Countermanding Notice of Trial.—[Leave for notice of trial to be countermanded] may be given subject to such terms as to costs or otherwise as may be just: (O. XXXVI., r. 13.)

County Court Action.—When an action is commenced in the County Court, and at the hearing transferred to the Chancery Division, as the subject matter exceeds 500*l.*, though the plaintiff succeeds in his action, he must pay the defendant's costs of the hearing in the County Court: (*Ward v. Wyld*, 37 L. T. Rep. N. S. 68.)

Delivery of Pleadings, Services, and Notices.—As to delivery of pleadings, services, and notices, the fees are not to be allowed when the same solicitor is for both parties, unless it be necessary for the purpose of making an affidavit of service: (Add. R., Aug. 1875, Sp. All., r. 6.)

Demand.—Service of . . . [See *Service*.]

Demurrer.—[No order to amend a pleading while a demurrer is pending] shall be made except on payment of the costs of the demurrer: (O. XXVIII., r. 7.)

[If a demurrer is not entered and notice thereof is not given, and an order for leave to amend is not served in time] the demurrer shall be held sufficient for the same purposes and with the same result as to costs as if it had been allowed on argument: (O. XXVIII., r. 6.)

Where a demurrer to the whole or part of any pleading is allowed upon argument, the party whose pleading is demurred to shall, unless the court otherwise order, pay to the demurring party the costs of the demurrer: (O. XXVIII., r. 8.)

Where the defendants were charged with fraud, and their demurrer was allowed, the plaintiff having leave to amend, the costs of the demurrer were reserved: (*Duckett v. Gover*, L. Rep. 6 Ch. Div. 82; 46 L. J. 407, Ch.)

In default of payment, the demurring party may obtain an order to stay proceedings until payment, and may afterwards move to dismiss for *non-pros*: (*White v. Bromige*, 38 L. T. Rep. N. S. 413; 26 W. R. 312.)

Where a demurrer is overruled the demurring party shall pay to the opposite party the costs occasioned by the demurrer, unless the court shall otherwise direct: (O. XXVIII., r. 11.)

Denials Improperly Pleaded.—Where the court or a judge shall be of opinion that any allegations of fact denied or not admitted by the defence ought to have been admitted, the court may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted: (O. XXII., r. 4.)

Discontinuance.—[A plaintiff withdrawing or discontinuing by notice, without leave,] shall [thereupon] pay the defendant's costs of the action,

or if the action be not wholly discontinued, the defendant's costs occasioned by the matter so withdrawn: (O. XXIII., r. 1.)

Such costs shall be taxed: (*Id.*)

[An order for discontinuance by a plaintiff may be made] upon such terms as to costs . . . as may seem fit: (*Id.*)

A defendant may sign judgment for the costs of an action if it is wholly discontinued, or for the costs occasioned by the matter withdrawn, if the action be not wholly discontinued: (O. XXXIII., r. 2a, June, 1876.)

Where the plaintiff discontinues without leave before delivery of statement of claim, the defendant is entitled as of right to all the costs of the action: (*The St. Olaf*, L. Rep. 2 P. Div. 113; 36 L. T. Rep. N. S. 302; 46 L. J. 74, P. D. & A.)

[The same terms may be imposed on making an order, on the application of a defendant that] the whole or any part of his alleged grounds of defence or counterclaim . . . be withdrawn or struck out: (O. XXXIII., r. 1.)

One of the defendants to an action for the recovery of land was allowed to withdraw his defence, after the action had been in the paper for trial but had been postponed till another action relating to the same property should be ready for trial, upon the terms of giving the plaintiffs all the relief to which they could be entitled at the trial, and paying the costs occasioned by the defence, and the costs of a summons for leave to withdraw. And, the defendant having offered in chambers what the court considered proper terms, the plaintiffs were ordered to pay the costs of an adjournment of the summons into court: (*Real and Personal Advance Company v. McCarthy*, L. Rep. 14 Ch. Div. 188; 42 L. T. Rep. N. S. 48; 28 W. R. 418.)

Dismissing action.—When the statement of claim is not delivered in time the court or a judge, on an application to dismiss the action with costs for want of prosecution may make such order, or such other order on such terms as to the court or a judge shall seem just: (see O. XXIX., r. 1.)

When the plaintiff fails to give notice of trial, the defendant, instead of giving notice of trial, may move for a similar order: (see O. XXXVI., r. 4a, June, 1876.)

District Registry.—When a writ of summons for the commencement of an action shall be issued from a district, and when an action proceeds in a district registry, all fees and allowances, and rules and directions relating to costs, which would be applicable to such proceeding if the writ were issued, and the action proceeded in London, shall apply to such writ of summons issued from and other proceedings in the district registry: (Add. R., Aug. 1875, Sp. All., r. 34.)

Where final judgment is entered in the district registry costs shall be taxed in such registry unless the court or a judge shall otherwise order: (O. XXXV., r. 3.)

Where all proceedings were carried on in the district registry up to further consideration, which was heard before Hall, V.C., he refused to make an order for taxation, otherwise than before the taxing officer in London, and said that such an order would only be made under very special circumstances: (*Day v. Whittaker*, L. Rep. 6 Ch. Div. 734; 36 L. T. Rep. N. S. 683; 46 L. J. Ch. 680; 25 W. R. 767.)

Documents.—See *sup.*, *Copies*, and *post*, *Evidence*.

Drawing.—As to drawing any pleading or other document, the fees allowed shall include any copy made for the use of the solicitor, agent, or client, or for counsel to settle: (Add. R. Aug., 1875, Sp. All., r. 2.)

The fees allowed to solicitors are as follows:

	Lower Scale. £ s. d.			Higher Scale. £ s. d.		
Accounts, statements, and other documents for the judges' chambers, when required, and fair copy to leave, per folio...	0	0	8	0	0	8
Advertisements to be signed by judges' clerk, including attendance therefor	0	6	8	0	13	4
Bill of costs for taxation, including copy for the taxing officer	0	0	8	0	0	8
Brief, on trial or hearing of cause, issue of fact, assessment of damages, examination of witnesses, demurrer, special case and petition before a court or judge, sheriff, commissioner, referee, examiner, or officer of the court, when necessary and proper in addition to pleadings, including necessary and proper observations, per folio...	0	1	0	0	1	0
Brief on application to add parties	0	6	8	0	10	0
Or per folio	0	1	0	0	1	0
Brief on further consideration, per sheet of ten folios	0	6	8	0	6	8
Statement of claim	0	10	0	1	1	0
Or per folio	0	1	0	0	1	0
Statement of defence	0	5	0	0	10	0
Or per folio	0	1	0	0	1	0
Statement of defence and counter-claims	0	5	0	1	1	0
Or per folio	0	1	0	0	1	0
Reply, with or without joinder of issue, confession of defence, joinder of issue without other matter, demurrer, and any other pleading (not being a petition or summons) and amendments of any pleading	0	5	0	0	10	0
Or per folio	0	1	0	0	1	0
Particulars, breaches, and objections, when required, and one copy to deliver	0	5	0	0	6	8
Or such amount as the taxing officer shall think fit, not exceeding per folio	0	0	8	0	1	4
If more than one copy to be delivered, for each other copy per folio	0	0	4	0	0	4
Special case, affidavits in answer to interrogatories and other special affidavits, special petitions, and interrogatories, per folio	0	1	0	0	1	0

And see *post*, *Special Documents*.

Evidence.—As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed: (Add. R., Aug. 1875, Sp. All., r. 8.)

The taxing officer, in his discretion, may allow for the attendance of scientific witnesses at the trial, and the reasonable expenses of such witnesses qualifying themselves to give evidence: (*Turnbull v. Janson*, L. Rep. 3 C. P. Div. 264; 47 L. J. 384, C. P.)

The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same: (O. XXXVII., r. 3.)

Unreasonable refusal to consent to affidavit evidence may subject the party refusing to an order for payment of the costs: (*Patterson v. Wooler*, L. Rep. 2 Ch. Div. 586.)

Any party printing evidence for the purpose of an appeal without . . . order shall bear the costs thereof, unless the Court of Appeal or a judge thereof shall otherwise order: (O. LVIII., r. 12.)

In case of refusal or neglect to admit [documents] after . . . notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the action may be, unless at the hearing or trial the court certify that the refusal to admit was reasonable: (O. XXXII., r. 2.)

No costs of proving any document shall be allowed, unless such notice be given except when the omission to give the notice is in the opinion of the taxing officer a saving of expense: (*Id.*)

As to affidavits, when there are several deponents to be sworn, or it is necessary for the purpose of an affidavit being sworn to go to a distance, or to employ an agent, such reasonable allowance may be made as the taxing officer in his discretion may think fit: (Add. R. Aug., 1875, Sp. All., r. 4.)

The following fees are allowed:—	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
Commissioners to take oaths or affidavits. For every oath, declaration, affirmation, or attestation upon honour in London or the country	0	1	6	0	1	6
The solicitor for preparing each exhibit in town or country	0	1	0	0	1	0
The commissioner for marking each exhibit	0	1	0	0	1	0

[And see *post*, *Improper Proceedings*; *Instructions*, *Special Documents*.]

Excluding Cause of Action.—The court or a judge making an order excluding any of several causes of action, may make such order as to costs as may be just: (O. XVII., r. 9.)

Execution.—A second writ [of execution on a judgment drawn up by the Chancery Registrars for the recovery of money and costs] shall be for costs only, and shall be issued not less than eight days after the first writ: (O. XLII., r. 15a, April, 1880.)

The following fees are allowed:—	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
Writ of execution or other writ to enforce judgment or order	0	7	0	0	10	0
If more than four folios, for each folio beyond four	0	1	4	0	1	4
Attendances to issue or seal	{ [Included in other fees.]					
Copies, for sealing	{ [Included in other fees.]					
Endorsements, for sealing	{ [Included in other fees.]					
Præcipes for officer sealing	{ [Included in other fees.]					
Procuring a writ of execution or notice to the sheriff, marked with a seal of renewal	0	6	8	0	6	8
Notice thereof to serve on sheriff	0	4	0	0	5	0
Service [See <i>Service</i> .]						

Executor.—An executor improperly paying a legacy into court under the Trustee Relief Act, will be left to take his costs out of the residuary estate, and will not have them out of the legacy: (*Re Birkett*, L. Rep. 9 Ch. Div. 576; 39 L. T. Rep. N. S. 418; 47 L. J. 846, Ch.)

An executor, who has obtained an order allowing him to continue the proceedings in an action instituted by the testator, in which the testator has obtained judgment, notice of appeal having been given, is in the same position and subject to the same liabilities as he would have been under

the old order for revivor, and is personally liable for the costs of the action: (*Boyton v. Boyton and others*, L. Rep. 4 App. Cas. 733; 41 L. T. Rep. N. S. 458, H. of L.; 27 W. R. 825.)

Extending Time.—See *post*, *Time*.

Improper Proceedings.—The court or a judge may, at the hearing of any cause or matter, or upon any application or procedure in any cause or matter in court or at chambers, and whether the same is objected to or not, direct the costs of any pleading, affidavit, evidence, notice to cross-examine witnesses, account, statement, or other proceeding, or any part thereof, which is improper, unnecessary, or contains unnecessary matter, or is of unnecessary length, to be disallowed, or may direct the taxing officer to look into the same and to disallow the costs thereof, or of such part thereof as he shall find to be improper, unnecessary, or to contain unnecessary matter, or to be of unnecessary length; and in such case the party whose costs are so disallowed shall pay the costs occasioned to the other parties by such unnecessary proceeding, matter, or length: (Add. R., Aug. 1875, Sp. All. r. 18.)

The court has directed the taxing officer to look into the affidavits, and disallow the costs of so much of them as appear to be of unnecessary length: (*Cracknall v. Janson*, L. Rep. 11 Ch. Div. 1; 39 L. T. Rep. N. S. 33.)

Where in the Chancery Division any question as to any costs is under the preceding Rule 18 dealt with at chambers, the chief clerk is to make a note thereof, and state the same on his allowance of the fees for attendance at chambers, or otherwise as may be convenient for the information of the taxing officer: (A. R., Aug. 1875, Sp. All. r. 20.)

As to setting off such costs, see *post*, *Set-off*. [And see *post*, *Opposite Party's Costs*.]

Inquiry, Writ of.—See *post*, *Writ*.

Inspection of Documents.—As to the inspection of documents, no allowance is to be made for any notice or inspection, unless it is shown to the satisfaction of the taxing officer that there were good and sufficient reasons for giving such notice and making such inspection: (Add. R., Aug. 1875, Sp. All. r. 15.)

Instructions.—As to instructions to sue or defend, when the higher scale is applicable, if in consequence of the instructions being taken separately from more than three persons (not being co-partners) the taxing officer shall consider the fee . . . provided [in the schedule] inadequate, he may make such further allowance as he shall in his discretion consider reasonable: (Add. R., Aug. 1875, Sp. All. r. 3.)

The allowances for instructions and drawing an affidavit in answer to interrogatories and other special affidavits, and attending the deponent to be sworn, include all attendances on the deponents to settle and read over: (Add. R., Aug. 1875, Sp. All. r. 5.)

The following fees for instructions are allowed to solicitors:

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
To add parties by order of court or judge	0	6	8	0	13	4
For affidavit in answer to interrogatories, and other special affidavits	0	6	8	0	6	8
To appeal	0	13	4	1	1	0
For counsel to advise on evidence when the evidence in chief is to be taken orally	0	6	8	0	6	8
Or not to exceed	0	13	4	1	1	0
For counsel to make any application to a court or judge where no other brief	0	6	8	0	10	0

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
For brief on motion for special injunction	0	13	4	1	1	0
For brief on hearing or trial of action upon notice of trial given, whether such trial be before a judge or with or without a jury, or before an official or special referee, or on trial of an issue of fact before a judge, commissioner, or referee, or on assessment of damages	1	1	0	2	2	0
For such brief, and for brief on the hearing of an appeal when witnesses are to be examined or cross-examined such fee may be allowed as the taxing officer shall think fit having regard to all the circumstances of the case, and to other allowances, if any, for attendance on witnesses and procuring evidence.						
The fees for instructions for brief are not to apply to a hearing on further consideration.						
To defend... ..	0	6	8	0	13	4
For statement of complaint	0	13	4	2	2	0
For statement or further statement of defence	0	6	8	0	13	4
For counter-claim	0	6	8	0	13	4
For confession of defence	0	6	8	0	13	4
For reply by plaintiff when defendant set up a counter-claim	0	13	4	1	1	0
For reply or further reply in any other case by plaintiff or other person. with or without joinder of issue ...	0	6	8	0	13	4
For joinder of issue without other matter and for demurrer	0	6	8	0	13	4
For special case, special petition, any other pleading (not being a summons), and interrogatories for examination of a party or witness	0	6	8	0	13	4
To amend any pleading	0	6	8	0	13	4
To sue	0	6	8	0	13	4

And see *post*, *Special Documents*.

Interlocutory Applications.—The general practice of the Master of the Rolls is to order that the costs of all interlocutory applications in an action should be those of the successful party “in any event,” and should only be taxed on the first general taxation of costs in the action; but in special cases, as where the interlocutory application decides the whole question in dispute, or where the conduct of the unsuccessful party meets with his disapprobation, he allows an immediate taxation: (68 L. T. 361.)

Interpleader.—An interpleader order does not deprive the court of jurisdiction as to costs: (*Wicks v. Wood*, 26 W. R. 680.)

Interrogatories.—The court in adjusting the costs of the action shall at the instance of any party inquire or cause inquiry to be made into the propriety of exhibiting such interrogatories; and if it is the opinion of the taxing master or of the court or judge that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be borne by the party in fault: (O. XXXI., r. 2.)

The following fees are allowed to solicitors:

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
Copies for service of interrogatories, with necessary notice (if any), to accompany, per folio	0	0	4	0	0	4

[And see *sup.*, *Copies*, and, *post*, *Instructions*, and *Special Documents*.]

Irregularity.—[In case of non-compliance with rules of court the] proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with . . . upon such terms [as to costs] as the court or judge shall think fit: (O. LIX., r. 1, and see *sup. Amendment*.)

Judgment by Default.—In case of non-appearance by the defendant where the writ of summons is specially indorsed, under Order 3, rule 6, the plaintiff may sign final judgment for any sum not exceeding the sum indorsed . . . with interest . . . and a sum for costs: (O. XIII., r. 3.)

Where the defendant fails to appear to the writ of summons . . . not specially indorsed, but where the plaintiff's claim is for a debt or liquidated demand only, no statement of claim need be delivered, but the plaintiff may . . . enter final judgment for the amount shown thereby and costs to be taxed, provided that the amount shall not be more than the sum indorsed upon the writ besides costs: (O. XIII., r. 5.)

[If defendant makes default in delivery of defence or demurrer in an action claiming only a debt or liquidated demand] the plaintiff may enter final judgment for the amount claimed, with costs: (O. XXIX., r. 2.)

Where judgment by default has been given for non-appearance at the trial, through a solicitor's mistake, an order for restoration of the cause to the list, will be made subject to payment of costs of the day and of the application: (*Wright v. Clifford*, 26 W. R. 369; *Burgoine v. Taylor*, 38 L. T. Rep. N. S. 438; *Cockle v. Joyce*, L. Rep. 7 Ch. Div. 36; 37 L. T. Rep. N. S. 428.)

Mandamus.—The following fees are allowed to solicitors:

	Lower Scale.	Higher Scale.
	£ s. d.	£ s. d.
The writ	0 10 0	1 1 0
Or per folio	0 1 4	0 1 4
Attendance to Issue or Seal	{ [Included in other fees.]	
Copies for officer sealing	{ [Included in other fees.]	
Indorsements	{ [Included in other fees.]	
Præcipe, on sealing	{ [Included in other fees.]	
Service [see <i>Service</i> .]	{ [Included in other fees.]	

Married Woman.—The court may order the costs to be paid out of the separate estate of a married woman, party to the action: (*Morris v. Freeman*, L. Rep. 3 P. D. 65; 39 L. T. Rep. N. S. 125.)

Motion.—A party not interested, who has been served with notice of motion, is not entitled to appear by counsel merely to ask for costs. But where no intimation was given to him when he was served, that he need not appear, and no tender was made to him of his costs of being advised as to the effect of the motion, he was allowed 40s. costs: (*Campbell v. Holyland*, L. Rep. 7 Ch. Div. 166; 38 L. T. Rep. N. S. 128; 47 L. J. 145, Ch.; 26 W. R. 160.)

Where defendants were served with an informal notice of motion, to which they were not bound to appear, and they appeared to oppose the motion, but no one appeared in support of it, they were refused their costs: (*Daubney v. Skuttleworth*, L. Rep. 1 Ex. Div. 53; 45 L. J. 177, Ex.)

[The court or judge making an order *ex parte*, to avoid delay, may impose] such terms as to costs as such court or judge may think fit: (O. LIII., r. 3.)

Notice—The following fees are allowed to solicitors :

In Company Cases :

	Lower Scale. £ s. d.	Higher Scale. £ s. d.
As to notice in proceedings to wind-up companies, for preparing or filling up each notice to creditors to attend and receive debts, and to contributories to settle list of contributories	0 1 0	0 1 0
And for preparing or filling up each notice to contributories to be served with a general order for a call, or an order for payment of a call	0 1 0	0 1 0
And for drawing notice to be served on contributories or creditors of a meeting, per folio	0 1 0	0 1 0
For each copy of the last-mentioned notice to serve, per folio	0 0 4	0 0 4

To Creditors in other Cases—

For preparing or filling up for service in any other cause or matter, each notice to creditors to prove claims, and each notice that cheques may be received, specifying the amount to be received for principal and interest, and costs, if any	0 1 0	0 1 0
---	-------	-------

Of Filing Affidavits—

Where notice of filing affidavits is required, only one notice is to be allowed for a set of affidavits filed, or which ought to be filed together.

Of Motion—

For preparing notice of motion	0 2 0	0 5 0
Or per folio	0 1 0	0 1 0
Copy for service	0 1 0	0 1 0
Or per folio	—	0 0 4

To Produce or Admit—

For preparing notice to produce or admit, and one copy	0 5 0	0 7 6
If special or necessarily long, such allowance as the taxing officer shall think proper, not exceeding per folio	0 0 8	0 1 4
And for each copy beyond the first, such allowance as the taxing master shall think proper, not exceeding per folio	0 0 4	0 0 4

Other notices—

For preparing any necessary or proper notice, not otherwise provided for and demand	0 1 6	0 1 6
Or if special, and necessarily exceeding three folios, for preparing same, for each folio beyond three	0 1 0	0 1 0
And for each copy for service, per folio beyond such three	0 0 4	0 0 4

Service of.—See *Service*.

[And see *sup. Copies*.]

Objections.—See *sup. Copies*.

Offer.—In order to stay their liability to costs, the defendants must make a clear unconditional offer, equivalent to the whole right of the plaintiff at the time: (*Trotter v. Maclean*, L. Rep. 13 Ch. Div. 575; 42 L. T. Rep. N. S. 118.)

Next Friend.—A judgment should expressly provide for the costs of a next friend, as they cannot otherwise be allowed out of the estate on further consideration: (*Caley v. Caley*, W. N. 1877, p. 89.)

A next friend will be made to pay personally the costs of striking out scandalous pleadings: (*Coyle v. Cumming*, 40 L. T. Rep. N. S. 455.)

Opposite Party's Costs.—As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear to the taxing officer to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party: (Add. R., Aug. 1875, Sp. All. r. 26.)

Orders.—The following fees are allowed to solicitors:—

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
Copies for service of orders with necessary notices (if any) to accompany per folio	0	0	4	0	0	4

[And see *sup.*, *Copies*, and *post*, *Service*.]

Particulars.—[See *sup.*, *Copies*.]

Payment into Court.—Where the money paid into court by the defendant is accepted by the plaintiff in satisfaction of the entire cause of action, the plaintiff, after notice to the defendant, may tax his costs, and, in case of non-payment within forty-eight hours, sign judgment for his costs so taxed: (See O. XXX., r. 4.)

If the plaintiff does not give to the defendant the notice required by the Act, he takes the risk, if the sum paid him is not sufficient, of losing all costs: (*Langridge v. Campbell*, L. Rep. 2 Exch. Div. 281; 46 L. J. Ex. 277.)

But even where he has not given the notice, he may apply by summons at chambers for an order giving him costs: (*Greaves v. Fleming*, L. Rep. 4 Q. B. Div. 226; 48 L. J. 335, Q. B.)

Where a defendant paid a sum of money into court in satisfaction of the plaintiff's claim, and the issues were afterwards referred to an official referee, who reported that the sum paid in was sufficient, the court in its discretion allowed the plaintiff his costs up to the time of payment into court: (*Buckton v. Higgs*, L. Rep. 4 Ex. Div. 174; 40 L. J. 755; 27 W. R. 803.)

The court or a judge may, for sufficient reason, deprive a party of his costs: (*Broadhurst v. Willey*, W. N. 1876, p. 21.)

Perusals.—As to perusals, the fees are not to apply where the same solicitor is for both parties: (Add. R., Aug. 1875, Sp. All. r. 7.)

The following fees are allowed to solicitors for perusals:

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
Of statement of complaint, statement of defence, reply, joinder of issue, demurrer, and other pleading (not being a petition or summons) by the solicitor of the party to whom the same are delivered	0	6	8	0	13	4
Or per folio	—	—	—	0	0	4
Of amendment of any such pleading in writing	0	6	8	0	6	8
Or per folio	—	—	—	0	0	4
If same reprinted	0	6	8	0	13	4
Or per folio of amendment	—	—	—	0	0	4
Of interrogatories to be answered by a party by his solicitor	0	6	8	0	13	4
Or per folio	—	—	—	0	0	4
Of special case by the solicitor of any party except the one by whom it is prepared	0	6	8	0	13	4
Or per folio	—	—	—	0	0	4
Of copy order to add parties, notice of defendant's claim against any person not a party to the action under Order XVI., Rule 18, and of defendant's statement of defence and counterclaim served on a						

	Lower Scale. £ s. d.			Higher Scale. £ s. d.		
person not a party under Order XXII., Rule 6, by the solicitor of the party served therewith, and in these several cases the perusal of the plaintiff's statement of claim is also to be allowed unless the solicitor has been previously allowed such perusal ...	0	6	8	0	13	4
Or per folio	—			0	0	4
Of notice to produce and notice to admit by the solicitor of the party served	0	6	8	0	13	4
Of affidavit in answer to interrogatories by the solicitor of the party interrogating, and of other special affidavits by the solicitor of the party against whom the same can be read, per folio ...	0	0	4	0	0	4

As to perusal of petition, see *post*, *Petition*.

Petition.—Where a petition in any cause or matter assigned to the Chancery Division is served, and notice is given to the party served that in case of his appearance in court his costs will be objected to, accompanied by a tender of [2*l*. 2*s*.] costs for perusing the same, the party making such payment shall be allowed the same in his costs, provided such service was proper, but not otherwise; but this order is without prejudice to the rights of either party to costs, or to object to costs where no such tender is made, or where the court or judge shall consider the party entitled, notwithstanding such notice or tender, to appear in court. In any other case in which a solicitor of a party served necessarily or properly peruses any such petition without appearing thereon, he is to be allowed a fee not exceeding 2*l*. 2*s*. : (Add. R., Aug. 1875, Sp. All. r. 17.)

Where a petition which ought to be short is of great length, the court will allow a fixed sum, generally ten guineas, for costs : (*Bull v. Jones*, W. N. 1880, p. 65.)

The following fees are allowed to solicitors,

	Lower Scale. £ s. d.			Higher Scale. £ s. d.		
Copies for service of petitions with necessary notices (if any) to accompany per folio	0	0	4	0	0	4

[And see *sup*. *Copies*, and *post*, *Service*.]

Pleading [see *sup*. *Copies*, and *post*, *Prolixity*.]

Probate Costs.—Costs of an administration in the Chancery Division have priority over a charge subsequently created on the estate, for costs, by another court, e.g., the Probate Division : (*Re Mayherd*, L. Rep. 5 Ch. Div. 596.)

Prolixity.—Any costs occasioned by the use of any more prolix or other forms of writs, and of indorsements thereon, than the forms prescribed [by the Rules] shall be borne by the party using the same, unless the court shall otherwise direct : (O. II., r. 2.)

The court, in adjusting the costs of the action shall inquire at the instance of any party into any unnecessary prolixity [in a statement of claim, defence, set-off, or counter-claim] and order the costs occasioned by such prolixity to be borne by the party chargeable with the same : (O. XIX., r. 2.)

Referee.—Where the report contains no mention of the reference, the costs may be dealt with by the taxing-master without an order therefor by the court : (*Rowcliffe v. Leigh*, 26 W. R. 729.)

Scandal.—The court may order a person who has filed a scandalous

affidavit to pay the costs of it, on the application of any person, even a stranger to the action, or *mero motu*: (*Cracknall v. Janson*, L. Rep. 11, Ch. Div. 1; 39 L. T. Rep. N. S. 33.)

When scandalous pleadings are struck out the applicant will be allowed costs as between solicitor and client: (*Coyle v. Cuming*, 40 L. T. Rep. N. S. 455.)

Service.—The following fees are allowed to solicitors:

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
Where appearance not entered—						
Of any writ, summons, warrant, interrogatories, petition, order, notice, or demand on a party who has not entered an appearance, and if not authorised to be served by post	0	5	0			0
If served at a distance of more than two miles from the nearest place of business or office of the solicitor serving the same, for each mile beyond such two miles therefrom	0	1	0	0	1	0
Where in consequence of the distance of the party to be served, it is proper to effect such service through an agent (other than the London agent), for correspondence in addition	0	7	0	0	7	0
Where more than one attendance is necessary to effect service, or to ground an application for substituted service, such further allowance may be made as the taxing officer shall think fit.						
For service out of the jurisdiction such allowance is to be made as the taxing officer shall think fit.						
Where appearance entered—						
Service where an appearance has been entered on the solicitor or party	0	2	6	0	2	6
Or if authorised to be served by post	0	1	6	0	1	6
Where two documents served together:						
Where any writ, order, and notice, or any two of them, have to be served together, one fee only for service is to be allowed.						
Copies for service—						
Except as otherwise provided, the allowances for services include copies for service.						
In proceedings to wind up a company, the usual charges relating to printing shall be allowed in lieu of copies for service, where the fee for copies would exceed the charges for printing, and amount to more than 3 <i>l</i> .						
Where any appointment is or ought to be adjourned, service of a notice of the adjournment, or next appointment, is not to be allowed.						
Of interrogatories	0	0	4	0	0	4
Of notice of motion	0	1	0	0	1	0
Or per folio	—			0	0	4
Of notice not otherwise provided for if special, per folio, beyond three, if necessary	0	0	4	0	0	4
Of order, with necessary notices (if any) to accompany, per folio... ..	0	0	4	0	0	4
Of petitions, per folio	0	0	4	0	0	4
Each copy of summons to attend at judge's chambers	0	1	0	0	2	0
Or per folio	0	0	4	0	0	4
Of writs, if exceeding two folios, per folio, beyond such two	0	0	4	0	0	4

Setting aside Judgment by Default.—[An order of the court or a judge setting aside a judgment by default may be made] upon such terms as to costs . . . as such court or judge may think fit : (O. XXIX., r. 14; and see *sup.*, *Judgment by Default.*)

Set-off.—In any case in which, under the preceding rule No. 18, or any other rule of court, or by the order or direction of a court or judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such officer may allow or certify the costs to be paid, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered : (Add. R., Aug. 1875, Sp. All. r. 19.)

The right of set-off prevails over the solicitor's lien for costs : (*Robarts v. Buëe*, L. Rep. 8 Ch. Div. 198; 47 L. J. 414, Ch.; 26 W. R. 393.)

In an action for an injunction in respect of three separate subjects of complaint the plaintiff obtained an injunction upon one point, but his claim was dismissed as to the other two, and under an order to tax the costs of the defendant of so much of the action as had been dismissed, and to tax the costs of the plaintiff of the rest of the action, with a set off of the costs of the plaintiff against those of the defendant, the certificate of the taxing master taxing the costs as a whole, and apportioning them in thirds was held to be right : (*Knight v. Purssell*, L. Rep. 11 Ch. Div. 412; 41 L. T. Rep. N. S. 581; 49 L. J. 120, Ch.; 28 W. R. 90.)

When the plaintiff succeeded as to part, and failed as to the rest of his action, which was for an injunction, it was left to the taxing master to ascertain the costs in respect of each matter, and to set-off one portion against the other : (*Bourke v. Alexandra Hotel Company*, 25 W. R. 782.)

Severance.—Only one set of costs is allowed in case trustees or personal representatives sever in commencing or defending proceedings : (Dan. 1274.)

Where the severance is caused by default or misconduct of one of two such parties, and one set of costs only is allowed, it is generally ordered to be paid to the innocent party : (Dan. 1274.)

Where such a party commences proceedings, and his costs have otherwise been properly incurred, if he has acted improperly in not making his co-trustee, &c., a co-plaintiff, the costs of the defendant trustee, &c., will be deducted from the plaintiff's costs, but if the defendant trustee, &c., refused to join as co-plaintiff, his costs will be disallowed : (Dan. 1274.)

If the whole of the costs are not given to one trustee, &c., the apportionment is generally left to the taxing officer : (*Id.*)

Shorthand Notes.—Costs of shorthand notes should be applied for at the trials. There is no power to allow them unless a special direction has been given : (*Kirkwood v. Webster*, L. Rep. 9 Ch. Div. 239.)

The court refused to give costs of shorthand notes to the successful party, though each side had employed a shorthand writer, where they had not required them to be produced : (*Thorley's Company v. Massam*, 41 L. T. Rep. N. S. 543.)

Where an appeal dismissed with costs generally, the costs of shorthand notes are not included, although the solicitors have agreed that one shorthand writer shall act for both parties : (*Ashworth v. Outram*, L. Rep. 9 Ch. Div. 486; 39 L. T. Rep. N. S. 441.)

No order for such costs can be made after the judgment on appeal has been drawn up : (*Hill v. Metropolitan Asylum*, W. N., 1880, p. 98.)

Where an action is referred, the cost of brief copies of the transcript

of shorthand writer's notes of each day's proceedings in the reference, made for the use of counsel, will not, in the absence of any order and of agreement between the parties, be allowed on taxation: (*Wells v. Mitcham Gas Light Company*, L. Rep. 4 Ex. Div. 1.)

Solicitor.—The court has no jurisdiction to make a solicitor pay the costs of an action rendered necessary by his having made a blunder: *Clark v. Girdwood*, L. Rep. 7 Ch. Div. 23; 37 L. T. Rep. N. S. 614; 47 L. J. 116, Ch.)

Where the solicitor of a party is uncertificated, such party cannot recover costs, although successful: (*Fowler v. Monmouthshire Canal Company*, L. Rep. 4 Q. B. Div. 334.)

Where a solicitor has commenced an action in the name of a plaintiff without authority, the proper course is for the plaintiff to serve notice of motion on the defendant, as well as on the solicitor, that the action may be dismissed, and that the solicitor may pay the costs of the plaintiff as between solicitor and client; and the costs of the defendant as between party and party: (*Newbiggin-by-the-Sea Gas Company v. Armstrong*, L. Rep. 13 Ch. Div. 310; 41 L. T. Rep. N. S. 637.)

Special Case.—See *sup. Copies*.

Special Documents.—As to writs of summons requiring special indorsement . . . pleadings and affidavits in answer to interrogatories, and other special affidavits, when the higher scale is applicable, the taxing officer may, in lieu of the allowances for instructions and preparing or drawing, make such allowance for work, labour, and expenses in or about the preparation of such documents as in his discretion he may think proper: (Add. R., Aug. 1875, Sp. All., r. 1.)

Specially indorsed Writ—Cause not shown.—Where the defendant appears, on a writ of summons specially indorsed, and fails to show cause why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed . . . interest, and costs; the court or judge may make an order empowering the plaintiff to sign judgment accordingly: (O. XIV., r. 1, May, 1877.)

[If the defence set up applies only to part of the claim, or any part] is admitted to be due; the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to, or as is admitted to be due, subject to such terms, if any, as to . . . the taxation of costs or otherwise, as the judge may think fit: (O. XIV., r. 4.)

The defendant may, notwithstanding [payment to procure stay of proceedings on a specially indorsed writ], have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's solicitor shall pay the costs of the action: (O. III., r. 7.)

The right of taxation exists, though payment has been accepted by the plaintiff after four days from service: (*Hoole v. Earnshaw*, W. N. 1878, p. 227; 39 L. T. Rep. N. S. 409.)

And see *sup.*, *Special Documents*.

Specific Performance.—When a vendor of real estate brought an action for a declaration that the contract was at an end, and the purchaser counter-claimed for specific performance, and succeeded on both action and counter-claim, he was held entitled to deduct his costs from his purchase money in priority to a mortgage by the plaintiff, made after the contract of sale, but before the commencement of action: (*Green v. Sevin*, L. Rep. 13 Ch. Div. 589; and see *Specific Performance*.)

Statement.—See *sup. Copies*.

Statement of Claim improperly delivered.—Where a plaintiff delivers a statement of claim without being required to do so, the court or a judge may make such order as to the costs occasioned thereby as shall seem

just, if it appears that the delivery of a statement of claim was unnecessary or improper: (O. XXI., r. 1.)

Striking Out.—The costs given on a motion to strike out will not exceed those of a summons attended by counsel: (*Marriott v. Marriott*, 26 W. R. 416; and see *sup. Irregularity, Scandal.*)

Subpœna.—The following fees are allowed to solicitors:

	Lower Scale.	Higher Scale.
	£ s. d.	£ s. d.
<i>Ad test. duces tecum</i>	0 6 8	0 6 8
If more than four folios, for each folio beyond four ...	0 1 4	0 1 4
<i>Ad test.</i> for any number of persons not exceeding three, and the same for every additional number not exceed- ing three	0 6 8	0 6 8
Attendances to issue or seal copies on sealing ...	[Included in other fees.]	
Copies on sealing		
Indorsements on sealing		
<i>Præcipe</i> on sealing		
Service [see <i>Service</i> .]		

Summons.—The following fees are allowed to solicitors:

	Lower Scale.	Higher Scale.
	£ s. d.	£ s. d.
Ordinary—		
Summons to attend at judges' chambers	0 3 0	0 6 8
Or if special, at taxing officer's discretion, not exceed- ing	0 6 8	1 1 0
Copy for the judge, when required	0 2 0	0 2 0
Or per folio	—	0 0 4
Original—		
Original summons for proceedings in chambers in the Chancery Division	0 13 4	1 1 0
And attending to get same and duplicate sealed, and at the proper office to file duplicate and get copies for service stamped	0 13 4	0 13 4
Copy for the judge	0 2 0	0 2 0
Or per folio	—	0 0 4
Endorsing same and copies under 8th Rule of the 35th of the Consolidated General Orders of the Court of Chancery	0 6 8	0 6 8

And see *sup. Attendances, Chambers, Instructions.*

Term Fees.—The following are allowed to solicitors:

	Lower Scale.	Higher Scale.
	£ s. d.	£ s. d.
For every term commencing on the day the sittings in London and Middlesex of the High Court of Justice commence, and terminating on the day preceding the next such sittings, in which a proceeding in the cause or matter, by or affecting the party, other than the issuing and serving the writ of summons, shall take place	0 15 0	0 15 0
And further, in country agency causes or matters, for letters	0 6 0	0 6 0
Where no proceeding in the cause or matter is taken which carries a term fee, a charge for letters may be allowed, if the circumstances require it.		
In addition to the above an allowance is to be made for the necessary expense of postages, carriage and transmission of documents.		

Third Party.—Where a person was brought in to defend as third party, and was successful, the Queen's Bench Division refused to make the plaintiff pay his costs: (*Williams v. South-Eastern Railway Company*, 26 W. R. 352);

And the same court held that there was no jurisdiction to impose any terms as to costs of a party brought in by notice, and set aside an order for payment of the costs by the defendant: (*Yorkshire Waggon Company v. Newport and Abercarne Coal Company*, L. Rep. 5 Q. B. Div. 268; 42 L. T. Rep. N. S. 367); but Fry, J. ordered the costs of a third and fourth party to whom notice had been given, to be paid by the plaintiff, when the defendant substantially succeeded: (*Witham v. Vane*, 7th June, 1880.)

Where the Court of Appeal affirmed with costs an order joining a person as third party, and at the trial he obtained judgment dismissing him from the action with costs against the party joining him, the Court of Appeal held that it had no power to alter its judgment, or to vary the final judgment in the action by giving the third party his costs: (*Beynon v. Godden*, 48 L. J. 80, Ex.)

Time.—The costs of an application to extend the time for taking any proceeding shall, in the absence of an order by the court or a judge directing by whom they are to be paid, be in the discretion of the taxing master: (Add. R., Aug. 1875, Sp. All. r. 22a, April, 1880.)

Uncertificated Solicitor.—A party employing an uncertificated solicitor in any action or proceeding can recover no costs for money out of pocket on any ground whatever: (*Re Fowler v. The Monmouth Railway and Canal Company*, L. Rep. 4 Q. B. Div. 334; 41 L. T. Rep. N. S. 159; 48 L. J. 457, Q. B.)

Want of Prosecutions.—[See *sup.*, *Dismissing Action*.]

Warrant, Service of.—[See *post*, *Service*.]

Winding-up.—[See *Copies, post, Service*; and **WINDING-UP**.]

Withdrawing Claim or Defence.—[See *sup.*, *Discontinuance*.]

Work and Labour not specially provided for.—As to any work and labour properly performed and not herein provided for, and in respect of which fees have heretofore been allowed, the same or similar fees are to be allowed for such work and labour as have heretofore been allowed: (Add. R., Aug. 1875, Sp. All. r. 27.)

Writ.—Not specially provided for.

The following fees are allowed to solicitors:

	Lower Scale.	Higher Scale.
	£ s. d.	£ s. d.

(Including all indorsements and copies, or præcipes for the officer sealing them, and attendances to issue or seal.)

Writ of Execution [see *Execution*.]

Writ of Inquiry—

The writ	...	...	...	...	...	1	1	0	1	1	0
Attendances to issue or seal	...	...	...	...	...	{	[Included in other fees.]				
Copies, on sealing	...	...	...	...	...	{	[Included in other fees.]				
Indorsements, on sealing	...	...	...	...	...	{	[Included in other fees.]				
Præcipes, on sealing	...	...	...	...	...	{	[Included in other fees.]				

Service [see *Service*.]

Writ of Mandamus [see *Mandamus*.]

Writ of Subpœna [see *Subpœna*.]

	Lower Scale. £ s. d.	Higher Scale. £ s. d.
<i>Writ of Summons.</i> —The following fees are allowed to solicitors :		
The Writ	0 6 8	0 13 4
Attendance to issue or seal	{ [Included in other fees.]	
Concurrent writ	0 6 8	0 6 8
Copies for officer sealing	{ [Included in other fees.]	
If exceeding two folios, for service, per folio beyond such two	0 0 4	0 0 4
Endorsement (if special)	0 5 0	0 5 0
Endorsement (not special)	{ [Included in other fees.]	
Notice of, in lieu of service out of jurisdiction	0 4 0	0 5 0
Præcipe for officer sealing	{ [Included in other fees.]	
Renewal	0 6 8	0 6 8
Service [see <i>Service</i> .]		

And see *sup.*, *Specially Indorsed Writ*.

IV. TAXATION.

1. ON WHAT PRINCIPLE CONDUCTED.

A simple direction that costs are to be taxed, means taxed as between party and party: (Dan. 1299.)

Costs are only taxed as between solicitor and client when there is a special direction therefor: (*Id.*; Seton, 124.)

As to the costs allowed on taxation between party and party, see Add. R., Aug. 1875, Sp. All. r. 26, cited *sup.* III., 2, *Opposite Party's Costs*.

In taxation as between party and party generally, only those charges are allowed which are strictly necessary for the purposes of the prosecution of the litigation, or are contained in the tables of fees: (Dan. 1298.)

In taxation as between solicitor and client, the party will be allowed as many of the charges which he would have been compelled to pay his own solicitor, as being costs of suit, as fair justice to the other party will admit: (*Id.*)

But regard will be had to the position of the parties, and the fund out of which the costs are to be paid; distinctions with regard to different funds being made when the order is acted upon by the taxing master: (*Id.*; and see Add. R. Aug. 1875, r. 29, cited *post* 8 (*d.*)).

The addition of the words "and consequent thereon," or "and relating thereto," or both sets of words, to the words "as between solicitor and client," give a wider range to the taxation: (Seton, 124.)

Where costs are ordered to be paid to a party suing *in formâ pauperis*, such costs shall be taxed as *dives* costs, unless the court shall otherwise direct: (C. O. 40, r. 5.)

An order for payment of costs by two or more parties is joint and several, and if one of them absconds or dies the cost may still be taxed and recovered against the others: (*Re Colquhoun*, 5 De G. M. & G. 35; *Re Allen*, L. Rep. 11 Ch. Div. 244; 40 L. T. Rep. N. S. 187.)

Costs will be taxed, notwithstanding the absence of a personal representative: (*Aspden v. Seddon*, W. N. 1877, p. 207.)

In a case of a joint retainer an order to tax may be obtained against one of the parties, but it does not follow he is liable to pay the whole of the costs: (*Re Allen, sup.*)

A judgment directing costs to be taxed, warrants, unless further consideration is adjourned, the taxation of the costs of working out the directions of the judgment, notwithstanding a reservation of subsequent costs not provided for by the judgment, there being other costs by which these words might be satisfied : (Dan. 1316.)

If the costs are taxed immediately, subsequent costs which cannot be taxed by anticipation must be waived, or a fresh order obtained : (Seton, 124.)

2. PREPARATION OF BILL OF COSTS.

A fair copy of the bill must be made on foolscap paper, bookwise, the date being kept within the body of the bill, so as to leave the left-hand margin for deductions ; and a copy of the judgment or order under which the costs are taxed must be made on foolscap paper, bookwise, at the foot of which there must be the following certificate, endorsed and signed by the solicitor : " I hereby certify that this is a true copy of the original [judgment] as passed and entered " : (Dan. 1312 ; Ayck. 427.)

If there has been no previous taxation in the cause or matter, the solicitor must also sign in the margin of the order the following certificate : " I hereby certify that this cause [or matter] has not been already referred to any taxing master " : (*Id.*)

In a taxation as between party and party, the bill of costs may be amended at any time during the pendency of the taxation : (Dan. 1314 ; Ayck. 428.)

3. TO WHAT TAXING MASTER REFERRED.

All references for the taxation of costs shall be made to the taxing master in rotation ; or if there shall have been any former taxation of costs in the same cause or matter, then to the taxing master before whom such former taxation shall have taken place : (C. O. 40, r. 2.)

4. LEAVING DOCUMENTS WITH TAXING-MASTERS.

(a) *Where there has been previous Taxation.*

If there has been a previous taxation, it is unnecessary to get a fresh reference (Ayck. 427), but the bill of costs, and copy judgment, or order are taken at once to the office of the master before whom the previous taxation took place : (Dan. 1312.)

Before the warrant to tax is granted, the various papers in the cause, arranged in the order of the items in the bill, with vouchers for all fees and disbursements, must be left with the same taxing master : (Ayck. 428.)

(b) *Where no previous Taxation.*

If there has been no previous taxation, the original judgment or order, with the copy, and bill of costs (see *sup.* 2) must be taken to the taxing master's office, and the name of the sitting master ascertained : (Ayck. 427.)

The following order must be indorsed by the solicitor on the front sheet of the original order : " The day of 18 Mr. is the proper taxing master to whom the taxation of costs in this action [or matter] is referred : " (Ayck. 427 ; Dan. 1312 ; Dan. Forms, 1042.)

The order with the certificate of no previous taxation (see *sup.* 2) is handed to the sitting master's clerk, who gets the name of the taxing master in rotation marked : (Ayck. 427.)

The order and copy are then taken to the clerk of the taxation master in rotation, who examines and files the copy (which must include the certificates) : (Ayck. 427 ; Dan. 1312.)

The bill of costs is left with such clerks : (*Id.*)

The papers and vouchers must be left with the taxing master, as mentioned *sup.* (a)

5. WARRANT TO TAX.

When the papers are left a warrant to tax is taken out : (Ayek. 427.)

Only one warrant is to be issued on one bill, or set of bills, unless the taxing master thinks it necessary to issue a new warrant : (Ayek. 428.)

The practice is to issue one warrant on leaving, and one warrant to tax each bill or set of bills : (*Id.*)

Copies of the warrant are served on the opposite parties : (Ayek. 427.)

Forms of warrants on leaving, and to tax respectively, are given in Dartiell's Forms, p. 1042.

6. FURNISHING COPIES OF BILL.

Where any party is entitled to a copy of any . . . document prepared by or on behalf of this party which is not required to be printed, such copy shall be furnished by the party by or on whose behalf the same has been . . . prepared : (Add. R., Aug. 1875, O. V., r. 8.)

The party or his solicitor requiring any such copy, or his solicitor, is to make a written application to the party by whom the copy is to be furnished, or his solicitor, with an undertaking to pay the proper charges : (*Id.*, r. 9.)

The folios of all [such] copies shall be numbered consecutively in the margin thereof and the other particulars complied with : (See COPIES.)

Copies of bills of costs shall be made side for side, so as to correspond with the bills of costs left in the office : (C. O. 36, r. 7.)

The copies ought to be delivered within twenty-four hours after receipt of the request and undertaking or within such other time as the court or judge may in any case direct : (See *Copies*, and comp. C. O. 36, r. 6.)

7. GOING THROUGH BILLS BEFORE TAXATION.

In practice the bills are usually gone through, and compared with the papers and vouchers, by the taxing master's principal clerk, in the presence of the parties, at an appointment made for that purpose, prior to any attendance before the master : (Dan. 1314, note (g).)

8. THE TAXATION.

(a) *Directions as to Attendances.*

The taxing officer shall have authority to arrange and direct what parties are to attend before him on the taxation of costs to be borne by a fund or estate, and to disallow the costs of any party whose attendance such officer shall in his discretion consider unnecessary in consequence of the interest of such party in such fund or estate being small or remote or sufficiently protected by other parties interested : (Add. R., Aug. 1875, Sp. All., r. 24.)

(b) *Refusal to bring in Costs.*

When any party entitled to costs refuses or neglects to bring in his costs for taxation, or to procure the same to be taxed, and thereby prejudices any other party, the taxing officer shall be at liberty to certify the costs of the other parties, and certify such refusal or neglect, or may allow such party refusing or neglecting a nominal or other sum for such costs, so as to prevent any other party being prejudiced by such refusal or neglect : (Add. R., Aug., 1875, Sp. All. r. 25.)

(c) *Failure to Attend.*

If any parties entitled to attend fail to do so, the taxing master will proceed in their absence, on proof by affidavit of the due service of the warrant on them : (Dan. 1314.)

The affidavit is made before the taxing master, and indorsed on the original warrant : (*Id.*)

(d) *General Powers and Duties.*

The taxing officers . . . shall, for the purpose of any proceeding before them, have power and authority to administer oaths, and shall, in relation to the taxation of costs, perform all such duties as have heretofore been performed by any of the masters, taxing masters, registrars, or other officers of any of the courts whose jurisdiction is by the Act transferred to the High Court of Justice or Court of Appeal, and shall, in respect thereof, have such powers and authorities as previous to the commencement of the Act were vested in any of such officers, including examining witnesses, directing production of books, papers, and documents, making separate certificates or allocators, requiring any party to be represented by a separate solicitor, and to direct and adopt all such other proceedings as could be directed and adopted by any such officer on references for the taxation of costs, and taking accounts of what is due in respect of such costs, and such other accounts connected therewith as may be directed by the court or a judge : (Add. R., Aug. 1875, Sp. All. r. 23.)

[Where the judge has power to disallow costs of unnecessary proceedings (see *sup.* III., 2, *Improper Proceedings*), and] in any case . . . such question shall not have been raised before and dealt with by the court or judge, the taxing officer may look into the same (and, as to evidence, although the same may be entered as read in any decree or order) for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so : (Add. R., Aug. 1875, Sp. All. r. 18.)

When a defendant obtains the ordinary order to stay proceedings as payment of costs, it is the taxing master's duty to consider and determine questions raised by the defendant as to the propriety of proceedings charged for : (*Re Wormsley*, 39 L. T. Rep. N. S. 85 ; 47 L. J. 844, Ch. ; W. N. 1878, p. 193 ; 27 W. R. 36.)

In any case in which, under the preceding Rule No. 18, or any other rule of court, or by the order or direction of a court or judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay ; or such officer may allow or certify the costs to be paid, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered : (Add. R., Aug. 1875, Sp. All. r. 19.)

Where [an action] or petition is dismissed with costs, or a motion is refused with costs, or any costs are by any general or special order . . . to be paid, the taxing master . . . may tax such costs without any order referring the same for taxation, unless the court, upon the application of the party alleging himself to be aggrieved, prohibits the taxation of such costs : (C. O. 40, r. 38.)

This rule is not generally acted on : (Dan. 1309.)

As to all fees or allowances which are discretionary, the same are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who, in the exercise of such discretion, is to take into consideration the other fees and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances : (Add. R., Aug. 1879, Sp. All. r. 29.)

[Where an account consisting in part of any bill of costs, or the judge

directs the taxing master to assist him in settling the costs of establishing a debt in chambers] the taxing master, on receiving such direction, shall proceed to tax such costs, and shall have the same powers, and the same fees shall be payable in respect thereof, as if the same had been referred to the taxing master by an order, and he shall return the same, with his opinion thereon, to the judge by whose direction the same were taxed : (C. O. 40, r. 25.)

The bill of costs produced as a voucher at chambers is identified by the chief clerk's initials, and left at the taxing master's office with the direction to tax signed by the chief clerk : (Dan. 1312 n.)

Where, upon the taxation of any bill of costs, it appears to the taxing master, that, for the purpose of duly taxing the same, it is necessary to inspect any books, papers, or documents relating to the cause or matter in the chambers of any judge, the taxing master shall be at liberty to request the chief clerk of such judge to cause the same to be transmitted to the office of the taxing master; and also to request such chief clerk to certify any proceedings in the said chambers which may be comprised in the bill of costs under taxation; and in such cases the chief clerk, when and so soon and at and for such times as the due transaction of the business at the said chambers will permit, shall direct such books, papers, and documents to be transmitted to the office of the taxing master for his use during the taxation, and shall certify the proceedings which have taken place in the said chambers according to the request of the taxing master; and after the costs in respect of which such request of the taxing master was made shall have been certified, the taxing master shall cause the same books, papers, and documents which have been so transmitted to his office, if then remaining there, to be returned to the chambers of the judge : (C. O. 40, r. 26.)

When any book, paper, or document shall be transmitted from the chambers of a judge to the office of a taxing master, a memorandum of such transmission shall be made and signed by the taxing master or the clerk of the taxing master at whose request such book, paper, or document may be transmitted, and shall be delivered to the chief clerk of such judge; and when any such book, paper, or document shall be returned from the office of the taxing master to the judge's chambers, a memorandum of such return shall be made and signed by such chief clerk, or by one of his clerks, and shall be delivered to the taxing master : (C. O. 40, r. 27.)

The taxing master is the sole judge of the fact whether business has been done : (Dan. 1317.)

It is his duty to inquire also whether the business was required to be done : (*Id.*)

It is not within the province of the taxing officer to inquire into the question of a solicitor's negligence causing costs : (*The Papa de Rossie*, L. Rep. 3 P. Div. 160.)

(e) *Signature of Bill.*

After the taxation is completed, the bill is cast up by the solicitors, and the deductions are subtracted, after which they are checked by the clerk : (Ayck. 428 ; Dan. 1314.)

The taxing master then signs the bill : (Dan. 1314.)

(f) *Certificate of Taxation.*

If it is intended to enforce payment of costs by any other proceedings, or evidence of the amount is required, a certificate of the taxation must be obtained from the master, and filed in the Central Office, and an office copy taken : (Dan. 1314 ; Ayck. 1314.)

Where costs are directed to be paid out of money in court, or out of the proceeds of securities in court, the taxing master shall certify the amount of the fees of taxation payable in respect of such costs, unless he shall certify that such fees are included in the costs as taxed: (Ch. F. R. 1874, r. 58.)

(g) *Proceedings on Direction in case Parties differ.*

Where it is directed that costs shall be taxed in case the parties differ about the same, the party claiming the costs shall bring the bill of costs into the taxing master's office, and give notice of his having so done to the other party; and at any time within eight days after such notice, such other party shall have liberty to inspect the same without fee, if he thinks fit. And at or before the expiration of the eight days, or such further time as the taxing master shall in his discretion allow, such other party shall either agree to pay the costs or signify his dissent therefrom, and shall thereupon be at liberty to tender a sum of money for the costs. But where he makes no such tender, or where the party claiming the costs refuses to accept the sum so tendered, the taxing master shall proceed to tax the costs. And where the taxed costs shall not exceed the sum tendered, the costs of the taxation shall be borne by the party claiming the costs: (C. O. 40, r. 39.)

9. REVIEW OF TAXATION.

(a) *By Taxing Master.*

Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any item or items, may, at any time before the certificate or allocatur is signed, deliver to the other party interested therein, and carry in before the taxing officer, an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the item or items, or parts or part thereof, objected to, and may thereupon apply to the taxing officer to review the taxation in respect of the same: (Add. R., Aug. 1875, Sp. All. r. 30.)

The reasons of the objections need not be stated, but the items must be specified: (*Simmons v. Storer*, L. Rep. 14 Ch. Div. 154; 42 L. T. Rep. N. S. 291; 28 W. R. 408.)

Upon such application the taxing officer shall reconsider and review his taxation upon such objections, and he may, if he shall think fit, receive further evidence in respect thereof, and, if so required by either party, he shall state either in his certificate of taxation or allocatur, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto: (Add. R., Aug. 1875, Sp. All. r. 31.)

(b) *By Judge.*

[See APPEAL.]

10. IN DISTRICT REGISTRY.

[See *sup.* III., 2, *District Registry*; and DISTRICT REGISTRY.]

V. DELIVERY OF BILL AND TAXATION UNDER 6 & 7 VICT. C. 73.

1. DELIVERY OF BILL.

(a) *To be One Month before Action.*

No solicitor, nor any executor, administrator, or assignee [or trustee in bankruptcy (*Re Walton*, 4 K. & J. 78)] of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney

or solicitor [in his character as such (Dan. 1726)] until the expiration of one [calendar] month after such . . . solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements: (6 & 7 Vict. c. 73, s. 37.)

In calculating the month, the days on which the bill is delivered, and the action brought, are to be excluded: (Dan. 1726; Morg. & D. 305.)

An unsigned bill in a signed letter is sufficient: (*Re Bush*, 8 Beav. 66.)

The amount charged in respect of each item must be distinct: (*Wilkinson v. Smart*, 33 L. T. Rep. N. S. 573); but if these items are lumped together, a detailed statement may be allowed to be supplied: (*Re Tilleard*, 32 Beav. 476.)

No particular heading of the bill is required, but it should show in what court the business was done (Dan. 1732) if it has been done in any court. It should also show upon the face of it or by the accompanying letter, that the solicitor seeks to charge the person whom he intends to sue: (Dan. 1732.)

Generally it is sufficient if the bill gives such information as will enable the client to obtain advice as to the taxation: (Morg. & Ch. 8.)

Delivery to an agent duly authorised is sufficient (*Re Bush*, 8 Beav. 66) but not delivery to the party's solicitor: (Morg. & Ch. 8.)

The bill must be left and not merely shown: (*Id.*)

See further, as to what constitutes delivery: (Morg. & Ch. 7; Dan. 1733.)

(b) *Authorising Action before the Month.*

It shall be lawful for any judge of the [High Court] to authorise a . . . solicitor to commence an action or suit for the recovery of his fees, charges, or disbursements against the party chargeable therewith, although one month shall not have expired from the delivery of a bill as aforesaid, on proof to the satisfaction of the said judge that there is probable cause for believing that such party is about to quit England: (6 & 7 Vict. c. 73, s. 37.)

(c) *Signature to Bill.*

[The] bill shall either be subscribed with the proper hand of such . . . solicitor (or, in the case of a partnership, by any of the partners, either with his own name or with the name or style of such partnership), or of the executor, administrator, or assignee of such attorney or solicitor, or be inclosed in or accompanied by a letter subscribed in like manner referring to such bill: (6 & 7 Vict. c. 73, s. 37.)

The letter must be addressed to the person to whom the bill is sent: (Dan. 1731.)

A signed bill must be delivered though a certain sum has been agreed on: (*Wilkinson v. Smart*, 33 L. T. Rep. N. S. 573.)

The client may apply though the bill is unsigned.

[And see *sup.* (a)]

(d) *Ordering Delivery.*

It shall be lawful for the said [court] and judges, in the same cases in which they are respectively authorised to refer a bill which has been so as aforesaid delivered, sent, or left, to make such order for the delivery by any . . . solicitor, or the executor, administrator, or assignee of any attorney or solicitor, of such bill as aforesaid . . . or otherwise touching the same, in the same manner as has heretofore been done as regards such . . . solicitor, by such [court] or judges respectively, where any such

business had been transacted in the court in which such order was made: (6 & 7 Vict. c. 73, s. 37.)

The order may be obtained on motion or petition of course (Dan. 1734); but cannot be made after verdict, writ of inquiry, or payment: (*Re Becke and Flower, sup.*; *Re Winterbottom*, 15 Beav. 80.)

But this does not apply to a payment on account (*Re Woodard, sup.*); and an order of course obtained after action brought for costs, but before notice thereof, is not irregular: (*Re Farington*, 33 Beav. 346.)

The chief clerks of all the judges have now power to grant such orders: (per Jessel, M.R.; see W. N. 1880, p. 7.)

All material facts must be stated on the application: (*Re Winterbottom, sup.*; *Re Holland*, 19 Beav. 315; *Re Gedye*, 15 Beav. 254; *Re David*, 30 Beav. 278.)

2. REFERENCE FOR TAXATION.

(a) Application to Tax.

(1) How made.

The application need not be made to the branch of the court which heard the suit, unless the merits of the case enter into the questions: (Morg. & Ch. 9.)

The application to tax may be made by motion or petition of course—

(1.) Within one month after delivery of the bill: (*Re Becke and Flower*, 5 Beav. 406.)

(2.) After the expiration of such month, and before the expiration of twelve months from delivery of the bill: (*Re Becke and Flower, sup.*; *Re Byrch*, 8 Beav. 124; *Re Woodard*, 18 W. R. 37.)

In the latter case the order of course is made with such special directions as the court may order to be imposed: (*Re Bromley*, 7 Beav. 487; *Re Gaitskell*, 1 Phil. 581; *Re Pender*, 2 Phil. 69.)

A judgment which is not final in an action for the costs does not preclude an order of course for taxation: (*Re Gedye*, 15 Beav. 254.)

Applications by third parties under sect. 38 (as to which, see *post* (2).) may be made by motion or petition of course: (*Re Straford*, 16 Beav. 27.)

Applications may be made by motion or petition of course to tax costs already incurred, though costs become payable consequently, in the same suit: (*Re Jarman*, L. Rep. 4 Ch. Div. 835.)

An order of course is not irregular because some of the items are included in an existing order to tax in an action: (*Re Fluker*, 20 Beav. 143.)

A special agreement covering part only of the items of a bill, does not prevent the bill from being referred for taxation without a special order. (*Re Eyre*, 2 Phil. 367); but any suppression of the fact of such agreement will make the order irregular: (Morg. & Chute, 10.)

It is irregular for two parties jointly liable to obtain an order of course to tax costs incurred by them and another person: (*Re Ilderton*, 33 Beav. 201; *Re Lewin*, 16 Beav. 608.)

When an order of course is obtained improperly, it will be discharged on motion: (*Re Holland*, 19 Beav. 315.)

But the motion must be made promptly: (*Re Wavell*, 22 Beav. 634.)

[After one year from the date of the delivery of the bill, or at any time where there are special circumstances] all applications to refer any bill . . . shall . . . be made to a judge at chambers by summons: (Ch. O., 17th April, 1867, r. 1.)

The summons is an originating summons: (See CHAMBERS.)

The application is by summons in the following cases :

To tax same, only, of several bills (*Re Yetts*, 33 Beav. 412; *Re Law and Gould*, 21 Beav. 481);

To tax costs payable by executors, &c., under sect. 39 (as to which, see *post*, (2) (*Re Straford*, 16 Beav. 27);

Where there is a special agreement as to the whole of the costs (*Ward v. Lawson*, L. Rep. 8 Ch. App. 65, and other cases cited *Morg. & Chute*, 10);

When the retainer is disputed : (*Re Thurgood*, 19 Beav. 541).

All applications made under [the Act] to refer any . . . bill . . . to be taxed and settled shall be made in the matter of [the] solicitor : (6 & 7 Vict. c. 73, s. 43.)

The petition, motion paper, or summons, should be intituled in the matter of the solicitor's London agent, as well, if one has been employed, but need not be intituled in the matter of the Act : (*Re Walton*, 4 K. & J. 78.)

A married woman who applies for taxation of costs in respect of separate estate must do so by her next friend, even when she applies for an order of course : (*Re Waugh*, 15 Beav. 508.)

(2) By whom made.

By Party Chargeable, within the Month.

Upon the application of the party chargeable by such bill within one month it shall be lawful, in case the business contained in such bill or any part thereof shall have been transacted in the High Court of [Justice], or in any other Court . . . or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any court of law or equity [for any division of the High Court], or any judge of [any such divisions], and they are . . . respectively required to refer [the bill and demand for payment] to be taxed : (6 & 7 Vict. c. 73, s. 37; J. A., 1873, ss. 16, 39.)

By either Party, after the Month.

In case no such application as aforesaid shall be made within such month as aforesaid, then it shall be lawful for such reference to be made as aforesaid, either upon the application of the . . . solicitor, or the executor, administrator, or assignee of the attorney or solicitor, whose bill may have been so as aforesaid delivered, sent, or left upon the application of the party chargeable by such bill : (6 & 7 Vict. c. 73, s. 37.)

A solicitor has no statutory right to have the amount of his charges ascertained by taxation : (*Ex parte Ditton*, *Re Woods*, L. Rep. 13 Ch. Div. 318; 42 L. T. Rep. N. S. 161; 28 W. R. 402.)

A married woman who has made her separate estate liable for costs is a party chargeable : (*Waugh v. Waddell*, 16 Beav. 521.)

A personal representative of the client may apply : (*Jefferson v. Warrington*, 7 M. & W. 137.)

The fact of a party being in contempt does not prevent his proceeding to obtain a taxation : (*Newton v. Ricketts*, 11 Beav. 67.)

Overseers of the poor are bound to have bills taxed before they pay them : (*Morg. & Chute*, 9.)

By Third Parties.

Where any person not the party chargeable with any such bill within the meaning of the provisions contained [in sect. 37], shall be liable to pay or shall have paid such bill, either to the attorney or solicitor, his executor, administrator, or assignee, or to the party chargeable with such bill as aforesaid; it shall be lawful for such person, his executor, administrator,

or assignee to make such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make, and the same reference and order shall be made thereupon, and the same course pursued in all respects, as if such application was made by the party so chargeable with such bill as aforesaid: (6 & 7 Vict. c. 73, s. 38.)

A mortgagor or puisne incumbrancer may tax the costs of the solicitor of the mortgagee: (*Re Lees*, 5 Beav. 411; *Re Taylor*, 18 Beav. 165.)

But a mere volunteer, under no previous liability, does not, by paying a solicitor's bill acquire a right to tax it: (*Re Becke and Flower*, 5 Beav. 406.)

When under an agreement for a compromise one party agrees to pay the other's costs, the former party is entitled to have the costs taxed: (*Re Hartley*, 30 Beav. 620.)

But a bankrupt cannot apply (*Re Halsall*, 11 Beav. 163), even though discharged after payment by his trustee, and his creditors' payment in full: *Re Leadbitter*, L. Rep. 10 Ch. Div. 388.)

The *cestui que trust* stands in the place of the trustee, and the taxation is as between solicitor and client (*Re Neate*, 10 Beav. 181; *Re Baker*, 32 Beav. 526), but not so as to enable the solicitor to charge, as against the *cestui que trust*, for anything done unnecessarily, though by the trustee's express direction: (*Re Brown*, L. Rep. 4 Eq. 464.)

Persons only remotely interested have no right to have the bill taxed: (*Dan.* 1745; *Morg.* and *Ch.* 13.)

Taxation can only be applied for when the original client might have obtained an order: (*Morg.* 14.)

The taxation must be as between the original party and the solicitor: (*Id.*)

In case such application is made [by a third party] when, under the provisions . . . contained [in the Act], a reference is not authorised to be made except under special circumstances, it shall be lawful for the court or judge to whom such application shall be made to take into consideration any additional special circumstances applicable to the person making such application, although such circumstances might not be applicable to the party so chargeable with the said bill as aforesaid if he was the party making the application: (6 & 7 Vict. c. 73, s. 38.)

An allegation of excessive charges will not bring the case within this part of the section: (*Re Vardy*, 20 L. J. 325, Ch.)

In case of Costs Payable by Executors, &c.

It shall be lawful, in any case in which a trustee, executor, or administrator has become chargeable with any such bill as aforesaid, for the [judge], if in his discretion he shall think fit, upon the application of a party interested in the property out of which such trustee, executor, or administrator may have paid or be entitled to pay such bill, to refer the same, and such attorney's, or solicitor's, or executor's, administrator's, or assignee's demand thereupon, to be taxed and settled by the proper officer of the [Chancery Division]: (6 & 7 Vict. c. 73, s. 39.)

Taxation under this section may only be applied for where the immediate client might have applied: (*Morg.* & *Chute*, 14.)

The *cestui que trust* may not question the trustee's retainer of the solicitor, as between the trustee and the solicitor, and if there is an existing order to tax as between them, he is not entitled to another order, but may attend such taxation and raise the question of retainer: (*Dan.* 1745.)

An application by summons is necessary under this section: (*Re Straford*, 16 Beav. 27.)

(b) *Order of Reference.*(1) *Generally.*

[The order refers] such bill, and the demand of such . . . solicitor, executor, administrator, or assignee, thereupon to be taxed and settled by the proper officer of the court in which such reference shall be made without any money being brought into court: (6 & 7 Vict. c. 73, s. 37.)

Every order to be made for such reference as aforesaid shall direct the officer to whom such reference shall be made to tax such costs of such reference to be so paid [as mentioned *post* (f)], and to certify what, upon such reference, shall be found to be due to or from such . . . solicitor, or executor, administrator, or assignee of such attorney or solicitor, in respect of such bill and demand, and of the costs of such reference, if payable: (6 & 7 Vict. c. 73, s. 37.)

[Where the application is made by either party to the bill, or the solicitor's executor, administrator, or assignee, after the expiration of a month from the delivery of the bill the order may be made] with such directions, and subject to such conditions as the court or judge making such reference shall think proper: (6 & 7 Vict. c. 73, s. 37.)

When the client becomes bankrupt, and the solicitor does not prove for the bill, the trustees can only obtain an order on undertaking to pay the bill: (*Re Elmslie and Co.*, L. Rep. 9 Eq. 72.)

[Where a party chargeable applies within a month after delivery of the bill] the court or judge making such reference shall restrain such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, from commencing any action or suit touching such demand pending such reference: (6 & 7 Vict. c. 73, s. 37.)

[When the application is made by the party chargeable, or the solicitor, or his executor, administrator, or assignee, after one month from delivery of the bill] such court or judge may restrain such . . . solicitor, or the executor, administrator, or assignee of such attorney or solicitor, from commencing or prosecuting any action or suit touching such demand pending such reference, upon such terms as shall be thought proper: (6 & 7 Vict. c. 73, s. 37.)

The form of order on the client's application is given in schedule H. 39, to the Rules of April, 1880.

The form of order on the solicitor's application is given in schedule H. 40, to the same rules.

Where an action for the costs has been commenced in the High Court before the application to tax is made such action cannot be afterwards stayed by an order of course: (*Re Field*, W. N. 1877, p. 244.)

The form of order, after action brought, is given in schedule H. 41 to the Rules of April, 1880.

When there are further costs to be paid the order should not go on to direct delivery up of papers: (*Ex parte Jarman*, L. Rep. 4 Ch. Div. 835.)

An order of course must be served on the party against whom it is obtained, in the ordinary way: (Dan. 1735.)

As to endorsing the order, see EXECUTION.

If the copy order is not properly indorsed, the order may be served again, and a properly indorsed copy left: (Dan. 1735.)

(2) *After Verdict or Writ of Inquiry.*

No such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill after a verdict shall have been obtained or a writ of inquiry executed in any action for the recovery of the demand of such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor . . . except under special circum-

stances to be proved to the satisfaction of the court or judge to whom the application for such reference shall be made: (6 & 7 Vict. c. 73, s. 37.)

The mere fact of an action pending for the costs will not make any difference, but if anything is found due in the taxation, the client must pay the costs of the action: (*Re Hair*, 11 Beav. 96.)

(3) After Twelve Months.

No such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill after . . . the expiration of twelve months after such bill shall have been delivered, sent, or left as aforesaid, except under special circumstances, to be proved to the satisfaction of the court or judge to whom the application for such reference shall be made: (6 & 7 Vict. c. 73, s. 37.)

After twelve months even an unsigned bill cannot be taxed except under special circumstances: (*Re Gedye*, 14 Beav. 56.)

Successive bills of costs in a bankruptcy administration or winding up are not necessarily to be treated as one bill brought down to the date of the latest delivery, so as to bring both within the period of twelve months allowed to apply for taxation: (*Re Hall and Barker*, L. Rep. 9 Ch. Div. 538; 47 L. J. 621, Ch.; 26 W. R. 501; and comp. *Re Nicholson*, 3 D. F. & J. 93.)

When the client is a company, ordered to be wound up within twelve months after delivery of the bill, special circumstances need not be shown: (*Re Marseilles Company*, L. Rep. 11 Eq. 151, cited Dan. 1746, and see *post*.)

When a winding-up order is not made till after twelve months from delivery of the bill, special circumstances must be shown, to get an order to tax after twelve months from delivery of the bill: (*Re Quilter*, 4 De G. & S. 205, cited Dan. 1746.)

As to what are special circumstances, see *post* (5).

(4) After Payment.

The payment of any such bill as aforesaid shall in no case preclude the court or judge to whom application shall be made from referring such bill for taxation, if the special circumstances of the case shall in the opinion of such court or judge appear to require the same, upon such terms and conditions and subject to such directions as to such court or judge shall seem right, provided the application for such reference be made within twelve calendar months after payment: (6 & 7 Vict. c. 73, s. 41.)

Giving security is equivalent to payment: but part payment to, or simple retainer by, the solicitor is not: (*Morg. & Chute*, 16; Dan. 1749-50.)

There can be no payment within the Act before bill delivered: (Dan. 1750.)

The mere giving of a bill or note is not payment, unless treated as such by the parties: (Dan. 1749.)

Delay in making the application is fatal: (Dan. 1749.)

As to what are special circumstances, after payment, see *post* (5).

The twelve months are an absolute bar to an application under the Act unless perhaps actual fraud is shown: (*Morg. & Chute*, 18.)

But an action may be brought for such taxation, and an account which had been settled between a client, who was an old lady, and her solicitor, including arranged bills of costs, was ordered to be opened and the bills of costs taxed, after the lapse of nearly two years, without actual proof of error or overcharge, on the ground that the client had acted under undue influence and without sufficient information, and that much of the

business charged for was unnecessary and improper : (*Watson v. Rodwell*, L. Rep. 11 Ch. Div. 150.)

Where the client has had time to examine the bill, an order will not be made : (*Re Harrison*, 10 Beav. 57.)

(5) Special Circumstances.

After twelve months from delivery.

A dispute as to the completeness of a bill is a sufficient special circumstance to justify an application to tax after twelve months from delivery of the bill : (*Re Bagshawe*, 2 De G. & S. 265.)

The continuance of the relationship of solicitor and client is a sufficient special circumstance : (*Dan.* 1747, citing *Ex parte Flower*, 18 L. T. Rep. N. S. 457.)

Other special circumstances are pressure, or gross overcharge, amounting to what the court designates as fraud : (*Re Strother*, 3 K. & J. 518.)

Generally, the special circumstances should be such as to afford a reasonable excuse for not applying sooner, but this rule is not always followed : (see cases cited *Dan.* 1746.)

After Payment.

It is scarcely possible to lay down a general rule defining what special circumstances are sufficient to entitle the party to an order after payment (per Rolt, L.J. in *Re Newman*, L. Rep. 2 Ch. App. 712), but generally, either undue pressure and overcharge, or overcharges or errors so gross as to amount to fraud must be proved : (*Dan.* 1747, *Morg. & Chute*, 16.)

The overcharges must be clearly made out (*Jarm.* 443), and by the client : (*Re Towle*, 30 Beav. 170.)

If a bill is produced at the last moment, and reasonable facility for taxation is refused after an opportunity for taxation has been asked for, and there appears, on looking at the bill, to be a substantial ground for taxation, it will be allowed after payment : (*Re Newman*, L. Rep. 2 Ch. App. 707.)

In the case lastly cited payment was made because it was important for the client to complete a lease at once.

And the fact that a solicitor threatens to enforce a security unless the bill is paid at once, is sufficient : (see *Re Rance*, 22 Beav. 177, &c., cited *Morg. & Ch.* 17.)

Where the solicitor had produced the bills on the execution of a mortgage, out of the produce of which they had been paid, but had taken them back immediately, and afterwards refused to produce them, they were held taxable : (*Re Loughborough*, 23 Beav. 439.)

Where a charge of felony is pending against the managing clerk of a solicitor, on the trial of which the *bona fides* and legality of the charges in a professional bill of costs delivered by the solicitor to his client, the prosecutor, at a period anterior to the charge of felony, may directly affect the question of the accused's guilt or innocence, the court will, on the application of the solicitor, as a matter of common justice, order such bill to be referred to taxation, notwithstanding that it has been settled in account between the parties some months before : (*Re Fisher and Co.*, 42 L. T. Rep. N. S. 261.)

Where the defendant agreed, through his solicitor, to pay the plaintiff's solicitor a fixed sum for his costs and trouble in promoting a composition between the defendant and his creditors, no fraud or undue pressure being proved, the facts were held not to constitute special circumstances : (*Ex parte Docker*, L. Rep. 3 Q. B. Div. 726 ; 38 L. T. Rep. N. S. 509 ; 47 L. J. 509, Q. B. ; 26 W. R. 633.)

(6) Special Directions.

Where such reference as aforesaid shall be made when the same is not authorised to be made except under special circumstances provided [by sect. 37] then the said court or judge shall be at liberty, if it shall be thought fit, to give any special directions relative to the costs of such reference: (6 & 7 Vict. c. 73, s. 37.)

In the case of lost documents, and in other cases, if necessary, special directions will be given to the taxing master: (Dan. 1751.)

Where one of two parties jointly employing a solicitor took out a summons for taxation, the order directed that each party should be at liberty to question the retainer by them or either of them, and the taxing master was directed to distinguish by and to whom each sum by him found due was to be paid: (*Re Kitton*, 35 Beav. 369.)

[Where an order of reference for taxation is made in the case of costs payable by executors, &c. (see *sup.* (a) (2)), the order may be made] with such directions, and subject to such conditions as such judge shall think fit, and [the judge may] make such order as such judge shall think fit for the payment of what may be found due, and of the costs of such reference to or by such . . . solicitor, or the executor, administrator, or assignee of such attorney or solicitor, by or to the party making such application, having regard to the provisions [in the Act] contained relative to applications for the like purpose by the party chargeable with such bill, so far as the same shall be applicable to such cases, and in exercising such discretion as aforesaid, the said judge may take into consideration the extent and nature of the interest of the party making the application: (6 & 7 Vict. c. 73, s. 39.)

Where any money shall be so directed to be paid by such . . . solicitor, or the executor, administrator, or assignee of such attorney or solicitor, it shall be lawful for such judge, if he should think fit, to order the same, or any part thereof, to be paid to such trustee, executor, or administrator so chargeable with such bill, instead of being paid to the party making such application; and when the party making such application shall pay any money to such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, in respect to such bill, he shall have the same right to be paid by such trustee, executor, or administrator so chargeable with such bill as such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, had: (6 & 7 Vict. c. 73, s. 39.)

Where the trustees were dead, any balance found due from the solicitor was ordered to be paid into court to a separate account, and not to the applicant: (Dan. 1745; citing *Re Hallett*, 21 Beav. 250.)

For the purpose of any such reference upon the application of the person not being the party chargeable within the meaning of the provisions of [the] Act, or of a party interested, it shall be lawful for such court or judge to order any such . . . solicitor, or the executor, administrator or assignee of any such attorney or solicitor, to deliver to the party making such application a copy of such bill, upon payment of the costs of such copy: (6 & 7 Vict. c. 73, s. 40.)

(c) Evidence.

It shall not in any case be necessary in the first instance for such . . . solicitor, or the executor, administrator, or assignee of such attorney or solicitor, in proving a compliance with [the] Act, to prove the contents of the bill he may have delivered, sent, or left, but it shall be sufficient to prove that a bill of fees, charges, or disbursements, subscribed in the manner aforesaid, or enclosed in or accompanied by such letter as aforesaid, was

delivered, sent, or left in manner aforesaid; but nevertheless it shall be competent for the other party to show that the bill so delivered, sent, or left, was not such a bill as constituted a *bond fide* compliance with [the] Act: (6 & 7 Vict. c. 73, s. 37.)

(d) *What Costs Allowed.*

No bill which shall have been previously taxed and settled, shall be again referred, unless, under special circumstances, the court or judge to whom such application is made shall think fit to direct a re-taxation thereof: (6 & 7 Vict. c. 73, s. 40.)

The costs must have been incurred in a professional employment: (*Re Page*, 32 Beav. 487.)

Acting as steward of a manor is not such employment: (*Re Ward*, 5 Beav. 401.)

But the following are—

Attending revision courts (*Re Andrew*, 17 Jur. 1145);

Acting as election agent (*Re Osborne*, 25 Beav. 353);

Acting as London agent (*Harvey v. Mayhew*, 2 W. R. 128; *Jones v. Roberts*, 8 Sim. 397); but the amount will generally be ordered to be brought into court (Dan. 1744);

Procuring satisfaction as a bond for malt duties: (*Re Gaitskell*, 1 Phil. 576.)

Where the solicitor retained the bills and refused to produce them it was assumed that they were taxable: (*Re Loughborough*, 23 Beav. 439.)

Costs in a suit directed to be taxed include all costs up to the date of the certificate: (Morg. & Chute, 11.)

In taxing bills for parliamentary business the taxing master may even, under an order of cause, allow costs on the scale of parliamentary allowances: (*Re Sudlow*, 18 L. J. 182, Ch.)

The common order includes an account of all sums received by the solicitor in that character, but not a general account: (Dan. 1752.)

A certificate of the taxing masters as to the principle on which items are inserted in a solicitor's bill, according to the general practice of the profession, and without reference to decided cases, some of which are therein stated to be not in accordance, was, so far as is material, as follows:—

The practice is almost universal to make a distinction between [payments as professional disbursements in bills of costs, and others as payments in cash accounts.]

Such payments as the solicitor, in the due discharge of the duty he has undertaken, is bound to make, so long as he continues to act as solicitor, whether his client furnishes him with money for the purpose, or with money on account, or not; as, for instance, fees of the officers of the court, fees of counsel, expense of witnesses, &c., and also such payments in general business, not in suits, as the solicitor is looked upon as the person bound, by custom, to make, as for instance, counsels' fees on abstracts and conveyances, payments for registers in proving pedigrees, stamp duty on conveyances and mortgages, charges of agents, stationers or printers employed by him, &c., are, by practice, and . . . properly, introduced into the solicitor's bill of fees and disbursements.

But . . . payments which the solicitor is not either by law bound to make, or by custom looked upon as the person to make, as for instance, purchase-moneys or interest thereon, moneys paid into court, damages or costs paid to opponent parties, bills due to the solicitors of trustees, mortgagees or other parties, legacy or residuary duties, or other payments of a like description, which the solicitor makes as agent, on the order of

the client, and not in discharge of his own duty or liability as solicitor, are by practice, and . . . properly, charged in the cash account.

The question, whether such payments are professional disbursements or otherwise, is not affected by the state of the cash account between the solicitor and the client, . . . for instance, counsels' fees would not be the less properly be introduced into the bill of costs, as a professional disbursement, because the client may have given money expressly for paying them, and . . . purchase-money or damages would be properly so introduced, notwithstanding the solicitor may have advanced the money out of his own funds: (*Re Remnant*, 11 Beav. 611.)

Payments to counsel are professional disbursements, even when the client has appropriated a specific sum therefor: (*Re Bedson*, 9 Beav. 5.)

After delivery, and before notice of an order to tax, another bill may be substituted: (*Re Chambers*, 34 Beav. 177; but see *Re Heather*, L. Rep. 5 Ch. App. 694.)

After a bill has been referred, no alterations can be made in it or permitted by the taxing-master except by consent, or on a special application for leave: (*Re Catlin*, 18 Beav. 519; *Re Wells*, 8 Beav. 416; *Re Carven*, 8 Beav. 436.)

Items overcharged will not be allowed to be decreased: (*Re Whalley*, 20 Beav. 576.)

(e) *The Taxation.*

(1) *Refusal to Attend.*

Upon every such reference, if either the . . . solicitor, or executor, administrator, or assignee of the attorney or solicitor, whose bill shall have been delivered, sent, or left, or the party chargeable with such bill, having due notice, shall refuse or neglect to attend such taxation, the officer to whom such reference shall be made may proceed to tax and settle such bill and demand *ex parte*: (6 & 7 Vict. c. 73, s. 37.)

(2) *Assistance of other Taxing Officers.*

In all cases in which such bill shall have been referred to be taxed and settled, the officer to whom such reference is made shall be at liberty to request the proper officer of any other court [or division] having such an officer to assist him in taxing and settling any part of such bill, and such officer so requested shall thereupon proceed to tax and settle the same, and shall have the same powers, and may receive the same fees in respect thereof, as upon a reference to him by the court of which he is such officer, and shall return the same, with his opinion thereon, to the officer who shall have so requested him to tax and settle the same; and the officer to whom such reference is made shall not be paid any fee for that portion of the bill which shall have been so taxed and settled by the officer of such other court at his request: (6 & 7 Vict. c. 73, s. 42.)

(3) *Certificate of Taxation.*

Upon the taxation and settlement of any such bill the certificate of the officer by whom such bill shall be taxed shall (unless set aside or altered by order, decree, or rule of court), be final and conclusive as to the amount thereof: (6 & 7 Vict. c. 73, s. 43.)

The method of taxation, and the mode of reviewing the certificate are the same as in taxation in an action: (Dan. 1755: and see *sup.*)

The taxing master may, under an order of course, determine a question of liability and retainer other than those as to which the retainer is admitted by the petition: (*Re Bracey*, 8 Beav. 266, cited Jarm. 430.)

The taxing master may inquire whether proceedings were necessary without a special reference: (*Re Atkinson*, 26 Beav. 151.)

It is the taxing master's duty to inquire what sums applicable to the

payment of the bill have come to the hands of the solicitor, in his character as such, in order to ascertain whether the bill has been paid: (*Cooper v. Ewart*, 2 Phil. 362, cited Jarm. 430.)

(4) Special Certificate.

Such officer shall in all cases be at liberty to certify specially any circumstances relating to such bill or taxation, and the court or judge shall be at liberty to make thereupon any such order as such court or judge may think right respecting the payment of the costs of such taxation: (6 & 7 Vict. c. 73, s. 37.)

The costs are now governed by the general rule: (see *sup.* III., 1.)

(f) Costs of Reference.

In case any such reference as aforesaid shall be made upon the application of the party chargeable with such bill, or upon the application of such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, and the party chargeable with such bill shall attend upon such taxation, the costs of such reference shall, except as provided for [see *sup.* (e), (4)] be paid according to the event of such taxation; that is to say, if such bill when taxed be less by a sixth part than the bill delivered, sent, or left, then such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall pay such costs; and if such bill when taxed shall not be less by a sixth part than the bill delivered, sent, or left, then the party chargeable with such bill, making such application or so attending, shall pay such costs: (6 & 7 Vict. c. 73, s. 37.)

An application that extra costs of a special application may be disallowed should be made at the time: (*Re Hair*, 11 Beav. 96.)

When a reasonable objection is taken to the right to tax, the costs of the hearing will be ordered to abide the result of the taxation: (*Re Newman*, L. Rep. 2 Ch. App. 713.)

When a petition was presented for taxation of two bills, and succeeded as to one only, for which an order of course might have been obtained, the petitioner was made to pay all the costs: (*Re Cattlin*, 8 Beav. 121.)

A petitioner obtaining a special order, when an order of course only is necessary, will be made to pay the costs, although successful: (*Re Bignold*, 9 Beav. 269; *Re Bracey*, 8 Beav. 266; *Re Atkinson*, 26 Beav. 151.)

When a special order is rendered necessary through the breach of the solicitor's agreement, he will have to pay the costs of the special application: (*Ex parte Bayley*, 3 Jur. N. S. 33.)

The word "client" refers to the party chargeable, and an executor of a plaintiff applying for taxation of a bill delivered to the latter is liable if less than one-sixth is taxed off: (*Jefferson v. Warrington*, 7 M. & W. 137.)

(g) Ordering Judgment to be Entered.

Payment of the amount certified to be due and directed to be paid may be enforced according to the course of the court in which such reference shall be made; and it shall be lawful for . . . any judge [of the High Court] to order judgment to be entered up for such amount, with costs, unless the retainer shall be disputed, or to make such other order thereon as such court or judge shall deem proper: (6 & 7 Vict. c. 73, s. 43.)

VI. CHARGE FOR COSTS.

[See SOLICITOR.]

VII. RECOVERY OF.

No subpoena for the payment of costs, and, unless by leave of the court or a judge, no sequestration to enforce such payment, shall be issued: (O. XLVII., r. 2, April, 1880.)

Every person to whom any . . . costs shall be payable under a judgment shall, immediately after the time when the judgment was duly entered, be entitled to sue out one or more writ or writs of *fiery facias* or . . . of *elegit* to enforce payment thereof: (O. XLII., r. 15; and see EXECUTION.)

As to the procedure when costs are payable out of a fund in court, see PAYMENT INTO AND OUT OF COURT.

Costs to be paid out of a fund not in court, or out of the estate which is the subject of litigation, with interest, generally at 4l. per cent. may be declared to be a charge on the property, and the tenant for life may be directed to keep down the interest; or a sufficient part of the fund or estate to satisfy the costs will be ordered to be mortgaged or sold: (Dan. 1326.)

Where the court appoints [the official solicitor] to be guardian *ad litem*, of an infant or person of unsound mind, the court may direct that the costs to be incurred in the performance of the duties of such office shall be borne and paid, either by the parties or some one or more of the parties to the suit in which such appointment is made, or out of any fund in court in which such infant or person of unsound mind may be interested, and may give directions for the repayment or allowance of such costs, as the justice and circumstances of the case may require: (C. O. 40, r. 4.)

Costs are recoverable by the Crown, and are payable to the defendants in actions by the Crown: (see 18 & 19 Vict. c. 90, ss. 1, 2.)

Payment of costs will not be stayed pending appeal, if solicitors to whom these are payable give a personal undertaking to refund in case of reversal on appeal: (*Grant v. Banque Franco Egyptienne*, L. Rep. 3 C. P. Div. 202; 38 L. T. Rep. N. S. 612; 47 L. J. 455, Ch.; 26 W. R. 669.)

Nor on the ground that another proceeding in the same action is pending, under which costs may become payable to the applicant: (*Id.*)

VIII. APPEAL FROM ORDER AS TO.

[See APPEAL.]

COUNTERCLAIM.

[See PLEADING.]

COUNTY COURTS.

- I. CONCURRENT JURISDICTION OF, IN EQUITY.
- II. ORDERING TRIAL IN.
- III. REMOVAL AND TRANSFERS TO AND FROM [see CERTIORARI; TRANSFER].
- IV. APPEALS FROM.

I. CONCURRENT JURISDICTION OF, IN EQUITY.

County Courts have . . . all the powers and authority [formerly possessed by] the High Court of Chancery in . . . suits or matters . . .

- (1) By creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs-at-law . . . next of kin [or mortgagees of next of kin (*Turner v. Rennoldson*, L. Rep. 16 Eq. 37)], in which the personal, or real, or personal and real estate, against or for an account, or administration of which, the demand may be made, shall not exceed in amount or value the sum of five hundred pounds;
- (2) . . . For the execution of trusts, [constructive or express (*Clayton v. Renton*, L. Rep. 4 Eq. 158)], in which the trust estate or fund shall not exceed [the same amount];
- (3) . . . For foreclosure or redemption [although the right to redeem is disputed (*Powell v. Roberts*, L. Rep. 9 Eq. 169)], or for enforcing any charge or lien, when the mortgage, charge, or lien shall not exceed [the same amount];
- (4) . . . For specific performance, [including specific performance of agreements for leases (*Wilcox v. Marshall*, L. Rep. 3 Eq. 270)], or for the delivering up or cancelling any agreement for the sale or purchase of any property, when the purchase money shall not exceed the [same amount];
- (5) . . . Under the Trustee Relief Acts, or under the Trustee Acts, or under any of such Acts, in which the trust estate or fund . . . to which the proceeding relates shall not exceed [the same amount];
- (6) . . . Relating to the maintenance or advancement of infants in which the property of the infant shall not exceed [the same amount];
- (7) . . . For the dissolution or winding-up of any partnership in which the whole property, stock, and credits of such partnership shall not exceed [the same amount];
- (8) . . . For orders in the nature of injunctions, when the same are requisite for granting relief in any matter in which jurisdiction is given by [the Act] to the County Court: (28 & 29 Vict. c. 99, s. 1.)
- (9) For partition (including the power and authority conferred [on the High Court of Chancery by 31 & 32 Vict. c. 40]) in any case when the property to which the suit relates does not exceed in value [the same amount]: (31 & 32 Vict. c. 40, s. 12.)

As to the jurisdiction of the County Courts to stay proceedings in other courts, compare 28 & 29 Vict. c. 99, s. 1, sub-sect. 8, and J. A., 1873, s. 23.

The Act contains no prohibition or restriction whatever with regard to the existing jurisdiction of the court: (*Brown v. Rye*, L. Rep. 17 Eq. 344.)

When a plaintiff institutes equitable proceedings in the Chancery Division, which he might have commenced in a County Court under the Act of 1865, he is entitled to his usual costs (*Brown v. Rye* (*sup.*); *Scotto v. Heritage*, L. Rep. 3 Eq. 212; but see *Simons v. McAdam*, L. Rep. 6 Eq. 324) subject to the court's general discretion as to granting costs: (see COSTS.)

II. ORDERING TRIAL IN.

Where, in any action of contract brought in [the High Court of Justice] the claim indorsed on the writ does not exceed fifty pounds, or where such claim, though it originally exceeded fifty pounds, is reduced by payment into court, payment, an admitted set-off, or otherwise, to a sum not exceeding fifty pounds, a judge of [the High Court] on the

application of either party, after issue joined, may, in his discretion, and on such terms as he shall think fit, order that the cause be tried in any County Court which he shall name: (19 & 20 Vict. c. 108, s. 26.)

The form of order is given in Schedule H. 42, to the Rules of April, 1880.

[The order being made,] thereupon the plaintiff shall lodge with the registrar of such [County] Court such order and the issue; and the judge of such court shall appoint a day for the hearing of the cause, notice whereof shall be sent, by post or otherwise, by the registrar to both parties or their attorneys; and after such hearing the registrar shall certify the result to the master's office of such superior court; and judgment in accordance with such certificate may be signed in such superior court: (19 & 20 Vict. c. 108, s. 26.)

Where no special terms are imposed by the order, the parties are entitled (if the demand is of sufficient amount) to a trial by jury, notwithstanding a second trial is directed in a case where the first trial was by the County Court judge, without a jury: (*Ford v. Taylor*, L. Rep. 3 C. P. Div. 21.)

The action is not transferred to the County Court, the trial only taking place in the County Court, and the cause itself remaining in the High Court: (per Blackburn, J., *Balmforth v. Pledge*, L. Rep. 1 Q. B. 427.)

County Court judges will sometimes certify as to costs. If they do not, costs do not follow as of course, but a motion must be made to the court above for costs to be allowed. Judgment may be signed on the certificate without moving for judgment: (*Scutt v. Freeman*, L. Rep. 2 Q. B. Div. 177.)

When the order does not impose any terms, the costs may be taxed according to the scale of the High Court, so far as regards the proceedings in the High Court; but so far as regards proceedings in the County Court, according to the County Court scale: (*Wheatcroft v. Foster*, E. B. & E. 737.)

The jurisdiction to grant a new trial remains in the High Court: (*Balmforth v. Pledge*, *sup.*)

When the action is tried by a County Court judge without a jury the application for a new trial must be made to the division in which the action was commenced, and not to the Court of Appeal: (*Davis v. Godbehere*, L. Rep. 4 Ex. Div. 215.)

The time for applying for a new trial is not regulated by the rules under the Judicature Act, but by the former practice, and the application must be made within four days from the day of trial if the cause be tried during the sittings, or within the first four days of the ensuing sittings, if tried when the court above is not sitting, unless further time is allowed: (*London v. Roffey*, L. Rep. 3 Q. B. Div. 6; *Dunn v. Pearson*, W. N. 1878, p. 82.)

The time for applying for a new trial runs from the day of the hearing of the cause, not from the filing of the registrar's certificate: (*Copcutt v. Great Western Railway Company*, L. Rep. 2 C. P. 465.)

III. REMOVAL AND TRANSFER TO AND FROM.

[See CERTIORARI, TRANSFER.]

IV. APPEALS FROM.

Appeals from County Court are expressly excepted from the matter assigned to the Chancery Division: (see J. A. 1873, s. 34.)

All appeals from . . . a County Court, . . . which might before the passing of [the Judicature Acts] have been brought to any court or

judge whose jurisdiction is . . . transferred to the High Court of Justice, may be heard and determined by Divisional Courts consisting respectively of such of the judges thereof as may from time to time be assigned for that purpose: (J. A. 1873, s. 45.)

As to the practice, see PART II.

Malins, V.C. has decided that, when the Divisional Court is not sitting, he has jurisdiction to hear appeal motions, and he has in such motions granted orders to show cause either before himself or the Divisional Court: (*Eccles v. Eccles*, W. N. 1875, p. 194; 33 L. T. Rep. N. S. 338; *Williams v. Bindon*, W. N. 1876, p. 16.)

The same judge has held that such applications should not be made at chambers: (*Williams v. Bindon*, *sup.*); but by sect. 6 of the County Courts Act, 1875, if the Divisional Court "be not then sitting, such motion may be made before any judge of a Superior Court sitting in chambers": (38 & 39 Vict. c. 50.)

The Divisional Court has held that it has no jurisdiction to hear a motion upon appeal from a County Court, which has already been before a judge at chambers, and has been adjourned to the sitting of the court. The judge at chambers before whom the motion has been brought in the first instance must himself hear and determine it: (*Button v. The Woolwich Building Society*, L. Rep. 5 Q. B. Div. 88; 42 L. T. Rep. N. S. 54; 49 L. J. 249, Q. B.)

COUNTY DEBENTURES ACT.

If default is made in payment to any person or persons entitled, of any sum or sums due on debentures or coupons issued under [the] Act, at the time appointed for payment thereof, and the sum or aggregate of the sums the payment of which is thus in default amount to not less than 500*l.*, such person or persons may, instead of or in addition to bringing an action or actions for the sum or sums due, apply to a court of equity for the appointment of a receiver [to whom certain powers are given by the Act]: (36 & 37 Vict. c. 35, s. 17.)

[The Act is repealed, as from the 1st Jan. 1876, but not so as to] abridge or prejudicially affect any right in respect of any debenture issued in pursuance [thereof] before the [above date], or any remedy for non-payment of moneys secured by any such debenture, and all such rights and remedies may [still] be enforced: (38 & 39 Vict. c. 83, s. 35; and see LOCAL LOANS ACT.)

CUSTODY OF INFANTS.

[See INFANTS.]

DECLARATION OF RIGHT.

No suit . . . shall be open to objection on the ground that a merely declaratory [judgment] or order is sought thereby, and it shall be lawful for the court to make binding declarations of right without granting consequential relief: (15 & 16 Vict. c. 86, s. 50.)

This section is still in full vigour: (*Cox v. Barker*, L. Rep. 3 Ch. Div. 369; *Sweeting v. Prideaux*, L. Rep. 2 Ch. Div. 413.)

The court can only make a declaration of right, where it can, if neces-

sary, act on it by giving consequential relief : (*Rooke v. Lord Kensington*, 2 K. & J. 753, &c., cited Seton, 20.)

The court cannot make declarations as to :

Future rights : (*Langdale v. Briggs*, 8 D. M. & G. 391.)

Rights of persons entitled in reversion : (*Garlick v. Lawson*, 10 Hare, App. xv.)

Rights depending on a contingency which has not happened : (*Dowling v. Dowling*, L. Rep. 1 Ch. App. 612, cited Seton, 20) ; or

Guarding against a claim which may never be made : (*Jackson v. Turneley*, 4 Drew, 617, cited Morg. 209.)

DECLARATION OF TITLE.

I. INTERPRETATION OF TERMS.

II. WHO MAY APPLY.

1. GENERALLY.
2. TWO OR MORE PERSONS.
3. MARRIED WOMEN.
4. INFANTS, &c.
5. CHANGE OF PARTIES.

III. PETITION FOR DECLARATION.

1. FORM.
2. SERVICE ON REGISTRAR.

IV. ORDER FOR INVESTIGATION OF TITLE.

V. INVESTIGATION OF TITLE.

VI. AFFIDAVIT AS TO TITLE.

VII. SECURITY FOR COSTS.

VIII. REGISTRAR OF INCUMBRANCES AND ESTATES.

IX. PETITION OPPOSING DECLARATION.

X. DISMISSAL OF PETITION FOR DECLARATION.

XI. ORDER NISI FOR DECLARATION OF TITLE.

1. MAKING ORDER.
2. SERVING COPY ON ADJOINING OWNERS, &c.
3. DEPOSITING COPY FOR INSPECTION.

XII. ADVERTISEMENTS.

XIII. THE DECLARATION OF TITLE.

1. WHERE MADE.
2. SEPARATE DECLARATIONS.
3. RESERVING RIGHTS UNDER LOST OR DESTROYED DEEDS.
4. WHEN FINAL (see *post*, XIV.)
5. EFFECT.
 - (a) *As to Purchaser for Valuable Consideration.*
 - (b) *As to Taxes, Leases, and Easements.*
 - (c) *As to Incumbrances.*
 - (d) *Irregularity or Informality in Proceedings.*
 - (e) *Where Procured by Fraud or Falsehood.*
6. REGISTRATION AS INDEFEASIBLE TITLE.

XIV. APPEAL.

1. FROM THE DECLARATION.
2. FROM DISMISSAL OF PETITION OR REFUSAL TO MAKE DECLARATION.
3. FROM ORDER ON PETITION TO RECALL OR VARY CERTIFICATE (see *post*, XIX.)

XV. PRODUCING DOCUMENTS OF TITLE.

- XVI. CERTIFICATE OF TITLE.
- XVII. SUBSTITUTING SEPARATE CERTIFICATE.
- XVIII. DUPLICATE CERTIFICATE.
- XIX. RECALLING OR VARYING CERTIFICATE.
- XX. COSTS.

I. INTERPRETATION OF TERMS.

In the construction of [the] Act (except where the context or other provisions of the Act require a different construction) the word "person" shall include a body politic or corporate; the word "possession" shall include receipt of the rents and profits; and the word "land" shall not include any incorporeal hereditaments, but shall include all corporeal tenements and hereditaments not expressly excepted: (25 & 26 Vict. c. 67, s. 48.)

II. WHO MAY APPLY.

1. GENERALLY.

Every person claiming to be entitled to land in possession for an estate in fee simple, either absolutely or subject to any incumbrances, estates, rights, or interests, vested or contingent, or claiming to have a power of disposing of land for his own benefit for an estate in fee simple in possession, either absolutely or subject to any incumbrances, estates, rights, or interests vested or contingent . . . may apply to the [Chancery Division] by petition in a summary way for a declaration of title: (*Id.*, s. 1.)

Persons entitled to apply for registration under 25 & 26 Vict. c. 53, were also entitled to apply; but no application under that Act can now be entertained: (38 & 39 Vict. c. 87, s. 125.)

No such petition shall be admitted as to lands of copyhold or customary tenure: (25 & 26 Vict. c. 67, s. 4.)

2. TWO OR MORE PERSONS.

Any two or more persons claiming to have together such estate or interest in land as would have enabled any one person to petition as aforesaid, may join in such a petition, and such proceedings shall be had thereupon as in the case of a single petitioner: (*Id.*, s. 9.)

3. MARRIED WOMEN.

Where any married woman is desirous of making any application, giving any consent, or doing any act, or becoming party to any proceeding under [the] Act, her husband's concurrence shall be required, and she shall be examined apart from her husband touching her knowledge of the nature and effect of the application or other act, and it shall be ascertained that she is acting freely and voluntarily; and such examination may be taken by the court or such persons as are authorised to take acknowledgments of deeds by married women under [3 & 4 Will. 4, c. 74], and . . . such examination shall be certified to the court: (*Id.*, s. 36.)

A married woman entitled to her separate use, and not restrained from anticipation, shall, for the purposes of [the] Act, be deemed a *feme sole*: (*Id.*)

4. INFANTS, &C.

Where any person who (if not under disability) might have made any application, given any consent, done any act, or been party to any proceeding under [the] Act, is a minor, idiot, or lunatic, the guardian or committee of the estate respectively of such person may make such applications, give such consents, do such acts, and be party to such proceedings, as such person respectively, if free from disability, might have made, given, done, or been party to, and shall otherwise represent such person for the purposes

of [the] Act: Provided always, that where there is no guardian or committee of the estate of any such person as aforesaid, being infant, idiot, or lunatic, or where any person the committee of whose estates if he were idiot or lunatic would be authorised to act for and represent such person under [the] Act is of unsound mind or incapable of managing his affairs, but has not been found idiot or lunatic under an inquisition, it shall be lawful for the court to appoint a guardian of such person for the purpose of any proceedings under [the] Act, and from time to time to change such guardian: (*Id.*, s. 37.)

5. CHANGE OF PARTIES.

Proceedings under [the] Act shall not abate or be suspended by any death or transmission or change of interest, but in any such case of death or transmission or change of interest it shall be lawful for the court, where it sees fit, to require notices to be given to persons becoming interested, or to make any order for discontinuing, suspending, or carrying on the proceedings, or otherwise in relation thereto, which to the court may appear just: (*Id.*, s. 38.)

III. PETITION FOR DECLARATION.

1. FORM.

Every petition for a declaration of title shall contain an exact description in their actual state of the lands as to which the declaration is sought, stating particularly the boundaries thereof, and the lands on which the same and every part thereof abut, and, so far as conveniently may be, the names and descriptions of the owners and occupiers of such last-mentioned lands: (Sched. to 25 & 26 Vict. c. 67, r. 1.)

Every such petition shall state what incumbrances, estates, rights, and interests, if any, the petitioner admits to affect his title, and subject to which he seeks to have his title declared, and shall be in such form as the court shall by general order direct: (25 & 26 Vict. c. 67, s. 2.)

No general order has been made.

2. SERVICE ON REGISTRAR.

It shall be lawful for the court, by general order or otherwise, if it shall think fit, to require that the registrar . . . shall be served with notice of such petition, and the registrar shall thereupon be made a party to and attend the proceedings on such petition, and the costs thereby properly incurred shall be paid by the petitioner: (*Id.*, s. 5.)

IV. ORDER FOR INVESTIGATION OF TITLE.

The court on the hearing of any such petition, on being satisfied that the petitioner has proved such a possession, and has stated such a title as, if established, would entitle him to a declaration under [the] Act, shall make an order for the investigation of the title in the same way as if the petitioner had obtained as vendor a decree for the specific performance of an agreement for sale of the land in question for the estate claimed in his petition: (*Id.*, s. 6.)

V. INVESTIGATION OF TITLE.

On the investigation of the title to the lands as to which the declaration is sought, the identity of the lands described in the petition, with the parcels as described in the title deeds, shall be established by affidavit or otherwise, as the court may deem just: (Sched., r. 2.)

The court may, if it shall deem it necessary or proper, require the petitioner to lodge in court a map or plan of the lands in question: (Sched., r. 3.)

VI. AFFIDAVIT AS TO TITLE.

No order [for a declaration of title] shall be made until the petitioner and his solicitor, and any other person whom the court may require, shall have made and filed an affidavit that to the best of their respective knowledge, information, and belief all settlements, deeds, documents, instruments, maps, plans, and papers relating to the title to the land in question have been produced to the court, or the cause of their non-production has been fully and fairly explained, and that all facts material to the title have been fully and fairly disclosed to the court: Provided always, that the court may dispense with such affidavit either from the petitioner or his solicitor when it shall think it reasonable so to do, or may permit the same to be modified as circumstances may seem to require: (25 & 26 Vict. c. 67, s. 10.)

VII. SECURITY FOR COSTS.

No order [for a declaration] shall be made until the petitioner shall have given security to the satisfaction of the court for payment of all costs, if any, which may be awarded to any person who may oppose the petitioner's right to the declaration prayed for: (*Id.*, s. 9.)

Security is ordered when the order *nisi* is made for a declaration: (*Re Roberts*, L. Rep. 10 Eq. 402.)

In one case the security required was 40*l*.

VIII. REGISTER OF INCUMBRANCES AND ESTATES.

A register [is] kept wherein any person having or claiming to have any estate, right, title, or interest in or to any land, or having or claiming to have any incumbrance thereon, [is] at liberty to enter his name and address, with the name of the county, parish, and township in which such land is situated, ... and when any person shall have made such entry the court shall not make an order under [the] Act unless it is satisfied, after such evidence as it shall think sufficient, that notice of the application for such order has been given to such person as shall have made such entry in a reasonable time before such order is actually made: (25 & 26 Vict. c. 67, s. 39.)

IX. PETITION OPPOSING DECLARATION.

Any person may, at any time before the proposed declaration of title has been made, petition the court in a summary way to be heard against the making thereof, and the court shall thereupon fix a time for the hearing of such petition, and shall, if necessary, enlarge the time for making the declaration until such petition shall have been disposed of: (*Id.*, s. 12.)

On the hearing of such petition [in opposition] the court may introduce such restrictions or qualifications in the title sought to be declared as the justice of the case requires, or may reserve the rights of any person or class of persons, or may refuse to make any declaration of title: (*Id.*, s. 13.)

X. DISMISSAL OF PETITION FOR DECLARATION.

If the court, on such investigation, shall not be satisfied that the petitioner has shown such a title as it would have compelled an unwilling purchaser to accept, then it shall dismiss the petition, but subject to the right of appeal mentioned [*post*, XIV.]: (*Id.*, s. 7.)

XI. ORDER NISI FOR DECLARATION OF TITLE.

1. MAKING ORDER.

In case the court is satisfied after such an investigation that the

petitioner has shown such a title as it would have compelled an unwilling purchaser to accept, it shall, on the conditions hereinafter mentioned being complied with, make an order that on some day, not less than three months from the date of the order, a declaration shall be made establishing the petitioner's title, unless in the meantime cause is shown to the contrary; and the court may enlarge the time for so showing cause as often as it may deem proper: (*Id.*, s. 8.)

The court ordered the declaration to be made at the end of three months: (*Re Roberts*, L. Rep. 10 Eq. 402.)

2. SERVING COPY ON ADJOINING OWNERS, &c.

The petitioner, after obtaining the order for a declaration of title, shall cause a copy thereof, together with the description of the lands in question, with any engraved or lithographed plan thereof (if any exists) to be served on every adjoining occupier and owner, or on such of them and on such other persons (if any) as the court may direct to be so served: (Sched., r. 4.)

Every such copy served on any adjoining occupier or owner, or deposited as aforesaid, shall state that any person wishing to show cause against the making of the proposed declaration may do so by presenting a petition in a summary way to the [Chancery Division] at any time before the day appointed for making the proposed declaration: (Sched., r. 6.)

3. DEPOSITING COPY FOR INSPECTION.

[The petitioner] shall also cause a copy or copies thereof to be deposited in some office or place, offices or places, to be appointed by the court on or near to the lands in question, to be accessible at all reasonable times to all persons desirous of examining the same, and notice of every such deposit shall be affixed in some public place or places on or near to the lands in question: (Sched., r. 5.)

XII. ADVERTISEMENTS.

The petitioner after obtaining such order shall give notice of the same by advertisement in such newspapers and at such times as the court may direct, and in any other manner which the court may deem expedient for the purpose of informing all persons interested thereof, and as may be directed by any general or special order in that behalf: (25 & 26 Vict. c. 67, s. 11.)

The petitioner, after such deposit shall have been made [as mentioned *sup.*, XI., 3.] shall cause advertisements to be inserted three times at least in such newspapers on such days as the court shall direct, stating the said order, and stating also where any copy has been so deposited for inspection: (Sched., r. 7.)

The court in one case, where the property was in London, ordered the order to be advertised three times, at three days' interval, in each of three London newspapers: (*Re Roberts*, L. Rep. 10 Eq. 402.)

Unless the last of such advertisements is made within four weeks next after the date of the order, the time thereby fixed for showing cause against the same shall be enlarged for one calendar month, or such further time as the court shall direct: (Sched., r. 8.)

XIII. THE DECLARATION OF TITLE.

1. WHERE MADE.

If no petition has been presented against the proposed declaration of title within the time in that behalf limited, or if, having been presented, the court shall be of opinion that no sufficient ground has been shown for refusing to make a declaration of title, then the court shall, after the

expiration of the time limited for showing cause, upon being satisfied that the required notices have been duly given, and that all other requisitions have been duly complied with, make a declaration that the original petitioner has such title to the land in question as he sought to establish by his petition or such title, subject to any restrictions, reservations, or qualifications which it may deem necessary or proper to introduce: (25 & 26 Viet. c. 67, s. 15.)

2. SEPARATE DECLARATIONS.

Instead of a single declaration of title . . . the court may, on the application of the petitioner, make separate declarations . . . as to the title of separate parts of the land referred to in the petition: (*Id.*, s. 25.)

3. RESERVING RIGHTS UNDER LOST OR DESTROYED DEEDS.

If it shall appear to the court that all or any of the title deeds relating to the land in question have been lost or destroyed, the court may, if it shall think fit, reserve the rights of all persons under any such lost or destroyed deeds: (*Id.*, s. 14.)

4. WHEN FINAL.

[See *post*, XIV.]

5. EFFECT.

(a) *As to Purchaser for Valuable Consideration.*

Such declaration of title, as soon as it shall have become final for the purposes of [the] Act, shall in favour of any person thereafter deriving title as a purchaser for valuable consideration of the land therein referred to, or of any part thereof, or of any estate, right, or interest therein, by, from, through, or under the person whose title has been so declared, be deemed and taken to have correctly declared the same, but save as aforesaid such declaration shall have no force or effect whatever as to the title of the land comprised therein: (*Id.*, s. 24.)

(b) *As to Taxes, Easements, and Leases.*

The declaration of title shall not affect any of the claims, rights, or matters hereinafter mentioned, that is to say:

Land tax, succession duty, tithe rentcharge, rights of common, rents payable to the Crown, public rights of way, liability to repair highways by reason of tenure, rights of way, watercourses, rights of water and other easements, or servitudes, manorial rights and franchises, leases or agreements for leases for any term not exceeding twenty-one years where there is occupation under the same: (*Id.*, s. 29.)

(c) *As to Incumbrances.*

[Where] at the time of making such declaration of title as aforesaid there may be estates, rights, or interests in the land which may not be saved by the declaration . . . all money received by the person . . . , alienating [for valuable consideration] shall be deemed to have been received by him in trust to invest the same in the purchase of lands to be settled to the uses and on the trusts to and on which the lands so alienated stood limited at the time of such alienation: Provided always, that this clause shall not be deemed to impose any liability on any person who may have received any money on such alienation as a trustee, so far as relates to money which he may have duly applied in execution of the trusts reposed in him: (*Id.*, s. 35.)

(d) *Irregularity or Informality in Proceedings.*

The declaration of title, when it has . . . become final for the purposes of [the] Act, shall not be set aside or called in question by

reason of any irregularity or informality in the proceedings previous to the making thereof: (*Id.*, s. 20.)

(e) *When Procured by Fraud or Falsehood.*

If in the course of any proceeding before the court under [the] Act any person acting either as principal or agent shall, knowingly and with intent to deceive, make or assist or join in or be privy to the making of any material false statement or representation, or suppress, conceal, or assist or join in or be privy to the suppressing, withholding, or concealing from the court any material document, fact, or matter of information, every person so acting shall be deemed to be guilty of a misdemeanor [and] the order or declaration of title obtained by means of such fraud or falsehood shall be null and void for or against all persons other than a purchaser for valuable consideration without notice: (*Id.*, s. 44.)

6. REGISTRATION AS INDEFEASIBLE TITLE.

Every declaration of title might be registered as an indefeasible title (*Id.*, s. 21) prior to the passing of 38 & 39 Vict. c. 87, by sect. 125 of which it is enacted that no future applications under 25 & 26 Vict. c. 53, are to be made.

From and after [such] registration in the register of estates with an indefeasible title, such land [is] subject to the provisions of [25 & 26 Vict. c. 53]: (25 & 26 Vict. c. 67, s. 30.)

XIV. APPEAL.

1. FROM THE DECLARATION.

Any person may, at any time *within six months* from the making of any such declaration, appeal therefrom to the Court of Appeal and such court shall on the hearing of the appeal make an order confirming, varying, or annulling the declaration as it may see fit; but if there is no such appeal, then the said declaration shall, at the expiration of the said six months, become final for the purposes of [the] Act: (*Id.*, s. 16.)

Any person may appeal from any such order of the Court of Appeal to the House of Lords at any time within six months from the making thereof, and the said House may make an order confirming, varying, or annulling the said declaration as to them shall seem just; but if there is no such appeal, then the declaration, as approved by the said Court of Appeal shall at the expiration of the said six months become final for the purposes of [the] Act: (*Id.*, s. 17.)

In case of any such appeal as aforesaid to the House of Lords, the declaration of title as finally approved by them shall become final for the purposes of [the] Act: (*Id.*, s. 18.)

2. FROM DISMISSAL OF PETITION OR REFUSAL TO MAKE DECLARATION.

In case the court shall have dismissed the original petition on the ground that the petitioner had not shown such a title as it would have compelled an unwilling purchaser to accept, or if, on the hearing of any petition against the making of the declaration of title prayed for, the court shall have refused to make any declaration of title, the original petitioner shall have the same rights of appeal to the Court of Appeal and to the House of Lords as is given [by the Act] to any person appealing against a declaration of title actually made: (*Id.*, s. 19; and see *sup.* 1.)

3. FROM ORDER ON PETITION TO RECALL OR VARY CERTIFICATE.

[See *post*, XIX.]

XV. PRODUCING DOCUMENTS OF TITLE.

Before any certificate [of title] shall be sealed, the petitioner shall produce to the court such of his deeds and muniments of title as the court shall require, and the same shall be stamped or marked by the officer issuing the certificate in such manner as the court shall by general orders direct, for the purpose of showing that a declaration of title has been made as to the land therein comprised, or as to such part thereof as is comprised in the declaration : (*Id.*, s. 23.)

XVI. CERTIFICATE OF TITLE.

Any person who has obtained in manner aforesaid a final declaration of title shall be entitled to receive from the court, on payment of the proper fees, and on production of his title deeds for the purpose mentioned [*sup.*, XV.], a certificate under the seal of the court setting forth the title so declared, and further stating that the time for appealing has expired, and such certificate shall be conclusive evidence of the facts therein stated : (*Id.*, s. 22.)

Instead of a single certificate the court may, on the application of the petitioner give separate certificates as to the title of separate parts of the land referred to in the petition : (*Id.*, s. 25.)

XVII. SUBSTITUTING SEPARATE CERTIFICATES.

If for the purpose of a sale or other disposition of the land comprised in any certificate of title, or of any part thereof, the holder of any such certificate shall be desirous of having separate certificates of title relating to separate portions of the land, it shall be lawful for the court, on petition by such holder, to order his certificate to be cancelled, and in lieu thereof to give him separate certificates for separate parts of the land comprised in the certificate so cancelled; and every such separate certificate shall refer to and state the date of the cancelled certificate, and shall have the same effect as to the land therein comprised as if it had been given at the time of such date, but no such substitution of certificates shall in any way prejudice or affect the title of any person who shall previously thereto have become entitled to any part of the land comprised in the original certificate, or any interest in the same : (*Id.*, s. 26.)

The land mentioned in every such separate certificate [might] be entered upon the register of estates with an indefeasible title. . . . : (*Id.*, s. 27.)

No applications under 26 & 27 Vict. c. 53, are in future to be made : (38 & 39 Vict. c. 87, s. 125.)

XVIII. DUPLICATE CERTIFICATE.

If any certificate of title shall be lost or destroyed, the court may issue a fresh certificate in lieu of that so lost or destroyed, expressing on the face thereof that it is a duplicate, but no such fresh certificate shall be of any avail against any person who may have already derived title under the original certificate : (25 & 26 Vict. c. 67, s. 28.)

XIX. RECALLING OR VARYING CERTIFICATE.

If, at any time after any such declaration of title as aforesaid has been made, any person shall consider himself to be aggrieved thereby, it shall be lawful for him to present a petition praying that the same may be recalled or varied in such manner as may be just, and the court shall thereupon proceed in the hearing of such petition in the same manner as if the same had been presented before the declaration of title had been

made, and the court may, on the hearing of the said petition, annul the declaration and order the certificate or certificates to be given up to be cancelled, or may make such variations therein as it may deem just, and may, if it shall think fit, also direct the registry thereof, if made, to be cancelled; but no proceeding on any such petition shall prejudice or affect the title of any person who before any such annulling or variation shall have acquired a title under the said declaration as a purchaser for valuable consideration of the said land or of any estate or interest therein: (*Id.*, s. 31.)

The court may, on the hearing of any such last-mentioned petition, make any order which it may deem just, restraining the person who has obtained the declaration, and all persons claiming by, through, from, or under him otherwise than as a purchaser for valuable consideration, from in any manner dealing with the said land until such petition shall have been disposed of: (*Id.*, s. 32.)

All proceedings on any such petition shall be liable to the same right of appeal as in the case of petitions presented before such declaration of title was made: (*Id.*, s. 33, and see *sup.* XIV.)

XX. COSTS.

The court shall have power to order costs either as between party and party or as between solicitor and client to be paid by and to any person, party to any proceeding under [the] Act, and to give directions as to the fund out of which such costs shall be paid: (*Id.*, s. 34.)

DECREE.

[See JUDGMENT.]

DEEDS.

I. SETTLEMENT.

1. ON ABSOLUTE DIRECTION TO SETTLE.

2. ON DIRECTION TO SETTLE IF PARTIES DIFFER.

II. ENROLMENT [see CENTRAL OFFICE, CHARITIES.]

I. SETTLEMENT.

1. ON ABSOLUTE DIRECTION TO SETTLE.

When any judgment or order directs any instrument to be absolutely settled by the judge, on the return of the summons to proceed [see CHAMBERS] the party entitled to prepare the draft is directed to leave it at chambers, and proceedings are adjourned to a later day: (Dan. 1147.)

At the adjournment the draft is gone through by the chief clerk, and any points disposed of: (*Id.*)

The judge may obtain the assistance of any of the conveyancing counsel of the court: [See CONVEYANCING COUNSEL.]

When the opinion of such counsel is obtained, an appointment is obtained, and notice thereof served: [See CHAMBERS.]

At such appointment the draft is finally settled, and marked for engrossment: (Dan. 1147.)

In urgent cases the chief clerk issues his memorandum to the conveyancing counsel on the return of the summons to proceed, and adjourns the proceedings till the draft is settled. The draft, or a fair copy certified by

the solicitor to be true, is left at chambers, and settled on an appointment obtained for the purpose: [See CHAMBERS.]

2. ON DIRECTIONS TO SETTLE IF PARTIES DIFFER.

This should not be given where an infant is a necessary party: (Dan. 1147.)

Where, by any [judgment] or order a deed is directed to be settled by the judge in chambers in case the parties differ about the same, a summons to proceed shall be issued: (C. O. 35, r. 17.)

Upon the return of such summons the party entitled to prepare such deed [is] directed to deliver a copy thereof, within such time as the judge shall think fit, to the party entitled to object thereto; and the party so entitled to object [is] directed to deliver to the other party a statement in writing of his objections (if any) within eight days after the delivery of such copy; and the proceeding shall be adjourned until after the expiration of the said period of eight days: (*Id.*)

If the statement of objections is not delivered within such time, or the enlarged time, the party will be considered to have approved the deed: (Dan. 1148.)

When the deed has been settled, it is engrossed by the party having conduct of the proceedings, and brought into chambers: (Dan. 1148.)

An affidavit must accompany the engrossment and verify it: (See form given in Sched. 19 to the Regulations of August, 1857.)

A memorandum of approval is written in the margin of the first skin of the engrossment, and signed by the chief clerk, who also initials the other skins: (Dan. 1148.)

The chief clerk generally certifies the settlement by the judge: (*Id.*)

II. ENROLMENT.

[See CENTRAL OFFICE, CHARITIES.]

DEFENCE ACTS.

- I. PURCHASE OF LANDS, &c., BY SECRETARY FOR WAR.
- II. TAKING LANDS, &c., COMPULSORILY.
- III. PAYMENT OR COMPENSATION FOR OMITTED INTERESTS.
- IV. PAYMENT IN OF PURCHASE OR COMPENSATION MONEY.
 1. WHERE OWNER UNDER DISABILITY, OR NOT ABSOLUTELY ENTITLED.
 2. ON FAILURE TO SHOW TITLE.
- V. INVESTMENT AND PAYMENT OUT.
- VI. SERVICE ON SECRETARY OF STATE.
- VII. POWER OF SECRETARY TO USE LANDS CLAUSES ACTS.

I. PURCHASE OF LANDS, &c. BY SECRETARY FOR WAR.

It shall be lawful for [Her Majesty's Principal Secretary of State for the War Department for the time being] from time to time to contract for and purchase, for and on behalf of Her Majesty, her heirs or successors, any messuages, buildings, castles, forts, lines, or other fortifications, manors, lands, tenements, or hereditaments, or to take or purchase any lease of the same which shall in their judgment be desirable to be purchased, for and on behalf of the . . . ordnance or barrack service, or the defence of the realm, upon such terms as to the said [secretary] shall seem meet; and to enter into any contracts necessary for that purpose: (5 & 6 Vict. c. 94, s. 9, as altered by 18 & 19 Vict. c. 117.)

Bodies politic and persons under disability may agree with such secretary for such sales or leases : (see 5 & 6 Vict. c. 94, ss. 10, 18.)

II. TAKING LANDS, &c., COMPULSORILY.

In case any such bodies or other persons [by the Acts] authorised to contract on behalf of themselves or others . . . or any other person or persons interested in any such lands [&c.] shall, for the space of fourteen days next after notice in writing [given by the Secretary for War, refuse to treat, or to accept the sum offered, or be prevented by absence from treating, possession may be given as in the Act mentioned, and a jury summoned who shall] find the compensation to be paid, either for the absolute purchase of such lands [&c.], or for the possession or use thereof, as the case may be : (5 & 6 Vict. c. 94, s. 19.)

If the compensation claimed do not exceed 200*l.*, the same shall be settled by two justices : (23 & 24 Vict. c. 112, s. 13.)

Where, by reason of absence from the United Kingdom, any party is prevented from treating, or cannot, after diligent inquiry, be found, the amount of such compensation shall be determined by valuation [by a surveyor appointed by] two justices : (23 & 24 Vict. c. 112, s. 14.)

III. PAYMENT OR COMPENSATION FOR OMITTED INTERESTS.

If at any time after the said Secretary of State has entered upon any lands vested in him under [the] Act, any party appear to be entitled to any estate, right, or interest in or charge affecting such lands which through mistake and inadvertence has been omitted to be purchased or compensated for, the said Secretary of State shall nevertheless remain in the undisturbed possession of such lands, and shall be deemed to have an indefeasible title thereto, but shall pay compensation for any such estate, right, interest, or charge, which but for [the] enactment might be recovered or enforced, and also pay to such party, or to any other party, who may establish a right thereto, full compensation for the mesne profits or interests which would have accrued to such parties respectively in respect thereof, during the interval between the entry of the said Secretary of State thereon, and the time of the payment of such compensation by the said Secretary of State so far as such mesne profits or interests may be recoverable at law or in equity : [and] such compensation shall be agreed on or awarded and paid in like manner as the same would have been agreed on or awarded and paid in case the said Secretary of State had purchased or compensated for such estate, right, interest, or charge, before his entering upon such lands, or as near thereto as circumstance will admit : (23 & 24 Vict. c. 112, s. 36.)

IV. PAYMENT IN OF PURCHASE OR COMPENSATION MONEY.

1. WHERE OWNER UNDER DISABILITY OR NOT ABSOLUTELY INTERESTED.

Where any money shall have been or shall be agreed, or shall have been or shall be required by the verdict of any jury, to be paid or given by the said [secretary] for the absolute purchase or exchange of any messuages, buildings, castles, forts, lines, or other fortifications, manors, lands, grounds, tenements, or hereditaments, or of any reversion as aforesaid, or of the enfranchisement of any copyhold or purchase of any other interest belonging to any such body, or other person or persons under any disability or incapacity, or not having the absolute interest therein, the said money, if the same shall amount to or exceed the sum of 200*l.*, shall

be paid into the [Bank of England in the name and with the privity of the Paymaster-General in the matter of the Acts to the credit of the persons claiming to be interested therein (naming them): (5 & 6 Vict. c. 94, s. 25, as amended by 22 & 23 Vict. c. 21, s. 8.)

When the money is under 200*l.* and over 20*l.*, it may, at the option of the landowner, be paid to three trustees: (5 & 6 Vict. c. 94, s. 27.)

[Upon the filing in the Chancery Division of the certificate of the Paymaster-General, with the receipt annexed, of the payment in, the hereditaments in respect whereof the same is paid shall be vested in the Secretary for War] for the service of the . . . ordnance department, or for the defence of the realm, in trust for Her Majesty, her heirs and successors: (5 & 6 Vict. c. 94, s. 25, as amended by 18 & 19 Vict. c. 117; and 22 & 23 Vict. c. 21, s. 8.)

Where any compensation is *required* to be paid into the Bank of England . . . under [the Acts], there shall be added thereto a sum of 30*l.* as an equivalent for the expenses consequent upon such payment, and upon such compensation, with such additional sum (which shall be deemed part of such compensation), being so paid, the said Secretary of State shall be discharged from all liability in respect thereof, and the Court . . . may allot to any tenant for life or for any other qualified estate in respect of any expenses of investment incurred by him, any portion of any such compensation which the court may deem just: (23 & 24 Vict. c. 112, s. 21.)

Service on the Secretary of War, of applications concerning a fund paid in under this section, is unnecessary: (Seton, 1472.)

2. ON FAILURE TO SHOW TITLE.

The said Secretary of State may in any case at or after the expiration of three months from the time at which the compensation for any lands has been agreed upon or otherwise ascertained, if the owner thereof have not in the meantime made out a title thereto to the satisfaction of the said Secretary of State, pay such compensation, without such addition as aforesaid [see *sup.* 1] into the Bank of England . . ., in manner hereinbefore referred to, and such payment shall discharge the said Secretary of State from all liability in respect of the money so paid: (23 & 24 Vict. c. 112, s. 22.)

As to effect of payment in, see *sup.* 1.

V. INVESTMENT AND PAYMENT OUT.

The [Chancery Division is] empowered, in a summary way, upon motion or petition for or on behalf of any person or persons interested in or entitled to the benefit of the money so paid to and received by the [Paymaster-General], or the interest or produce thereof, and upon reading the certificate [of the Paymaster-General] concerning the same . . . and receiving such further satisfaction as [the court] shall think necessary, to make and pronounce such orders and directions for paying the said money or any part of the same, or for placing out such part thereof as shall be principal in the public funds, or upon Government or real securities and for payment of the dividends or interest thereof or any part thereof to the respective persons entitled to receive the same, or for laying out the principal or any part thereof in the purchase of other lands or hereditaments, to be conveyed and settled to, for, and upon the same uses, trusts, interests, or purposes as the . . . messuages [&c.], so purchased or taken, stood settled at the time of the payment of such money as aforesaid, or as near thereto as the same can be done, or otherwise concerning the disposition of the said money or any part thereof, and the interest of the same or any part thereof for the benefit of the person or persons entitled to and

interested in the same respectively, or for appointing any person or persons to be a trustee or trustees for all or any of such purposes as the said court shall think just and reasonable : (5 & 6 Vict. c. 94, s. 26.)

All orders and directions in relation to any money paid [in] or the securities in or upon which the same may be invested, or the dividends or interest on such money and securities, which under the . . . Acts the [Chancery Division] is empowered to make or give on motion or petition, may be made or given by the [judges of such division] while sitting at chambers, upon summons in like manner as in other cases in which proceedings may be so had before [such judges] : (23 & 24 Vict. c. 112, s. 23.)

This section has not abolished the practice by motion or petition : (Seton, 1473; and see *Re Maynard*, there cited, as to the costs of a petition for investment.)

[Where money is paid in on account of failure to deduce a title for three months] the court . . . may, upon application for payment of such money to the party entitled, in case the court be of opinion that there was no unreasonable delay in deducing the title, or that a good title was shown, order all or any costs occasioned by such payment into court to be paid by the Secretary of State : (23 & 24 Vict. c. 112, s. 22.)

VI. SERVICE ON SECRETARY OF STATE.

Any notice, summons, or other document required to be served on the said Secretary of State may be served by being delivered to the Solicitor for the War Department for the time being, or by being left for him thereat; and any notice, summons, writ, or other document required to be given by or on behalf of the said Secretary of State shall be given under the hand of such solicitor : (23 & 24 Vict. c. 112, s. 45.)

VII. POWER OF SECRETARY FOR WAR TO USE LANDS CLAUSES ACTS.

For the purpose of acquisition of any messuages, lands, tenements, and hereditaments wanted for the service of the Admiralty or of the War Department or for the defence of the realm, it shall be lawful for Her Majesty's Principal Secretary of State for the War Department for the time being to use all or any of the powers and provisions by the Lands Clauses Consolidation Act, 1845, . . . given to promoters of undertakings, as therein mentioned, and for such purposes, the said principal secretary shall be deemed and taken to be the promoters of an undertaking within the meaning of the said Act, and all the powers and provisions thereof shall, if used by Her Majesty's Principal Secretary of State for the War Department, be treated as if they were contained in the 5 & 6 Vict. c. 94; for the purpose of being used and made available by the principal officers of Her Majesty's ordnance, and had been transferred to the said principal secretary for the time being by [18 & 19 Vict. c. 117] for the purposes aforesaid; [but not so as to] authorise any purchase otherwise than by agreement of any land, except according to [5 & 6 Vict. c. 23], or prejudice or affect the powers or authorities of the said principal secretary for the time being under the last-mentioned statutes, or either of them : (23 & 24 Vict. c. 107, s. 7.)

It shall be lawful for [the Secretary for War] (if [he] shall think proper so to do) to use and avail [himself] of all the powers and provisions contained in the Lands Clauses Consolidation Act, 1845, for the purpose of ascertaining, making, and paying compensation for and extinguishing all rights of common, commonable and other rights in, over, or affecting any lands the soil of which has at any time been or shall hereafter be purchased or taken . . . under [5 & 6 Vict. c. 94], and for such purpose the

[Secretary of War] shall be deemed and taken to be promoters of an undertaking within the meaning of the said Lands Clauses Consolidation Act, 1845, and all the powers and provisions of the last-mentioned Act may, if necessary, be treated as if they had been contained in the . . . 5 & 6 Vict. c. 94, for the purposes of being used or made available by the said [secretary, but not so as to] prejudice or affect [his] powers and authorities under the last-mentioned statute: (17 & 18 Vict. c. 67, s. 1.)

The said Secretary of State may, if he think fit, as well in respect of lands required to be kept free from buildings as in respect of lands taken under [the] Act, use and avail himself of all or any of the powers and authorities by the Lands Clauses Consolidation Act, 1845, given to "the promoters of the undertaking;" and every party enabled by the last mentioned Act to sell and convey or release lands or any estate or interest therein to "the promoters of the undertaking" shall have the same or the like powers to contract, and agree with the said Secretary of State as to the compensation to be paid in respect of any lands, estates, or interests taken or affected under the provisions of [the] Act; [but] nothing in this enactment shall prejudice or affect the right to exercise the other powers or authorities given [by the Act]: (23 & 24 Vict. c. 112, s. 29; and see Seton, 1473.)

DISCONTINUANCE AND WITHDRAWAL.

I. BY PLAINTIFF.

1. BY NOTICE WITHOUT LEAVE.

2. BY LEAVE.

II. BY DEFENDANT.

III. BY EITHER PARTY BY CONSENT.

I. BY PLAINTIFF.

1. BY NOTICE WITHOUT LEAVE.

The plaintiff may, at any time before receipt of the defendant's statement of defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action or withdraw any part or parts of his alleged cause of complaint: (O. XXIII., r. 1.)

A letter from the plaintiff's solicitor to the defendant's solicitor, stating that they "are instructed to proceed no further with the action" is sufficient notice: (*The Pomerania*, 39 L. T. Rep. N. S. 642.)

The rule does not entitle a plaintiff to discontinue after the action has been entered for trial: (*Matthews v. Antrobus*, 49 L. J. 80, Ch.)

[When the plaintiff discontinues by notice] thereupon he shall pay the defendant's costs of the action, or, if the action be not wholly discontinued, the defendant's costs occasioned by the matter so withdrawn: (O. XXIII., r. 1.)

Such costs shall be taxed: (*Id.*)

A defendant may sign judgment for the costs of an action if it is wholly discontinued, or for the costs occasioned by the matter withdrawn, if the action be not wholly discontinued: (O. XXIII., r. 2a, June, 1876; and see COSTS.)

As to the form of *fi. fa.* for such costs: (see *Bolton v. Bolton*, L. Rep. 3 Ch. Div. 276.)

Such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action: (O. XXIII., r. 1.)

2. BY LEAVE.

Save as in this rule otherwise provided [see *sup.* 1], it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the court or a judge, but the court or a judge may, before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may seem fit, order the action to be discontinued, or part of the alleged cause of complaint to be struck out: (O. XXIII., r. 1.)

The discretion given must be exercised with certain limitations, and so as not to take away from the defendant any advantage to which he is fairly entitled: (*Stahlschmidt v. Walford*, L. Rep. 4 Q. B. Div. 219; 40 L. T. Rep. N. S. 194; 48 L. J. 348, Q. B.; 27 W. R. 412.)

Where the plaintiff had given an undertaking as to damages, the court directed a reference as to them: (*Newcomen v. Coulson*, L. Rep. 7 Ch. Div. 764; 38 L. T. Rep. N. S. 275; 47 L. J. 429, Ch.; 26 W. R. 350.)

As to signing judgment for costs, see O. XXIII., r. 2a, June, 1876, cited *sup.* 1.

II. BY DEFENDANT.

The court or a judge may in like manner [see *sup.* I., 1], and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave: (O. XXIII., r. 1.)

As to the terms imposed, see the cases cited under Costs, *sup.* 222.

III. BY EITHER PARTY BY CONSENT.

Where a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant, upon producing to the proper officer a consent in writing signed by the parties: (O. XXIII., r. 2.)

DISCOVERY.

I. ACTION FOR.

II. ON INTERROGATORIES.

1. DELIVERY OF INTERROGATORIES.

(a) In Ordinary Cases.

- (1) Who may interrogate.
- (2) What Questions allowed.
- (3) At what Stage allowed.
- (4) Order for Interrogatories.

(b) In Case of Corporation Company, &c.

(c) Reserving Question of Discovery.

(d) Form of Interrogatories.

(e) Setting aside and striking out Interrogatories.

(f) Costs of improper Interrogatories.

2. ANSWER.

(a) When filed.

(b) Form and Printing.

(c) Objections to Answer.

(d) How Sufficiency determined.

(e) Further Answer.

(f) Failure to Comply with Order.

- (1) Liability to Attachment.
- (2) Liability to have Action dismissed or Defence struck out.

(g) *How used as Evidence.*

III. AS TO SOLICITOR'S AUTHORITY FOR WRIT.

IV. AS TO PARTNERS IN FIRM.

V. OF DOCUMENTS.

1. BY AFFIDAVIT.

- (a) *Application for Order.*
- (b) *Reserving Question of Discovery.*
- (c) *At what Stage ordered.*
- (d) *Where Order made.*
- (e) *Form of Affidavit.*
- (f) *Further Affidavit.*
- (g) *Failure to comply with Order* [see *sup.* II., 2 (f)]

2. BY INSPECTION.

- (a) *Notice to Produce.*
- (b) *Notice to Inspect.*
- (c) *Failure to give Inspection,*
 - (1) *Order for Inspection.*
 - (2) *Depriving Party of Right to use Documents.*
 - (3) *Liability to Attachment.*
 - (4) *Liability to have Action dismissed or Defence struck out.*

3. BY PRODUCTION.

- (a) *On Oath by Order.*
- (b) *On Notice at the Trial* [see EVIDENCE.]

VI. AS TO PROPERTY.

1. WHAT ORDER MAY BE MADE.
2. HOW APPLICATION MADE.

I. ACTION FOR.

If the plaintiff's claim be for discovery only the statement of claim shall shew it: (O. XIX., r. 8.)

The action lies in every case in which the bill of discovery formerly lay in Chancery, except where a simpler remedy is expressly given under the Judicature Acts or Rules: (*Anderson v. Bank of British Columbia*, L. Rep. 2 Ch. Div. 644; 45 L. J. 449, Ch.; 24 W. R. 624.)

In the case of a corporation or joint-stock company against whom discovery is sought, it is improper to make an officer of the defendant company a party for the purpose of obtaining discovery from the company, as any member or officer may be ordered to be examined on interrogatories: (*Wilson v. Church*, 39 L. T. Rep. N. S. 413; L. Rep. 9 Ch. Div. 552; and see II., 1, (b).)

It was not distinctly laid down in what cases a discovery only was obtainable (1 Mad. Ch. Pr. 3rd edit. 268), but the following grounds of objection to bills of discovery were recognised:—1. That the subject is not cognisable in any municipal court; 2. That the court will not lend its aid to obtain a discovery for the particular court for which it is wanted; 3. That the plaintiff is not entitled to the discovery by reason of some personal disability; 4. That the plaintiff has no title to the character in which he sues; 5. That the value of the suit is beneath the dignity of the court; 6. That the plaintiff has no interest in the subject or title to the discovery required, or that an action will not lie for which it is wanted; 7. That the defendant is not answerable to the plaintiff, but that some other person has the right to call for discovery; 8. That the policy of the

law in regard to the relation in which the defendant stands exempts the defendant from being called upon for the discovery; 9. That the defendant is not bound to show his title; 10. That the discovery will not be material; 11. That the defendant is a mere witness; 12. That the defendant cannot be called upon to criminate himself: (Cooper's Equity Pleading, 189; Story, 1489; *Orr v. Diaper*, L. Rep. 4 Ch. Div. 92.)

The plaintiff must still show, on the face of his pleading, his title to the discovery sought, which must be necessary to his own case, not a satisfaction of a prying into that of the adverse party. The party requiring discovery must also state a case which will, if he is a plaintiff, constitute a good ground of action, or, if a defendant, a good ground of defence. But discovery will not be refused unless it is clear that the alleged ground of action is insufficient: (St. 1490-1493a.)

II. ON INTERROGATORIES.

1. DELIVERY OF INTERROGATORIES.

(a) *In Ordinary Cases.*

(1) Who may Interrogate.

The plaintiff may, at the time of delivering his statement of claim, or at any subsequent time not later than the close of the pleadings, and a defendant may, at the time of delivering his defence, or at any subsequent time not later than the close of the pleadings, without any order for that purpose, and either party may at any time, by leave of the court or a judge, deliver interrogatories in writing for the examination of the opposite party or parties, or any one or more of such parties, with a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: (O. XXXI., r. 1.)

When third parties have appeared under Order XVI., r. 20, and have been given liberty to defend, under rule 21, the plaintiff has the right to obtain discovery from them: (*Macallister v. Bishop of Rochester*, L. Rep. 5 C. P. Div. 194; 42 L. T. Rep. N. S. 481; 49 L. J. 443, C. P.; 28 W. R. 584.)

Persons made third parties by counter-claim cannot interrogate the original defendants: (*Molloy v. Kilby*, W. N. 1880, p. 105.)

(2) What Questions allowed.

The right to discovery is regulated by the rules formerly existing in the Court of Chancery, and the decisions at common law, when inconsistent, are no longer binding: (*Anderson v. Bank of British Columbia*, cited *sup.* I.; *Atherley v. Harvey*, L. Rep. 2 Q. B. Div. 524; 36 L. T. Rep. N. S. 551; 46 L. J. 518, Q. B.; 25 W. R. 727; *Fisher v. Owen*, L. Rep. 8 Ch. Div. 645; 38 L. T. Rep. N. S. 577; 47 L. J. 681, Ch.; 26 W. R. 581.)

In some cases the interrogatory itself will be bad, and may be struck out or set aside: (see *post* (e).) In other cases, the party interrogated may not be bound to answer the interrogatory, but may be only entitled to object to answer by his affidavit: (see *post*, 2 (c).)

An interrogatory is not in itself objectionable because the answer might tend to criminate the person interrogated: (*Fisher v. Owen*, *sup.*; *Allhusen v. Labouchere*, L. Rep. 3 Q. B. Div. 654; 39 L. T. Rep. N. S. 207; 48 L. J. 34, Q. B.; 27 W. R. 12; overruling on this point *Atherley v. Harvey*, *sup.*)

And privilege must be expressly relied on in the affidavit of the party interrogated, and not set up as a ground for setting aside or striking out an interrogatory.

Interrogatories must be relevant and material: (Dan. 481, 487.)

If it can be supposed that the discovery may in any way be material for the purposes of the action, the party will be compelled to make it: (Dan. 488.)

The court will look narrowly into the question of materiality if the discovery is such that it may be used prejudicially to the party interrogated, irrespective of the action: (*Carver v. Pinto Leite*, L. Rep. 7 Ch. App. 90.)

A plaintiff is entitled to a discovery of facts material to his own case, or upon which the defendant relies to establish his case, but not of the evidence which the defendant proposes to adduce in support of it (*Eade v. Jacobs*, L. Rep. 3 Ex. Div. 335; 37 L. T. Rep. N. S. 621; 47 L. J. 74, Ex.; 26 W. R. 159); and, although the plaintiff may not be entitled to discovery of every detail, he is entitled to such information as will prevent him from being taken by surprise, and let him know what case he has to meet: (*Saunders v. Jones*, L. Rep. 7 Ch. Div. 435.)

Thus, when the plaintiff sued to recover possession of land on breach of a lessee's covenant in a lease, and the defendant alleged verbal consent to the breach, the plaintiff was allowed to interrogate the defendant as to when the consent was given, and the conversation which took place, but not as to the persons in whose presence the consent was given: (*Eade v. Jacobs*, *sup.*)

And when in an action for wrongful dismissal, the defendant alleged specific acts of misconduct, and also in general terms, other acts of misconduct, interrogatories by the plaintiff as to what specific acts the defendant relied on were ordered to be answered: (*Saunders v. Jones*, *sup.*)

When the plaintiff alleged that he had seen "some accounts" which showed that the defendants had not properly discharged certain debts, an interrogatory by the defendants as to what accounts they were was allowed. An interrogatory as to how the liability to the plaintiff arose was also allowed, but questions as to whether certain allegations in the statements of claim and defence were true were disallowed: (*Johns v. James*, L. Rep. 13 Ch. Div. 370.)

In an action for dissolution of partnership, where allegations of misconduct in the presence of patients were made, interrogatories as to the particulars and circumstances were allowed, but interrogatories as to the names of such patients were disallowed: (*Lyon v. Tweddell*, L. Rep. 13 Ch. Div. 375.)

A defendant may ask any questions tending to destroy the plaintiff's case: (*Hoffman v. Postill*, L. Rep. 4 Ch. App. 673; *Commissioners of Sewers v. Glasse*, L. Rep. 15 Eq. 302.)

Where a plaintiff is bound to answer he must answer fully: (*Hoffman v. Postill*, *sup.*)

Where in an action for the price of three horses alleged to have been sold to the defendant, the statement of defence denied that the horses were sold to the defendant, and alleged that the prices charged were excessive, and that the horses were ordered by his wife without any authority to pledge his credit for them, and it was replied that the horses were necessities suitable to the estate and degree of the wife, the following interrogatories were administered to the plaintiffs: 1. State the date when you purchased each of the horses alleged by you to have been sold to the defendant on, &c. 2. State, if you did in fact purchase each or any of the said horses, and were in fact the owner of the same, when, as you allege, you sold them to the defendant. 3. Give the exact amount you paid or had contracted to pay for each of the said horses. 4. If you were

not the owners of the said horses or any of them at the date when, as you allege, you sold them to the defendant, state specifically and in detail how and under what circumstances you had each and every of the said horses in your custody, possession, or control. 5. State specifically and in detail the date or dates upon which you received the said horses into your control.—Of these the 1st and 2nd were allowed, and the 2nd, 4th, and 5th disallowed: (*Sheward v. Lord Lonsdale*, L. Rep. 5 C. P. Div. 47; 42 L. T. Rep. N. S. 54; affirmed *Id.* 172; 28 W. R. 324.)

Where the statement of claim alleged that the defendants had advertised a worthless mine by means of private newspapers and circulars containing false statements, and that the plaintiff was thereby induced to take shares, interrogatories administered by the defendants asking the grounds on which the plaintiff alleged the mine to be worthless, and that he should set out the particular papers by which he had been deceived, were allowed: (*Ashley v. Taylor*, 38 L. T. Rep. N. S. 44.)

Interrogatories delivered in an action for specific performance to the plaintiffs, who were trustees, tending to show that they were guilty of a breach of trust in entering into the contract, were held to be irrelevant: (*Mansfield v. Childerhouse*, L. Rep. 4 Ch. Div. 82; 35 L. T. Rep. N. S. 590; 46 L. J. 30, Ch.)

The question of relevancy sometimes depends on the stage of the proceedings: (see *Saunders v. Jones*, *sup.*; *Elmer v. Creasy*, L. Rep. 9 Ch. App. 69; *Saull v. Browne*, *id.* 364, and other cases cited Dan. Forms, 3rd edit., 914.)

No question can be put to a party by interrogatories merely because the answer may discredit him: (*Allhusen v. Labouchere*, *sup.*)

It seems improper to ask for accounts to be set out: (*Lyon v. Tweddell*, *sup.*; but see *Saunders v. Jones*, *sup.*)

The matters, relating to the case of the interrogating party, interrogated on, ought to be alleged in his pleading, unless he has no knowledge on which to found such allegation: (*M'Garel v. Moon*, L. Rep. 10 Eq. 22.)

A party ought not to interrogate as to conclusions of law or inferences from fact, or as to matters which are admitted by the opposite party's pleading: (Dan. Forms, 3rd edit., 914; *Johns v. James*, *sup.*)

Interrogatories of a fishing or speculative character will not be allowed: (*Buchanan v. Taylor*, W. N. 1876, p. 73.)

Interrogatories as to what documents are in the possession or power of the opposite party are improper: (*Pitton v. Chatterburg*, W. N. 1875, p. 248; *Bannicott v. Harris*, W. N. 1876, p. 9.)

(3) At what Stage allowed.

It has been held by the Court of Appeal that there is no invariable rule that interrogatories may not, without order, be delivered by the plaintiff before the statement of defence, but that if he does so deliver them, on the defendant's application to have them struck out, the plaintiff may be required by the judge to give some reason for wanting the answers: (*Mercier v. Cotton*, L. Rep. 1 Q. B. Div. 442; 35 L. T. Rep. N. S. 79; 27 W. R. 566.) The Master of the Rolls has held that the decision of the Court of Appeal is limited to actions in the nature of common law actions, and does not apply to actions in the Chancery Division: (*Harbord v. Monk*, L. Rep. 9 Ch. Div. 616; 27 W. R. 164.)

The plaintiff was allowed to interrogate before delivery of the defence in *Beal v. Pilley* (38 L. T. Rep. N. S. 253).

Leave will not generally be granted to a defendant to deliver interrogatories before the delivery of the statement of defence: (*Disney v. Long-*

bourne, L. Rep. 2 Ch. Div. 704; 35 L. T. Rep. N. S. 301; 46 L. J. 532, Ch.)

Leave will not be granted to deliver interrogatories after the close of the pleadings without an explanation of the circumstances under which the delay occurred: (*Ellis v. Ambler*, 36 L. T. Rep. N. S. 410.)

Where some explanation of the delay was given, and it was stated on affidavit that the application was not made for the purpose of delay, such leave was granted: (*London and Provincial Marine Insurance Company v. Davies*, L. Rep. 5 Ch. Div. 775; 37 L. T. Rep. N. S. 67.)

And see the cases cited *post* V., 1 (c).

(4) Order for Interrogatories.

The form of order for delivery of interrogatories is given in Schedule H. 14, to the Rules of April, 1880.

Where leave is necessary to deliver interrogatories, they will not be gone into upon the summons for such leave, but leave will be granted or refused, without reference to the particular interrogatories sought to be delivered. If they are objected to, it must be after delivery: (*Berkeley v. Standard Discount Company*, L. Rep. 9 Ch. Div. 643; but see *Hall v. London and North Western Railway Company*, 35 L. T. Rep. N. S. 848.)

(b) In Case of Corporation or Company.

If any party to an action be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply at chambers for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly: (O. XXXI., r. 4.)

As to the impropriety of making the officer a party for the purpose of discovery, see *Wilson v. Church*, cited *sup.* I.

Interrogatories delivered to a company without an order will be struck out: (*Carter v. Leeds Daily News Company*, W. N. 1876, p. 11.)

A member of a company examined on interrogatories cannot refuse to file his affidavit until he has been paid his taxed costs of making it; nor will the court make any order as to the payment of his costs separately from the costs of the company: (*Berkeley v. Standard Discount Company*, L. Rep. 13 Ch. Div. 97; 41 L. T. Rep. N. S. 374; 28 W. R. 125.)

An ordinary member of a company ought not to be examined on interrogatories unless the judge is satisfied that there is no officer of the company capable of making the discovery, and that the member proposed to be examined has the required information: (*Id.*)

When a foreign government is plaintiff, the court will stay proceedings till a person is appointed to make discovery: (*Republic of Costa Rica v. Erlanger*, L. Rep. 1 Ch. Div. 171.)

(c) Reserving Question of Discovery.

If the party from whom discovery of any kind . . . is sought objects to the same, or any part thereof, the court or a judge may, if satisfied that the right to the discovery . . . sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute in the action should be determined before deciding upon the right to the discovery . . . order that such issue or question be determined first, and reserve the question as to the discovery: (O. XXXI., r. 19.)

The discovery must be material to the determination of the issue:

(*Wood v. Anglo-Italian Bank*, 34 L. T. Rep. N. S. 255 ; *Re Leigh*, L. Rep. 6 Ch. Div. 256 ; 25 W. R. 783.)

(d) *Form of Interrogatories.*

Interrogatories may be in the Form No. 7 in Appendix B. [to the Rules of 1875] with such variations as circumstances may require : (O. XXXI., r. 3.)

The questions should, generally, be put in such a form that the party questioned can answer "Yes" or "No" to them : (*Armitage v. Fitzwilliam*, W. N., 1876, p. 56.)

(e) *Setting Aside and Striking out Interrogatories.*

An application to set aside the interrogatories on the ground that they have been exhibited unreasonably or vexatiously, or to strike out any interrogatory or interrogatories on the ground that it or they is or are scandalous, may be made at chambers within four days after service of the interrogatories : (O. XXXI., r. 5 ; Nov., 1878.)

No interrogatories will be allowed while a demurrer is pending to the pleading of the interrogating party, at any rate if plaintiff : (Dan. 466 ; Seton, 4th edit., 156.)

It is only when the interrogatories are altogether an abuse of process that an application can be made to set them aside altogether : (*Fisher v. Owen*, L. Rep. 8 Ch. Div. 645 ; 38 L. T. Rep. N. S. 577 ; 47 L. J. 681, Ch. ; 26 W. R. 581 ; *Allhusen v. Labouchere*, L. Rep. 3 Q. B. Div. 654 ; 39 L. T. Rep. N. S. 207 ; 48 L. J. 34, Q. B. ; both decided under the repealed rules.)

Applications to strike out must generally specify the particular interrogatories objected to : (*Allhusen v. Labouchere*, *sup.*)

It is in the discretion of the judge at chambers whether he will strike out interrogatories delivered by the plaintiff before the statement of defence : (*Beal v. Pilling*, 38 L. T. Rep. N. S. 486.)

The judge ought to go through the interrogatories, and not strike out all because some are bad : (*Allhusen v. Labouchere*, *sup.*)

Particular interrogatories will not be set aside for being irrelevant, the mode of taking the objection being by the affidavit : (*Gay v. Labouchere*, L. Rep. 4 Q. B. Div. 206 ; 48 L. J. 279, Q. B.)

A court or a judge may enlarge or abridge the time for applying to strike out interrogatories, although the application is not made until after the expiration of the four days allowed : (O. LVII., r. 6.)

(f) *Costs of Improper Interrogatories.*

The court in adjusting the costs of the action shall at the instance of any party inquire or cause inquiry to be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing master or of the court or judge that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be borne by the party in fault : (O. XXXI., r. 2 ; and see COSTS.)

2. ANSWER.

(a) *When filed.*

Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as a judge may allow : (O. XXXI., r. 6.)

(b) *Form and Printing.*

An affidavit in answer to interrogatories shall, unless otherwise ordered by a judge, if exceeding ten folios, be printed, and may be in the form No. 8 in the Appendix (B.) [to the Rules of 1875], with such variations as circumstances may require : (O. XXXI., r. 7 ; as altered by r. 7 a, June, 1876.)

The schedule must be printed, but a judge will sometimes order an affidavit to be in writing: (*Webb v. Bömford*, 46 L. J. 288, Ch.)

(c) *Objections to Answer.*

Any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant, or not *bona fide* for the purpose of the action, or that the matters inquired into are not sufficiently material at that stage of the action, or on any other ground, may be taken in the affidavit in answer: (O. XXXI., r. 5, Nov. 1878.)

The objection must be taken in the affidavit in answer, unless there is nothing in the interrogatories that the person interrogated is bound to answer, or unless the objection to one or more is that it or they are scandalous: (*Gay v. Labouchere*, L. Rep. 4 Q. B. Div. 206; 48 L. J. 279, Q. B.; 27 W. R. 412.)

Where it is apparent that the interrogatories ought not to have been put, they may be left unanswered without any reason being given: (*Smith v. De Berg*, W. N. 1877, p. 116; 36 L. T. Rep. N. S. 471; 26 W. R. 606.)

A party is not bound to answer irrelevant interrogatories: (see *sup.* (a), (2).)

Where the defendant, a shipowner, sued by the owners of the cargo and charterers for non-delivery of cargo, alleged that the non-delivery was caused by perils of the sea excepted in the charter-party and bill of lading, interrogatories asking the plaintiffs whether the cargo was insured, and if so, with whom, by whom, and to what amount, were held to be irrelevant and inadmissible: (*Bolckow, Vaughan, and Co. v. Young*, 42 L. T. Rep. N. S. 690.)

The party may refuse to answer on the ground that the discovery may subject the party making it to pains and penalties, or some forfeiture, or something in the nature of forfeiture: (Dan. 481; Seton, 160, 161; and cases cited *inf.*)

It is unnecessary to show that punishment will follow: (Dan. 482, citing *Harrison v. Southcote*, 1 Atk. 539.)

It is immaterial what may be the nature of the punishment, and whether it arises by Ecclesiastical Law, the law of the land, or the laws of a foreign country: (Dan. 482.)

Matters which criminate under the two statutes of Elizabeth are not within the rule: (*Bunn v. Bunn*, 4 D. J. & S. 316; 12 W. R. 561.)

A person cannot resist discovery on the ground that it will subject him to a penalty to which he has rendered himself liable by his own agreement: (Dan. 484.)

The deponent must state in his affidavit that he believes the penalty would be incurred: (*Scott v. Miller*, Joh. 220, 338.)

An objection to answering interrogatories, on the ground that an answer would tend to criminate, must be taken by the affidavit, such ground of objection being therein stated: (*Fisher v. Owen*, L. Rep. 8 Ch. Div. 645; 38 L. T. Rep. N. S. 377; 47 L. J. 477, Ch.; *Althusen v. Labouchere*, L. Rep. 3 Q. B. Div. 654; 39 L. T. Rep. N. S. 207; 48 L. J. 34, Q. B.; 27 W. R. 12; both decided under the repealed rules.)

Information derived from communications which are privileged cannot be insisted on by interrogatories: (Dan. 488 *et seq.*; Seton, 164; Morg. & Ch. 517.)

Communications between solicitor and client, or either of them and counsel or town agent, relating to the matters in litigation, are privileged: (*Id.*) The privilege extends to former solicitors, &c., of the parties: (Morg. & Ch. 517); but not to pursuivants of the Heralds' College: (*Stade v. Tucker*, 43 L. T. Rep. N. S. 49; 28 W. R. 807.)

Communications between the solicitor and a third party are privileged, if made confidentially and with a view to the litigation: (*Bullock v. Corrie*, L. Rep. 3 Q. B. Div. 356; *Anderson v. Bank of British Columbia, sup.*; *M'Corquodale v. Bell*, L. Rep. 1 C. P. Div. 471.)

Discovery may be resisted on the ground that it would be injurious to the public interest: (Dan. 498.)

In an action for redemption by a second against a first mortgagee, the defendants answered that part of an interrogatory in which they were asked to set forth the amount due for principal, interest, and costs, but declined to answer further. The interrogatory further asked whether defendants held any and what securities for their debt other than the security upon which the plaintiffs' debt was charged. The plaintiffs objected to the defendants' answer, and the defendants were ordered to set forth what security they held: (*West of England, &c., Bank v. Nicholls*, L. Rep. 6 Ch. Div. 613.)

The privilege may be asserted either by the solicitor or the client: (Seton, 165.)

Where interrogatories, delivered in an action against a corporation to the town clerk or other their proper officer, were answered by the town clerk, who objected to give information on the ground that it was derived from communications which had been made to him as solicitor in the action, and were therefore privileged, it was held that, as the corporation had elected to answer through him, the objection could not be maintained: (*Mayor of Swansea v. Quirk*, L. Rep. 5 C. P. Div. 106; 41 L. T. Rep. N. S. 758; 49 L. J. 157, C. P.; 28 W. R. 370.)

(d) *How Sufficiency Determined.*

No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the court or a judge on motion or summons: (O. XXXI., r. 9.)

As a general rule the application should be by summons: (*Chesterfield Colliery Company v. Black*, 24 W. R. 783.)

The summons must specify the particular interrogatories or parts of interrogatories to which a further answer is required: (*Anstey v. North and South Woolwich Subway Company*, L. Rep. 11 Ch. Div. 439; 40 L. T. Rep. N. S. 393; 27 W. R. 575; *Chesterfield Colliery Company v. Black, sup.*)

(e) *Further Answer.*

If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the court or a judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further either by affidavit or by *viva voce* examination, as the judge may direct: (O. XXXI., r. 10.)

As to the summons, see *sup.* (d).

(f) *Failure to Comply with Order.*

(1) *Liability to Attachment.*

If any party fails to comply with an order to answer interrogatories . . . he shall be liable to an attachment: (O. XXXI., r. 20.)

Service of an order for discovery made against any party on his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order: (O. XXXI., r. 21.)

Service of an order to answer interrogatories is within the rule: (*Re Mulcaster*, 47 L. J. 609, Ch.; 26 W. R. 434.)

A solicitor upon whom an order against any party for discovery or inspection is served under the last rule, who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment: (O. XXXI., r. 22.)

(2) Liability to have Action Dismissed or Defence Struck Out.

If any party fails to comply with any order to answer interrogatories [besides being] liable to attachment, he shall . . . if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the court or a judge for an order to that effect, and an order may be made accordingly: (O. XXXI., r. 20; and see DISMISSING ACTION.)

The court has a discretion whether it will dismiss the action: (*Hartley v. Owen*, W. N. 1876, p. 193.)

(g) *How Used as Evidence.*

Any party may, at the trial of an action or issue, use in evidence any one or more of the answers of the opposite parties to interrogatories without putting in the others: Provided always, that in such case the judge may look at the whole of the answer, and if he shall be of opinion that any other of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in: (O. XXXI., r. 23.)

III. AS TO SOLICITOR'S AUTHORITY FOR WRIT.

Every solicitor whose name shall be indorsed on any writ of summons shall, on demand in writing made by or on behalf of any defendant who has been served therewith or has appeared thereto, declare forthwith whether such writ has been issued by him or with his authority or privity; and if such solicitor shall declare that the writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the court or a judge: (O. VII., r. 1.)

IV. AS TO PARTNERS IN FIRM.

When a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitors shall, on demand in writing by or on behalf of any defendant, declare forthwith the names and places of residence of all the persons constituting the firm. And if the plaintiffs or their solicitor shall fail to comply with such demand, all proceedings in the action may, upon an application for that purpose, be stayed upon such terms as the court or a judge may direct. And when the names of the partners are so declared, the action shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as the plaintiffs in the writ. But all proceedings shall, nevertheless, continue in the name of the firm: (O. VII., r. 2.)

[When partners sue or are sued in the name of their firm] any party to an action may . . . apply by summons to a judge for a statement of the names of the persons who are co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise as the judge may direct: (O. XVI., r. 10.)

The form of order under this rule is given in Schedule H. 9, to the Rules of April, 1880.

A refusal to obey the order does not render the party liable to attachment: (*Pike v. Frank Keene and Byne*, W. N. 1876, p. 36.)

V. OF DOCUMENTS.

1. BY AFFIDAVIT.

(a) *Application for Order.*

Any party may, without filing any affidavit, apply to a judge for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question in the action: (O. XXXI., r. 12.)

Application should be made to a judge although the matter has been referred to a referee: (*Re Leigh*, L. Rep. 2 Ch. Div. 661.)

A party is not entitled as of right to an order for discovery of documents. A judge must in some way be satisfied that the documents are in the possession of the opposite party, and, although he may in his discretion dispense with an affidavit, if there is nothing in the nature of the case to suggest that the documents are in the opposite party's possession or power, he may require an affidavit: (*Johnson v. Smith*, 36 L. T. Rep. N. S. 741; 25 W. R. 539.)

In a petition of right the Crown is entitled to discovery of documents from the suppliant: (*Tomlin v. The Queen*, L. Rep. 4 Ex. Div. 252; 40 L. T. Rep. N. S. 542; 27 W. R. 651.)

A defendant in an action for recovery of land, although denying the plaintiff's title, must make the affidavit and specify in detail all the documents in his possession relating to the subject matter, although he states that they relate exclusively to his own title, and do not aid the plaintiff's case, and although the defendant may not be compellable to produce them at the hearing: (*Fortescue v. Fortescue*, 34 L. T. Rep. N. S. 847; 24 W. R. 945; *Magdalen Hospital v. Knotts*, 21 S. J. 610; *New British Mutual Investment Company v. Peed*, L. Rep. 3 C. P. Div. 196; 26 W. R. 354); but the court must be satisfied, upon the pleadings or upon affidavit, that the plaintiff has some tangible ground of action: (*Phillips v. Phillips*, L. Rep. 4 Q. B. Div. 127; 40 L. T. Rep. N. S. 815; 48 L. J. 135, Q. B.)

Upon the application of either party . . . upon an affidavit by such party of his belief that any document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the court or judge to order . . . if such party is a body corporate, that some officer to be named of such body corporate, shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the matter in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and if so, on what grounds) to the production of such as are in his or their possession or power; and, upon such affidavit being made, the court or judge may make such further order thereon as shall be just: (C. L. P. A. 1854, s. 50; *Cook v. Oceanic Steam Company*, W. N. 1875, p. 220.)

In the case of a foreign government or corporation being a party, the court may stay proceedings until a proper person is appointed to make discovery of documents: (*Republic of Liberia v. Roye*, L. Rep. 1 App. Cas. 139.)

The form of order for an affidavit of documents is given in Schedule H. 15 to the Rules of April, 1880.

(b) *Reserving Question of Discovery.*

The question of discovery may be reserved till after the trial of any issue or question as in the case of interrogatories: (see O. XXXI., r. 19; *sup.* II., 1 (c).)

(c) *At what Stage Ordered.*

There seems to be no doubt that an order may be made on the application

of either the plaintiff or defendant at any time: (*Union Bank of London v. Manby*, cited *inf.*; *Republic of Costa Rica v. Strousberg*, L. Rep. 11 Ch. Div. 323; 40 L. T. Rep. N. S. 401; 27 W. R. 512.)

An order will not, generally, be granted to the plaintiff before delivery of the statement of claim: (*Cashin v. Craddock*, L. Rep. 2 Ch. Div. 140; 34 L. T. Rep. N. S. 52.)

And after delivery of the statement of claim the order will not be made as of course before delivery of the statement of defence: (*Hancock v. Guerin*, L. Rep. 4 Ex. Div. 3; 27 W. R. 112); but it seems unnecessary for the plaintiff to make out a special case for production: (*Union Bank of London v. Manby*, L. Rep. 13 Ch. Div. 239; 41 L. T. Rep. N. S. 393; 49 L. J. 106, Ch.; 28 W. R. 23.)

The order will not generally be given on the defendant's application till after delivery of the statement of defence: (*Mercantile Mutual Insurance Company v. Shoesmith*, W. N. 1876, p. 64; *Plum v. Normanton Iron Company, Id.*, 73.)

The same rules apply to actions transferred to the Chancery Division from County Courts: (*Davies v. Williams*, L. Rep. 13 Ch. Div. 550; 42 L. T. Rep. N. S. 469; 49 L. J. 322, Ch.; 28 W. R. 223.)

In some cases, as in interpleader, discovery may be ordered, although there are no pleadings: (*Phillips v. Phillips*, 27 W. R. 939.)

(d) Where Order Made.

An order can only be obtained against a party to the action, and cannot be made even against his solicitor: (*Cashin v. Craddock*, L. Rep. 2 Ch. Div. 140; 34 L. T. Rep. N. S. 52.)

The next friend of a plaintiff of unsound mind, not so found, is liable to the order: (*Higginson v. Hall*, L. Rep. 10 Ch. Div. 235; 39 L. T. Rep. N. S. 603; 48 L. J. 250, Ch.; 27 W. R. 469.)

If the next friend cannot make the affidavit, it must be made by some one acquainted with the facts: (*Id.*)

In an action on a marine policy it was held that proceedings could not be stayed until an affidavit had been made by a person not a party, and not under the plaintiff's control, though the plaintiff derived his title to the subject-matter through him: (*Fraser and Co. v. Burrows*, L. Rep. 2 Q. B. Div. 624; 46 L. J. 501, Q. B.)

Discovery of documents cannot now be obtained on interrogatories: (*Pitton v. Chatterburg*, W. N. 1875, p. 248.)

(e) Form of Affidavit.

The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which, if any, of the documents therein mentioned, he objects to produce, and it may be in the Form No. 9 in Appendix B. [to the Rules of 1875] with such variations as circumstances may require: (O. XXXI., r. 13.)

As to the omission of the words "and never have had," see *Wagstaffe v. Anderson*, cited *post* (f.)

It is not enough to state, in answer to the application, that certain documents are privileged. The affidavit must state the grounds upon which privilege is claimed: (*Gardner v. Irwin*, L. Rep. 4 Ex. Div. 49; 40 L. T. Rep. N. S. 357; 48 L. J. 223, Ex.; 27 W. R. 442.)

It is not enough to state, in a mere formal affidavit, that discovery is objected to on the ground of public policy; but it should appear that the mind of a responsible person has been brought to bear on the question of the expediency to the public interest of giving or refusing the information asked for. In an action against the Secretary of the Board of Trade, the defendant not having denied his responsibility for the acts of the servants of

the board, possession of documents by the board, which are under his official control, is possession by himself: (*Kain v. Farrer*, 37 L. T. Rep. N. S. 469.)

Where a party, by his affidavit, sets up a good claim of privilege in respect of certain of the documents, he need only describe them sufficiently to enable the court, if it calls for their production, to identify the documents as those mentioned in the affidavit. An affidavit describing such privileged documents as "numbered 50 to 76 inclusive, and tied up in a bundle marked with the letter A, and initialed by me," was held sufficient: (*Taylor v. Batten*, L. Rep. 4 Q. B. Div. 85; 39 L. T. Rep. N. S. 408; 48 L. J. 72, Q. B.; 27 W. R. 106.)

(f) *Further Affidavit.*

If the affidavit is insufficient, a further affidavit may be ordered on summons to consider the sufficiency: (*Re Leigh's Estate*, L. Rep. 6 Ch. Div. 256; Morg. and Ch. 522.)

The omission of the words "and never have had" from an affidavit of documents is in itself a sufficient reason for ordering a further and better affidavit: (*Wagstaffe and others v. Anderson, Moss, and Michell*, 39 L. T. Rep. N. S. 332.)

An affidavit of discovery is conclusive, unless the answer can be shown to be insufficient, either from the affidavit itself, or from admissions on the pleadings of the party making discovery, or from the documents set out in the affidavit of discovery: (*Jones v. Monte Video Gas Company*, W. N. 1880, p. 87; 42 L. T. Rep. N. S. 639; 28 W. R. 758.)

When the defendant filed an affidavit of documents, and the plaintiff thereupon, upon an affidavit stating that certain documents material to the question in dispute were in defendant's possession, but were not comprised in his affidavit, applied for an order for further discovery, it was held that plaintiff was not entitled to the order: (*Id.*)

An affidavit in contradiction of the affidavit of documents cannot be admitted (*Id.*), except in contradiction of irrelevant matter: (*Underwood v. Secretary for India*, 14 W. R. 551.)

There can be no cross-examination on an affidavit as to documents: (Morg. & Ch. 521.)

If the affidavit is inconsistent with the pleadings, or a reasonable suspicion founded on the pleadings and affidavits exists that documents are omitted, or that protection for same is improperly claimed, a further summons may be issued requiring the defendant to state whether he has a particular document or class of documents in his possession, or, as the case may be, for production of the documents claimed to be privileged: (Morg. and Ch. 522.)

The sufficiency of the affidavit may be determined on an application to set aside an order of course discharging an attachment: (*Price v. Price*, 48 L. J. 215, Ch.)

(g) *Failure to Comply with Order.*

[See *sup.* II., 2 (f).]

2. BY INSPECTION.

(a) *Notice to Produce.*

Every party to an action or other proceeding shall be entitled, at any time before or at the hearing thereof, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof: (O. XXXI., r. 14.)

[See COPIES, COSTS.]

Notice to any party to produce any documents referred to in his pleading

or affidavits shall be in the Form No. 10 in Appendix B. [to the Rules of 1875]: (O. XXXI., r. 15.)

The notice must be in the prescribed or an equivalent form: (*Re Credit Company*, L. Rep. 11 Ch. Div. 256; 48 L. J. 221, Ch.; 27 W. R. 380.)

(b) *Notice to Inspect.*

The party to whom such notice is given shall, within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in [his affidavit of documents], or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice may be in the Form No. 11 in Appendix B. [to the Rules of 1875]; with such variations as circumstances may require: (O. XXXI., r. 16.)

(c) *Failure to give Inspection.*

(1) Order for Inspection.

If the party served with notice [to produce for inspection] omits to give such notice of a time for inspection, or objects to give inspection, the party desiring it may apply to a judge for an order for inspection: (O. XXXI., r. 17.)

The form of order, generally, is given in Schedule H. 16, to the Rules of April, 1880.

The form in case of underwriters is given in Schedule H. 17, to the same rules.

Refusal to a party's solicitor is refusal to the party: (*Re Credit Company*, cited *sup.* (a).)

Every application for an order for inspection of documents shall be to a judge. And except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party: (O. XXXI., r. 18.)

The rules formerly applicable in the Court of Chancery, as to the right to discovery, apply in the High Court: (*Anderson v. Bank of British Columbia*, L. Rep. 2 Ch. Div. 644; *Bustros v. White*, L. Rep. 1 Q. B. Div. 423; 34 L. T. Rep. N. S. 835; 45 L. J. 642, Q. B.; 24 W. R. 721.)

The rules as to privilege apply, whether discovery is sought by action, interrogatories, or production, or inspection of documents: (*Clegg v. Edmundson*, 22 Beav. 125; and see *sup.* I.; II., 2 (c).)

Generally a litigant is entitled to discovery of all the documents in his adversary's possession which are relevant to his case, except communications between a person and his solicitors and counsel with a view to obtain legal assistance and advice, whether made directly or through an agent or deputy who is to communicate them to the solicitor: (*English v. Tottie*, L. Rep. 1 Q. B. Div. 141; 33 L. T. Rep. N. S. 724; 45 L. J. 138, Q. B.; 24 W. R. 393; *Anderson v. Bank of British Columbia*, *sup.*)

Reports of an accountant employed by the solicitor, instructions to counsel, and anything in the nature of instruction for action, even if it has terminated, are privileged (*Nicholls v. Jones*, 1 H. & M. 588; *Walsham v. Stainton*, *Id.* 1; *Wilson v. Northampton Railway Company*, L. Rep. 14 Eq. 477); and it is immaterial whether the documents are

prepared at the request of the solicitor, or ultimately laid before him, if they are prepared with a *bonâ fide* intention as instructions (*Southwark and Vauxhall Water Company v. Quick*, L. Rep. 3 Q. B. Div. 315; 47 L. J. 258, Q. B.; 26 W. R. 341); and whether before or after litigation: (*Mostyn v. West Mostyn Company*, 34 L. T. Rep. N. S. 531; *Bacon v. Bacon*, *id.* 349.)

Inspection cannot be obtained of letters from a third party to the plaintiff's solicitor, written in contemplation of and with a view to the litigation: (*McCorquodale v. Bell*, L. Rep. 1 C. P. Div. 471.)

As to indorsements on counsel's briefs in other proceedings, see *Walsham v. Stainton*, 9 L. T. Rep. N. S. 603; 2 H. & M. 1; *Nicholls v. Jones*, 2 H. & M. 588; *Re Brown*, 42 L. T. Rep. N. S. 501; 28 W. R. 575.)

Communications between solicitor and client, when once privileged, are always privileged: (*Bullock v. Corry*, L. Rep. 3 Q. B. Div. 356; 38 L. T. Rep. N. S. 102; 47 L. J. 352, Q. B.; 26 W. R. 330.)

In an action for not unloading at the port of discharge, whereby the plaintiffs who had entered into a charter-party upon terms as to the discharge of the ship, similar to those in the contract of sale, and had had to pay damages in an action by the shipowner, inspection by the defendants was refused of correspondence in the plaintiff's possession between the firm and his solicitor, and the solicitor and other persons, relating to the shipowner's action: (*Bullock v. Corrie*, *sup.*)

Independent communications between a person and his agent are not privileged: (*Id.*)

In an action for breach of contract to deliver goods, letters from the plaintiff's solicitor complaining having been forwarded by the defendant to the company of whom he purchased, letters passing between the defendant and the company's agent were ordered to be inspected: (*English v. Tottie*, *sup.*)

In an action against a banking company for money improperly transferred from an account to another at a branch, plaintiff was allowed to inspect a letter from the manager of the branch in answer to a request from the London manager to send full particulars of the whole transaction: (*Anderson v. Bank of British Columbia*, *sup.*)

In an action by the owner of goods shipped on the defendant's vessel, for loss caused by collision by the defendant's negligence, a compromise between the owners of the two vessels was ordered to be inspected: (*Hutchinson v. Glover*, L. Rep. 1 Q. B. Div. 138; 45 L. J. 120, Q. B.; and see *Re Leigh's Estate*, L. Rep. 6 Ch. Div. 256; *Bagnall v. Carlton*, W. N. 1880, p. 215.)

A letter written in answer to inquiries about the character of a servant is privileged in this sense only, that although it contains defamatory statements it will not support an action for libel unless malice is shown; but it is not privileged in the sense of being privileged from production, such privilege being confined to communications with the legal advisers of the party: (*Webb v. East*, L. Rep. 5 Ex. Div. 108; 41 L. T. Rep. N. S. 715; 49 L. J. 250, Ex.; 28 W. R. 336.)

Inspection was refused of reports of medical men on the health of a plaintiff, in an action for injuries, whose examination had been ordered on the application of the defendants (*Friend v. London, Chatham and Dover Railway Company*, L. Rep. 2 Ex. Div. 437; 36 L. T. Rep. N. S. 729; 46 L. J. 696, Ex.; 25 W. R. 735); of reports of surveys in possession of the plaintiff, written and prepared solely for the purpose of the action: (*The Theodor Korner*, L. Rep. 3 P. Div. 162; 38 L. T. Rep. N. S. 818; but see *Martin v. Butchard*, 36 L. T. Rep. N. S. 732.)

See also, on the subject of privilege, Ayck., 9th edit. 350, *et seq.*

A party cannot protect himself from producing a document on the ground that its production would tend to criminate him unless he pledges his oath that, to the best of his belief, its production would tend to criminate him, and it is doubtful whether a party can protect himself from producing a document on the ground that its production would tend to criminate him: (*Webb v. East, sup.*)

A party may refuse discovery on the ground that it relates to his own case alone, and not to that of the other party: (*Wigram on Discovery*, 277; *Kettlewell v. Barstow*, L. Rep. 7 Ch. App. 686; *Minet v. Morgan*, L. Rep. 8 Ch. App. 361; *Dan*. 1688.)

Title deeds may be inspected when they contain evidence as to boundaries in support of the case of the party applying for inspection: (*Wayne's Merthyr Company v. Powell's Dyffryn Steam Coal Company*, cited *inf.*)

A defendant in an action to recover possession of land may object to allow his title deeds or court rolls to be inspected: (*New British Mutual Investment Company v. Peed*, L. Rep. 3 C. P. Div. 196; 26 W. R. 354; *Owen v. Wynn*, L. Rep. 9 Ch. Div. 29; 38 L. T. Rep. N. S. 623; 26 W. R. 644.)

If a party swears that part of a document is immaterial or privileged liberty will be given to seal that part up: (*Seton*, 4th edit., 155; *Wilson v. Northampton Railway Company*, L. Rep. 14 Eq. 477; *Wayne's Merthyr Company v. Powell's Dyffryn Steam Coal Company*, W. N. 1880, pp. 141, 159.)

If the party from whom . . . inspection is sought objects to the same, or any part thereof, the court or a judge may, if satisfied that the right to the . . . inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute in the action should be determined before deciding upon the right to the . . . inspection, order that such issue or question be determined first, and reserve the question as to the . . . inspection: (O. XXXI., r. 19. See *Wood v. Anglo-Italian Bank*, 34 L. T. Rep. N. S. 255.)

(2) Depriving Party of Right to Use Documents.

Any party not complying with [a notice to produce for inspection] shall not afterwards be at liberty to put any such document in evidence on his behalf in such action or proceeding unless he shall satisfy the court that such document relates only to his own title, he being a defendant to the action, or that he had some other sufficient cause for not complying with such notice: (O. XXXI., r. 14.)

If the defendant has not delivered his statement of defence, the plaintiff has a "sufficient cause" for not complying with a notice to produce for inspection a title deed mentioned in the statement of claim, and is nevertheless entitled to put in the deed as evidence: (*Webster v. Whewall*, W. N. 1880, p. 142; 42 L. T. Rep. N. S. 868; 28 W. R. 951.)

(3) Liability to Attachment.

If any party fails to comply with an order . . . for . . . inspection of documents, he shall be liable to attachment: (O. XXXI., r. 20.)

Service of an order for . . . inspection made against any party on his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order: (O. XXXI., r. 21.)

A solicitor upon whom an order against any party for . . . inspection is served under the last rule, who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment : (O. XXXI., r. 22.)

(4) Liability to have Action dismissed or Defence struck out.

If any party fails to comply with any order . . . for . . . inspection of documents . . . he shall, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the court or a judge for an order to that effect, and an order may be made accordingly : (O. XXXI., r. 20.)

[See *sup.* II. 2 (f).]

There is a discretion in the judge as to dismissing the action or striking out the defence : (*Hartley v. Owen*, 34 L. T. Rep. N. S. 752.)

If a defence is struck out, the plaintiff may move for judgment as in default of pleading : (*Fisher v. Hughes*, 25 W. R. 528.)

3. BY PRODUCTION.

(a) On Oath by Order.

It shall be lawful for the court or a judge at any time during the pendency therein of any action or proceeding, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such action or proceeding, as the court or judge shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just : (O. XXXI., r. 11.)

Where a solicitor had been appointed clerk to a local board, with a salary, for conducting the legal as well as the ordinary business of the board, upon an interlocutory motion in an action for *mandamus* to compel production of papers, it was held by the Court of Appeal, that as such an order would prejudice the clerk's lien, it could not be made before the trial of the action without payment into court of a sum sufficient to meet the amount claimed by the clerk, upon which he was to have the same lien as upon the papers; and the court ordered that upon that being done the clerk should deliver up to the plaintiffs all books and papers claimed in the action : (*Newington Local Board v. Eldridge*, L. Rep. 12 Ch. Div. 349.)

Where application is made for third parties to produce documents notice must be given to the other parties to the action : (*Benyon v. Godden*, W. N. 1877, p. 257.)

Where the writ claims delivery up of documents in the possession of the defendants, the court will not order them to be delivered up upon an interlocutory application before the defence is put in : (*Republic of Costa Rica v. Strousberg*, L. Rep. 11 Ch. Div. 323; 40 L. T. Rep. N. S. 401; 27 W. R. 512.)

It is not the practice to make an order for production on the solicitor of a party against whom discovery is sought : (*Cashin v. Craddock*, L. Rep. 2 Ch. Div. 140; 34 L. T. Rep. N. S. 52.)

An order for production of documents will not generally be made before statement of claim delivered : (*Cashin v. Craddock*, L. Rep. 2 Ch. Div. 140; 34 L. T. Rep. N. S. 52.)

Where the defendants, before putting in their statement of defence, moved for the production by the plaintiffs of the conveyance under which they held their land, in order to ascertain whether it contained a reservation of minerals, it was held that the land having been conveyed to the plaintiffs in fee simple, they were *prima facie* entitled to the land down to

the centre of the earth, and unless the defendants could show that they were not so entitled the plaintiffs could not be compelled to produce their title deeds: (*Egremont Burial Board v. Egremont Iron Ore Company*, L. Rep. 14 Ch. Div. 158; 42 L. T. Rep. N. S. 179; 28 W. R. 594.)

There is no discretionary power in the judge as to whether production shall be ordered, but the right is exercisable at the option of the parties when no privilege can be established: (*Bustros v. White*, L. Rep. 1 Q. B. Div. 423; 34 L. T. Rep. N. S. 835; 45 L. J. 642, Q. B.; 24 W. R. 721.)

It is not a ground for refusing production that another party is interested in them: (*Kettlewell v. Barstow*, L. Rep. 7 Ch. App. 686.)

If the documents are in the joint possession of two persons, one of them cannot be ordered to produce them, but he may be made to set out the contents: (*Hadley v. McDougall*, L. Rep. 7 Ch. App. 312.)

In actions on marine policies production may be ordered though the documents are not in the party's possession, unless he satisfies the court that he cannot obtain their production: (*West of England Bank v. Canton Insurance Company*, L. Rep. 2 Ex. Div. 472.)

A party who is covenantee to a covenant for production of deeds cannot be ordered to obtain production if the covenantor is not a party: (*Bethell v. Casson*, 1 H. & M. 806.)

Where any deeds or other documents are ordered to be left or deposited, whether for safe custody or for the purpose of any inquiry in chambers or otherwise, the same shall be left or deposited in the [Central] Office, and shall be subject to such directions as may be given for the production thereof: (C. O. 42, r. 3; J. A. 1879.)

The [masters] shall have the care of all documents ordered to be deposited for safe custody, and shall . . . perform all . . . duties . . . in relation to the custody of exhibits deposited for inspecting and copying; [and] the attendance with records and exhibits on the judges of this court, or at the assizes, or elsewhere: (C. O. 1, r. 35; J. A., 1879.)

As to depositing documents in the chief clerk's chambers, see Seton, 140.

It shall be lawful for the court, or any judge of the division to which any cause or matter pending in the . . . High Court is assigned, if it shall be thought fit, to order that any books or documents may be produced . . . in the office of . . . any . . . district registrar; and in any such case the district registrar shall proceed to carry all such directions into effect in the manner prescribed: (J. A., 1873, s. 66.)

When the order directs deposit of the documents in the Central Office, they must be left with a schedule of the documents and a copy of the order. If the documents are numerous, or the parcel is large, a box is generally required: (Ayck. 354; Dan. 1698.)

Inspection of documents deposited at the Central Office is refused to the party depositing, or a plaintiff or defendant, unless suing or defending in person, or introduced by his solicitor: (Dan. 1698.)

Inspection under an order in the ordinary form may be had in the absence of the party depositing the documents: (*Id.*)

As to the fees for inspection, see FEES.

Copies or extracts may be taken without payment of any fee: (Dan. 1698.)

If production of documents deposited in court is required upon any examination of witnesses in the Chancery Division, or any office thereof, the master having custody of them, will attend on request, as a memorandum bespeaking the attendance being left with him, and a payment of his fee: (*Id.*)

If required elsewhere, an order must be obtained on motion or petition

of course supported by an affidavit of the necessity for production : (Dan. 1699.)

The officer may require a deposit of stamps on account of further fees, and a deposit of money on account of any further expenses which may probably become payable beyond the amount paid for fees and expenses on the application; and the officer or his clerk taking such deposit shall thereupon make a memorandum thereof on the application : (Order as to Court Fees, Oct. 1875, Sched.; and see FEES.)

The officer may also require an undertaking in writing to pay any further fees and expenses which may become payable beyond the amounts paid and deposited : (*Id.*)

When the purpose of deposit is satisfied, the person who deposited the documents may obtain an order for their delivery out, on motion or summons with notice, or, by consent, on petition of course : (Dan. 1699.)

(b) *On Notice at the Trial.* [See EVIDENCE.]

VI. AS TO PROPERTY.

1. WHAT ORDERS MAY BE MADE.

It shall be lawful for the court or a judge, upon the application of any party to an action, and upon such terms as may seem just, to make any order for the . . . inspection of any property, being the subject of such action, and for . . . the purpose aforesaid to authorise any person or persons to enter upon or into any land or building in the possession of any party to such action, and for . . . the purpose aforesaid to authorise any samples to be taken, or any observation to be made, or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence : (O. LII., r. 3.)

Upon a *primâ facie* case of mineral trespass or encroachment by the defendant, and where the fact of the trespass, which is denied, can only be ascertained by inspection, and no injury will result to the defendant therefrom, an order will be made on an interlocutory application : (Seton, 208.)

2. HOW APPLICATION MADE.

[The] application . . . may be made to the court or a judge by any party. If the application be by the plaintiff . . . it may be made after notice to the defendant at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application : (O. LII., r. 4.)

The application should not be *ex parte* : (*Habershon v. Gill*, W. N. 1875, p. 231.)

It may be made on summons : (*Cooper v. Ince Hall Company*, W. N. 1876, p. 24.)

The order is almost a matter of course (*Id.*) It may be made to extend to the removal of obstructions in the inspection : (Seton, 208.)

DISENTAILING DEED.

[See PROTECTOR OF SETTLEMENT.]

DISMISSING ACTION.

Besides being liable to have his action dismissed for want of a cause of action or because the evidence to prove its existence is insufficient, a plaintiff may have his action dismissed: For non-delivery of a statement of claim (O. XXIX., r. 1, see JUDGMENT); For default in delivering reply, when the time for giving notice of trial has elapsed: (see *Litton v. Litton*, L. Rep. 3 Ch. Div. 793; JUDGMENT.)

For failure to comply with an order to give security of costs, see *Costs*, *sup.* 207; For failure to give discovery or inspection (O. XXXI., r. 20; DISCOVERY); For default in giving notice of trial (O. XXXVI., r. 4; *Id.* r. 4a, June, 1876; JUDGMENT); for default in appearance at the trial: (O. XXXVI., r. 19; JUDGMENT.)

An application to dismiss an action for want of prosecution should generally be made by summons (*Freason v. Loe*, 26 W. R. 138); but it depends on circumstances whether it may not be properly made by motion: (*Evelyn v. Evelyn*, L. Rep. 13 Ch. Div. 138; 42 L. T. Rep. N. S. 248; 49 L. J. 18, Ch.; 28 W. R. 73.)

If the usual notice of motion be given, and the plaintiff does not at once submit to speed the cause and tender the costs of the notice, the defendant if the usual order is made will have his costs of moving in court: (*Id.*)

The form of order dismissing an action for want of prosecution is given in Schedule H. 13, to the Rules of April, 1880.

The balance of authority is in favour of the proposition that where an order is made dismissing an action for want of prosecution unless a certain act is done by a certain day, and the time has elapsed without the act having been done, the action is gone, and there is no jurisdiction to make an order extending the time: (*Whistler v. Hancock*, L. Rep. 3 Q. B. Div. 83; 37 L. T. Rep. N. S. 39; 47 L. J. 152, Q. B.; 26 W. R. 211; approved by the Court of Appeal in *Welply v. Buhl*, L. Rep. 3 Q. B. Div. 253; 37 L. T. Rep. N. S. 640; 47 L. J. 151, Q. B.; 26 W. R. 300; *Wallis v. Hepburn*, L. Rep. 3 Q. B. Div. 84, n.; *King v. Davenport*, L. Rep. 4 Q. B. Div. 402; 48 L. J. 606, Q. B.; 27 W. R. 798. But see *Burke v. Rooney*, L. Rep. 4 C. P. Div. 226; 48 L. J. 601, C. P.; 27 W. R. 915.)

DISTRICT REGISTRIES.

I. APPOINTMENT OF REGISTRARS AND THEIR DISTRICTS.

II. DEPUTY REGISTRARS.

III. REGISTRARS TO BE OFFICERS AND SUBJECT TO JURISDICTION OF COURT.

IV. MATTERS TRANSACTED IN REGISTRIES.

1. JURISDICTION OF REGISTRARS.

2. PROCEEDINGS TAKEN IN REGISTRIES.

(a) Issuing Writs of Summons.

(b) Proceedings generally after Issue of Writ.

(c) Entering Appearances [see APPEARANCE].

(d) Proceedings generally after Appearance.

(e) Trials to be in London.

(f) Judgments.

(g) Executions.

(h) Taxation of Costs [see *COSTS*, p. 222].

V. WHEN OFFICES OPEN.

VI. HOW APPLICATIONS MADE.

- VII. REFERRING MATTERS TO JUDGE.
- VIII. APPEALS FROM REGISTRAR.
- IX. REMOVING PROCEEDINGS TO AND FROM REGISTRIES [see TRANSFER.]
- X. DOCUMENTS AND COPIES.
- XI. COSTS.

I. APPOINTMENT OF REGISTRARS AND THEIR DISTRICTS.

It shall be lawful for Her Majesty, by Order in Council, from time to time to direct that there shall be district registrars in such places as shall be in such order mentioned for districts to be thereby defined, from which writs of summons for the commencement of actions in the High Court of Justice may be issued, and in which such proceedings may be taken and recorded as are mentioned [in the Act], and Her Majesty may thereby appoint that any registrar of any County Court, or any registrar or prothonotary or district prothonotary of any local court whose jurisdiction is transferred to the High Court of Justice, or from which an appeal is given to the Court of Appeal, or any person who, having been a district Registrar of the Court of Probate, or of the Admiralty Court, shall under [the Judicature] Act become and be a district registrar of the said High Court of Justice, or who shall hereafter be appointed such district registrar, shall and may be a district registrar of the said High Court for the purpose of issuing such writs as aforesaid, and having such proceedings taken before him as mentioned [in the Judicature Act.]: (J. A. 1873, s. 60.)

Where any such Order [in Council] has been made, two persons may, if required, be appointed to perform the duties of district registrar in any district named in the order, and such persons shall be deemed to be joint district registrars, and shall perform the said duties in such manner as may from time to time be directed by the said order, or any Order in Council amending the same: (J. A. 1875, s. 13.)

The registrar of any inferior court of record having jurisdiction in any part of any district defined by such order (other than a County Court) shall, if appointed by Her Majesty, be qualified to be a district registrar for the said district or for any and such part thereof as may be directed by such order or any order amending the same: (*Id.*)

It has been ordered as follows:

That there shall be district registrars in the places of Liverpool, Manchester, and Preston, and the district registrar at Liverpool of the High Court of Admiralty, and the district prothonotary at Liverpool of the Court of Common Pleas at Lancaster, shall be and are hereby appointed the district registrars in Liverpool; and the district prothonotary at Manchester of the said Court of Common Pleas shall be and is hereby appointed the district registrar in Manchester; and the district prothonotary at Preston of the said Court of Common Pleas shall be and is hereby appointed the district registrar at Preston; and that the district for each such place shall be the district now assigned to each such district prothonotary, under the provisions and authority of "The Common Pleas at Lancaster Amendment Act, 1869."

That there shall be a district registrar in Durham, and that the district prothonotary of the Court of Pleas at Durham shall be and is hereby appointed the district registrar in Durham; and that the district shall be the district, for the time being, of the County Court holden at Durham.

That, in the places mentioned in the schedule annexed, there shall be

district registrars, and that the registrar of the County Court held in any such place shall be and is hereby appointed the district registrar in such place, and that the district for each such place, shall be the district, for the time being, of the County Court holden at such place.

SCHEDULE.

Bangor.	East Stonehouse.	Nottingham.
Barnsley.	Exeter.	Oxford.
Barnstaple.	Gloucester.	Pembroke Docks.
Bedford.	Great Grimby.	Peterborough.
Birkenhead.	Great Yarmouth.	Poole.
Birmingham.	Halifax.	Portsmouth.
Boston.	Hanley.	Ramsgate.
Bradford.	Hartlepool.	Rochester.
Bridgwater.	Hereford.	Sheffield.
Brighton.	Huddersfield.	Shrewsbury.
Bristol.	Ipswich.	Southampton.
Bury St. Edmunds.	Kingston-on-Hull.	Stockton-on-Tees.
Cambridge.	King's Lynn.	Sunderland.
Cardiff.	Leeds.	Swansea.
Carlisle.	Leicester.	Totnes.
Carmarthen.	Lincoln.	Truro.
Cheltenham.	Lowestoft.	Wakefield.
Chester.	Maidstone.	Walsall.
Colchester.	Newcastle-upon-Tyne.	Whitehaven.
Derby.	Newport, Monmouth.	Wolverhampton.
Dewsbury.	Newport, Isle of Wight.	Worcester.
Dover.	Newtown.	York.
Dorchester.	Northampton.	(Order in Council of
Dudley.	Norwich.	12th Aug. 1875.)

II. DEPUTY REGISTRARS.

A district registrar of the Superior Court of Judicature may appoint a deputy [for a limited time], and all acts authorised or required to be done by, to, or before a district registrar may be done by, to, or before any deputy so appointed: (39 & 40 Vict. c. 59, s. 22.)

III. REGISTRARS TO BE OFFICERS, AND SUBJECT TO JURISDICTION OF COURT.

Every district registrar shall be deemed to be an officer of the Supreme Court, and be subject accordingly to the jurisdiction of such court, and of the divisions thereof: (J. A., 1875, s. 13.)

Every district registrar and other officer of a district registry shall be subject to the orders and directions of the court or a judge as fully as any other officer of the court, and every proceeding in a district registry shall be subject to the control of the court or a judge, as fully as a like proceeding in London: (O. XXXV., r. 9.)

IV. MATTERS TRANSACTED IN REGISTRIES.

1. JURISDICTION OF REGISTRARS.

All such district registrars shall have power to administer oaths and perform such other duties in respect of any proceedings pending in the said High Court of Justice or in the said Court of Appeal as may be assigned to them from time to time by Rules of Court, or by any special order of the court: (J. A., 1873, s. 62.)

Where an action proceeds in a district registry the district registrar may exercise all such authority and jurisdiction in respect of the action as may be exercised by a judge at chambers, except such as by [the] rules a

master of the Queen's Bench, Common Pleas, or Exchequer Divisions is precluded from exercising (O. XXXV., r. 4); that is to say, . . . all such business and . . . all such authority and jurisdiction in respect of the same as under the Act . . . or [the] rules, may be transacted or exercised by a judge at chambers, except in respect of the following proceedings and matters; that is to say,—

All matters relating to criminal proceedings or to the liberty of the subject :

The removal of actions from one division or judge to another division or judge :

The settlement of issues, except by consent : . . .

Inspection [of any property being the subject of an action] :

Appeals from district registrars :

Interpleader [where all parties concerned consent to a final determination of the question in dispute without a jury or special case, or where the sum in dispute is less than 50*l.*, and one of the parties desires such a determination (unless in either of such cases the parties agree to refer it to the registrar :)]

Prohibitions :

Injunctions and other orders under sub-sect. 8 of sect. 25 of the Act, or under O. LII., rr. 1, 2, 3, respectively : [See *MANDAMUS*; *PROPERTY*; *RECEIVER*.]

Awarding of costs, other than the costs of any proceeding before such [registrar] :

Reviewing taxation of costs :

Charging orders [absolute] on stock funds, annuities, or share of dividends or annual produce thereof ;

Acknowledgments of married women.

[Granting leave for service out of the jurisdiction of a writ of summons, or of notice of a writ of summons] : (O. LIV., r. 2, as altered by O. LIV., r. 2*a*, Nov., 1878.)

District registrars cannot appoint receivers, or take accounts directed by the judge unless specially directed by the judgment : (*Re Smith*, L. Rep. 6 Ch. Div. 692.)

According to Malins, V.C., and Hall, V.C., it is improper for the registrars to open banking accounts, and direct money to be paid into them : (*Id.*; *Finlay v. Davis*, L. Rep. 11 Ch. Div. 735.)

The Master of the Rolls, however, has approved of this course, and the Commissioners of the Treasury have approved of it : (*Id.*)

It shall be lawful for the court, or any judge of the division to which any cause or matter pending in the said High Court is assigned, if it shall be thought fit, to order that any books or documents may be produced, or any accounts taken or inquiries made, in the office of or by any such district registrar as aforesaid; and in any such case the district registrar shall proceed to carry all such directions into effect in the manner prescribed; and in any case in which any such accounts or inquiries shall have been directed to be taken or made by any district registrar, the report in writing of such district registrar as to the result of such accounts or inquiries may be acted upon by the court, as to the court shall seem fit : (*J. A.*, 1873, s. 66.)

As to taking accounts, see *ACCOUNT*, VIII.

Where an action had been removed to London, on the defendant's default the Court refused to direct accounts and inquiries to be taken in the registry, as needless expense would be thereby incurred : (*Walker v. Robinson*, 24 W. R. 427.)

It is in the discretion of a judge, with which the Court of Appeal will

not interfere, whether he will order a sale to take place in a district registry: (*McDonald v. Foster*, L. Rep. 6 Ch. Div. 193; 25 W. R. 602, 687.) Unless there are special circumstances making it desirable, Hall, V.C., will not direct a sale in the registry, but it is the usual practice of the Master of the Rolls to do so: (*Id.*)

As to inquiries and sale in a partition action, see *Sykes v. Schofield*, L. Rep. 14 Ch. Div. 629; 42 L. T. Rep. N. S. 629.

2. PROCEEDINGS TAKEN IN REGISTRIES.

(a) *Issuing Writs of Summons.*

Subject to the Rules of Court in force for the time being, writs of summons for the commencement of actions in the High Courts of Justice shall be issued by the district registrar when thereunto required: (J. A., 1873, s. 64.)

In any action other than a probate action, the plaintiff wherever resident may issue a writ of summons out of the registry of any district: (O. V., r. 1; and see WRIT OF SUMMONS.)

Special forms of writs issued out of registries are given in the schedule to the Rules of April, 1880.

(b) *Proceedings generally after Issue of Writ.*

Unless any order to the contrary shall be made by the High Court of Justice, or by any judge thereof, all such further proceedings [after the writ is issued] . . . as may and ought to be taken by the respective parties to such action in the said High Court down to and including entry for trial, or (if the plaintiff is entitled to sign final judgment or to obtain an order for an account by reason of the non-appearance of the defendant) down to and including final judgment, or an order for an account, may be taken before the district registrar and recorded in the district registry, in such manner as may be prescribed by Rules of Court; and all such other proceedings in any such action as may be prescribed by Rules of Court shall be taken and if necessary may be recorded in the same district registry: (J. A., 1873, s. 64.)

When an action proceeds in the district registry all proceedings, except where by any of the Rules of the Supreme Court it is otherwise provided, or the court or a judge shall otherwise order, shall be taken in the district registry, down to and including final judgment: (O. XXXV., r. 1a., June 1876.)

(c) *Entering Appearances.* [See APPEARANCE.]

(d) *Proceedings generally after Appearance.*

If a sole defendant appears, or all the defendants appear in the district registry, or if all the defendants who appear appear in the district registry and the others make default in appearance, then, subject to the power of removal hereinafter provided, the action shall proceed in the district registry: (O. XII., r. 4.)

If the defendant appears, or any of the defendants appear, in London the action shall proceed in London; provided that if the court or a judge shall be satisfied that the defendant appearing in London is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, such court or judge may order that the action may proceed in the district registry, notwithstanding such appearance in London: (O. XII., r. 5.)

(e) *Trials to be in London.*

Actions commenced in district registries must be tried in London before the judge of the Chancery Division to whom they are assigned: (*Re Smith*, L. Rep. 6 Ch. Div. 692.)

Where defendant made default in pleading, Bacon, V.C. ordered the

action to be removed to London that it might be set down in his paper on motion for judgment: (*Walker v. Robinson*, 24 W. R. 137.)

Where an action proceeds in a district registry and is set down there for hearing in London, the documents in the action at the registry will be sent up to London for the hearing without any order being obtained for that purpose: (*Lumb v. Whiteley*, W. N. 1877, p. 40.)

(f) *Judgments.*

[See *sup.* (b.).]

As to entering judgment, see O. XXXV., r. 1a., June, 1876; r. 2; JUDGMENT.

An office copy of every judgment and order . . . entered in London shall be transmitted to the district registry to be filed with the proceedings in the action: (O. XXXV., r. 2.)

(g) *Execution.*

Where an action proceeds in the district registry all writs of execution for enforcing any judgment or order therein shall issue from the district registry, unless the court or a judge shall otherwise direct: (O. XXXV., r. 3; and see EXECUTION.)

Where an action proceeds in a district registry, all proceedings relating to the following matters, namely:—

- (a) Leave to issue or renew writs of execution;
- (b) Examination of judgment debtors for garnishee purposes;
- (c) Garnishee orders;
- (d) Charging orders *nisi*;

shall, unless the court or a judge otherwise order, be taken in the district registry: (O. XXXV., r. 3a, April, 1880.)

(h) *Taxation of Costs.* [See *COSTS, sup.*, p. 222.]

V. WHEN OFFICES OPEN.

The offices of each district registrar of the High Court of Justice shall be open on every day and hour of the year on which the offices of the registrars of the County Court of the place in which the district registry is situate are required to be kept open: (O. LXI., r. 4b, Dec., 1875.)

The office of the district registry at Manchester shall not be open in any year on the five days next following Whit Monday: (O. LXI., r. 4d, May, 1880.)

VI. HOW APPLICATIONS MADE.

Every application to a district registrar shall be made in the same manner in which applications at chambers are directed to be made by these rules: (O. XXXV., r. 5.)

That is "in a summary way by summons". (O. LIV., r. 1. Rules 10-14 of the same order do not apply to district registries: O. XXXV., r. 16, May, 1880.)

VII. REFERRING MATTERS TO JUDGE.

If any matter appears to the direct registrar proper for the decision of a judge, the registrar may refer the same to a judge, and the judge may either dispose of the matter or refer the same back to the registrar with such directions as he may think fit: (O. XXXV., r. 6.)

A district registrar cannot refer to a judge unless a summons has been taken out calling on the other side to appear before the registrar: (per Quain, J., W. N., 1875, p. 250.)

Every reference to a judge by . . . a district registrar in any action in the Chancery Division shall be to the judge to whom the action is assigned: (O. XXXV., r. 10.)

VIII. APPEAL FROM REGISTRAR.

[See APPEAL, II.]

IX. REMOVING PROCEEDINGS TO AND FROM REGISTRIES.

[See TRANSFER.]

X. DOCUMENTS AND COPIES.

In every such district registry such seal shall be used as the Lord Chancellor shall from time to time, either before or after the time fixed for the commencement of this Act, direct, which seal shall be impressed on every writ and other document issued out of, or filed in such district registry, and all such writs and documents, and all exemplifications and copies thereof, purporting to be sealed with the seal of any such district registry, shall in all parts of the United Kingdom be received in evidence without further proof thereof: (J. A., 1873, s. 61.)

When a cause in the Chancery Division is proceeding in a district registry, all certificates of the chief clerk and taxing masters, and all affidavits and other documents (required to be filed) used in London before the judge in Chambers, or before any taxing master or referee of the court, and not already filed in the district registry, shall be filed in the same office as they would have been filed in if the proceedings had originally commenced in London, and if the court or judge shall so direct, office copies thereof shall be transmitted to the district registry: (O. XIX., r. 29a. March, 1879.)

So much of O. XXXVII., r. 3d [EVIDENCE] as requires affidavits to be filed in the Central Office shall not apply to affidavits required to be filed in a District Registry: (O. XXV., r. 16, May, 1880.)

XI. COSTS.

When a writ of summons for the commencement of an action shall be issued from a district, and when an action proceeds in a district registry, all fees and allowances, and rules and directions relating to costs, which would be applicable to such proceeding if the writ of summons were issued in London, and if the action proceeded in London, shall apply to such writ of summons issued from and other proceedings in the district registry: (Add. R. Aug. 1875; Sp. All., r. 34; and see COSTS.)

DISTRINGAS.

ON STOCK [see CHARGING ORDER].

NUPER VICE-COMITEM [see EXECUTION].

DIVISIONAL COURTS.

Divisional courts may be held for the transaction of any part of the business assigned to the said Chancery Division, which the judge, to whom such business is assigned, with the concurrence of the president of the same division, deems proper to be heard by a divisional court: (J. A., 1873, s. 43.)

DOCUMENTS.

[See ADMISSIONS; DISCOVERY; EVIDENCE.]

ECCLESIASTICAL ESTATES.

- I. PAYMENT INTO COURT OF PURCHASE-MONEY OF LEASE.
- II. PETITION FOR PURCHASING REVERSION.
- III. PETITION FOR RAISING MONEY TO PURCHASE REVERSION.
- IV. PETITION FOR SALE OF LEASE.

I. PAYMENT INTO COURT OF PURCHASE MONEY OF LEASE.

In every case in which, under any contract by the Ecclesiastical Commissioners or any [ecclesiastical] corporation with any lessee or grantee holding land under [them] by any lease for lives or years, or copyhold or customary grant, for the purchase or receiving in exchange or partition by the Ecclesiastical Commissioners, or such corporation, of any land comprised in such lease or grant, any sum of money is agreed to be paid by the said Ecclesiastical Commissioners or such corporation, [and] the lessee or grantee [fail] or declare himself unable to make a marketable title to or any effectual assurance of such land . . . such sum of money may, with the consent of such lessee or grantee, be paid into the Bank of England with the privity of the [Paymaster-General] to an account in the matter of "An Act further to Amend the Acts relating to the Ecclesiastical Commissioners and the Act concerning the Management of Episcopal and Capitular Estates in England," to the credit of the parties interested in such land; and be disposed of in like manner as is directed by the Land Clauses Consolidation Act, 1845, with respect to purchase moneys in the case of parties neglecting or failing to make out satisfactory titles: (23 & 24 Vict. c. 124, s. 29; and see LANDS CLAUSES ACT; PAYMENT INTO AND OUT OF COURT.)

The Act applies to the estates of corporations both aggregate and sole: (*Hayward v. Pile*, L. Rep. 5 Ch. App. 214.)

II. PETITION FOR PURCHASING REVERSION.

Wherever the estate and interest under any such lease or grant may be vested in any trustee or trustees, either expressly or by implication of law and any moneys, stocks, funds, or securities for money are vested in the same trustees or trustee, upon the same or like trusts . . . such trustees or trustee [may] if there shall be no person capable of giving consent, or if such consent [of the beneficiaries] shall be withheld, and the trustee or trustees . . . consider such a course essential to the interest of the parties entitled under the settlement . . . with the sanction and approbation of the [Chancery Division] to be obtained on petition . . . raise out of such moneys, or by sale of such stocks [&c.], a sufficient sum for the purpose of purchasing the reversion of, or otherwise enfranchising the property comprised in such loan or grant: (23 & 24 Vict. c. 124, s. 36.)

III. PETITION FOR RAISING MONEY TO PURCHASE REVERSION.

When any such lease or grant [is] vested in any person or persons as a trustee or trustees, whether expressly or by implication of law, and other lands, whether freehold, copyhold, or leasehold, are vested in the same trustees or trustee upon the same or like trusts, or are settled to the same uses or purposes, or as near thereto as the different tenures of the land admit, and when any person is under any will or settlement in the actual possession or receipt of the rents and profits of the lands comprised

in such lease or grant, and of other lands settled, to like trusts or uses as aforesaid such trustees or trustee, or such person as aforesaid [may] with the sanction and approbation of the [Chancery Division] to be obtained on petition raise money, either by sale or mortgage, of all or any part of the property comprised in the lease or grant, and the other lands vested as aforesaid, as the court shall direct, for the purpose of purchasing the reversion of, or otherwise enfranchising the property comprised in, such lease or grant, in such manner and subject to such provisions for protecting or adjusting the equities arising under such purchase or enfranchisement, and such mortgage or sale as aforesaid, as the court [thinks] fit: (*Id.*, s. 37; and see *Re Adams*, 17 W. R. 582.)

As to when the court will sanction purchase of the reversion: (see *Hayward v. Pile* (*sup.*); *Re Wood's Estate* (L. Rep. 10 Eq. 572; *Hollier v. Burne*, L. Rep. 16 Eq. 163; *Maddy v. Hale*, L. Rep. 3 Ch. Div. 327; *Seton*, 1277-8.)

IV. PETITION FOR SALE OF LEASE.

In any case in which the estate and interest under any lease or grant made by any ecclesiastical corporation [is] vested in any trustee or trustees, [who] have not power to sell, [they may] with the consent in writing of the person or persons entitled for the time being to the beneficial receipt of the rent or annual proceeds thereof, if such person or persons [is] capable of giving consent, or if there [is] no person capable of giving consent, or if such consent [is] withheld, and the trustee or trustees consider a sale essential to the interests of parties entitled under the settlement, then, with the sanction and approbation of the [Chancery Division], to be obtained on petition sell and dispose of all or any part of such property: (23 & 24 Vict. c. 124, s. 38.)

The purchase money must be paid to the trustees, whose receipt is a sufficient discharge: (*Id.*)

The money so paid to such trustee or trustees shall be invested by him or them and such investment may, with the sanction and approbation of the court be made in the purchase of other leasehold estates, whether held under any ecclesiastical corporation or not: (*Id.*)

If the person entitled to the rents is of unsound mind, not so found, the petition must be intitled in the Chancery Division only, and not in Lunacy: (*Re Cheshire*, L. Rep. 7 Ch. App. 50.)

ELEGIT.

[See EXECUTION.]

ENROLMENT OF DEEDS.

[See CENTRAL OFFICE; CHARITIES.]

EQUITABLE RULES.

- I. CONFLICT BETWEEN RULES OF EQUITY AND OF COMMON LAW.
- II. CONCURRENT ADMINISTRATION OF LAW AND EQUITY.

I. CONFLICT BETWEEN RULES OF EQUITY AND COMMON LAW.

Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail: (J. A., 1873, s. 25, sub-s. 11.)

The "matters hereinbefore particularly mentioned" are administration of assets of insolvent estates and winding-up of companies (J. A., 1875, s. 10); statutes of limitation with reference to express trusts (J. A., 1873, s. 25, sub-sect. 2); equitable waste (*Id.* sub-s. 3); Merger (*Id.* sub-sect. 4); suits by mortgagors for possession of land (*Id.* sub-sect. 5, see *inf.*); assignment of debts and *choses in action* (*Id.* sub-sect. 6, see ASSIGNMENT OF DEBTS, TRUSTEE); stipulations not of the essence of contract (*Id.* sub-sect. 7); *mandamus*, injunctions, and receivers (*Id.* sub-sect. 8, see INJUNCTION, MANDAMUS, RECEIVER); damages by collisions at sea (*Id.* sub-sect. 9); infants (*Id.* sub-sect. 10, see INFANTS); with respect to which subjects there are special enactments amending the former law.

A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person: (J. A., 1873, s. 25, sub-sect. 5.)

Save as by the principal Act or this Act, or by any Rules of Court, may be otherwise provided, all forms and methods of procedure which at the commencement of this Act were in force in any of the courts whose jurisdiction is by the principal Act or this Act transferred to the said High Court and to the said Court of Appeal respectively, under or by virtue of any law, custom, general order, or rules whatsoever, and which are not inconsistent with the principal Act or this Act, or with any Rules of Court, may continue to be used and practised, in the said High Court of Justice and the said Court of Appeal respectively, in such and the like cases, and for such and the like purposes, as those to which they would have been applicable in the respective courts of which the jurisdiction is so transferred, if the principal Act and this Act had not passed: (J. A., 1875, s. 21.)

Where no rule of practice is laid down by the Judicature Acts or Rules and there is a variance in the old practice of the Chancery and Common, Law Courts, that practice is to prevail which is considered by the court most convenient: (*Newbiggin-by-the-Sea Gas Company v. Armstrong*, L. Rep. 13 Ch. Div. 310; 41 L. T. Rep. N. S. 637; 49 L. J. 231, Ch.; 28 W. R. 217; apparently overruling, on this point, *Grant v. Holland*, L. Rep. 3 C. P. Div. 180; 47 L. J. 518, C. P.; 26 W. R. 742.)

II. CONCURRENT ADMINISTRATION OF LAW AND EQUITY.

In every civil cause or matter commenced in the High Court of Justice law and equity shall be administered by the High Court of Justice and the Court of Appeal respectively, according to the rules following:

- (1.) If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right, which heretofore could only have been given by a court of equity, the said courts respectively, and every judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose properly instituted before the passing of this Act.

[Where to a claim against a married woman for goods sold and delivered, the defendant pleads coverture, the plaintiff may reply that she has separate estate, and is thus entitled to the same remedy as he would have had in a suit commenced to charge her separate estate: (*Hancock v. De Niceville*, W. N. 1875, p. 230.).]

- (2.) If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said courts respectively, and every judge thereof, shall give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that court for the same or the like purpose before the passing of this Act.

[In an action by a mortgagee for recovery of land and for debt, the mortgagor may plead his right to redeem: (*Hanbury v. Noone*, W. N. 1875, p. 260.).]

As to setting up equities in other divisions than the Chancery Division, see *Mostyn v. West Mostyn Coal Company*, L. Rep. 1 C. P. Div. 145.

Upon a proper case for opening signed accounts made by a mortgagor by his defence and evidence in a foreclosure suit in issue before the 2d Nov. 1875, the court entertained the equitable defence as if a cross bill or a counter-claim had been filed: (*Eyre v. Hughes*, L. Rep. 2 Ch. Div. 148.).

- (3.) The said courts respectively, and every judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and

in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of court or any order of the court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant.

[See PLEADING.]

- (4.) The said courts respectively, and every judge thereof, shall recognise and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognised and taken notice of the same in any suit or proceeding duly instituted therein before the passing of this Act.
- (5.) No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: Provided always, that nothing in this Act contained shall disable either of the said courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the court shall thereupon make such order as shall be just.

[See ADMINISTRATION, INJUNCTION, STAYING PROCEEDINGS, WINDING-UP.]

- (6.) Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner aforesaid, and to the other express provisions of this Act, the said courts respectively, and every judge thereof, shall recognise and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities existing by the common law or by any custom, or created by any statute, in the same manner as the same would have been recognised and given effect to if this Act had not passed by any of the courts whose jurisdiction is hereby transferred to the said High Court of Justice.
- (7.) The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all

such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided: (J. A., 1873, s. 24.)

One of the main objects of the Judicature Act was to enable the court to decide, if possible, in one proceeding, all the questions in dispute between the same parties relating to the same matters: (Per Jessel, M.R. *Hedley v. Bates*, L. Rep. 13 Ch. Div. 498; 42 L. T. Rep. N. S. 41; 28 W. R. 365.)

EQUITY TO SETTLEMENT.

[See MARRIED WOMAN.]

EVIDENCE.

I. FORMER RULES UNAFFECTED.

II. VIVÂ VOCE EVIDENCE.

1. AT TRIAL OR ASSESSMENT OF DAMAGES.

2. AT ANY TIME BY ORDER.

(a) General Powers.

(b) Examination De Bene Esse.

(1) Where allowed.

(2) When and How Application made.

(3) How Attendance of Witnesses procured [see post, 5].

(4) How Examination conducted [see post, 3].

(5) Order to read Depositions.

(c) Special Examiners abroad.

(d) Commissions.

(1) To India and the Colonies.

(2) To other Places.

(3) In what Cases granted.

(4) When Application made.

(5) How application made.

(6) Evidence.

(7) Forms of Orders.

(8) Præcipe for Writ.

(9) Date and Teste of Commission.

(10) Form of Commission.

(11) Disallowing Questions.

(12) Proceedings before Commissioners.

(13) Compelling Attendance of Witnesses [see post, 5].

3. BEFORE EXAMINER BY CONSENT.

(a) How Consent given.

(b) Appointment for Examination.

(c) Subpœnas.

(d) Order to Attend.

(e) How Examination conducted.

(f) Signing Depositions.

(g) Filing Depositions.

(h) Printing Depositions [see post, 6 (b)]

(i) Costs.

4. CROSS-EXAMINATION OUT OF COURT.
 - (a) *On Affidavits* [see *post*, III., 15].
 - (b) *On Account* [see ACCOUNT].
5. COMPELLING ATTENDANCE OF WITNESSES.
 - (a) *At the Trial*.
 - (b) *Before Examiners*.
 - (c) *At Chambers*.
 - (d) *On Commissions*.
 - (1) *Abroad*.
 - (2) *In Scotland or Ireland*.
 - (3) *In England*.
 - (4) *When Witness in Prison*.
 - (e) *Subpœnas*.
 - (1) *Generally*.
 - (2) *For whole of United Kingdom*.
 - (3) *Penalties for Disobeying*.
 - (f) *Where Witness in Prison*.
6. DEPOSITIONS.
 - (a) *Filing* [see *sup.*, 2 (a); 2 (c); 2 (d), (7) and (9); 3 (g)].
 - (b) *Printing*.
 - (c) *Copies*.
 - (d) *Production of Office Copies*.
 - (e) *Admissibility of Depositions*.
 - (1) *Where taken on Commission*.
 - (2) *Where taken before Examiner or Other Person*.
7. HOW WITNESSES ARE SWORN AND GIVE EVIDENCE.
 - (a) *Swearing and Affirming*.
 - (b) *Examination in Chief*.
 - (c) *Cross-Examination*.
 - (d) *Re-Examination*.
 - (e) *Recalling Witnesses*.
 - (f) *Rebutting Evidence*.
 - (g) *Examination in Case of Counter-claim*.

III. AFFIDAVIT EVIDENCE.

1. AT THE TRIAL.
 - (a) *By Consent*.
 - (b) *Without Consent*.
 - (c) *By Order*.
2. ON INTERLOCUTORY PROCEEDINGS.
3. ON FURTHER CONSIDERATION.
4. ON APPLICATION TO SIGN JUDGMENT ON SPECIALLY INDORSED WRIT.
5. PREPARATION OF AFFIDAVITS.
 - (a) *When Belief may be stated*.
 - (b) *To show Means of Knowledge*.
 - (c) *To be in First Person*.
 - (d) *Deponent's Addition*.
 - (e) *Paragraphs*.
 - (f) *Dates*.
 - (g) *Quotations*.
 - (h) *How Written or Printed*.
 - (i) *Interlineations and Erasures*.
 - (k) *Jurat*.
 - (l) *Schedules*.
 - (m) *Exhibits*.
6. SWEARING.
7. FILING.
8. NOTICE OF FILING.
9. USING ORIGINAL AFFIDAVITS.

10. TAKING OFF FILE AND EXPUNGING.
11. DELIVERING LISTS.
 - (a) *Plaintiffs' Affidavits in chief.*
 - (b) *Defendants' Affidavits.*
 - (c) *Plaintiffs' Affidavits in reply.*
12. PRINTING.
13. OFFICE COPIES.
14. FURNISHING COPIES [see COPIES.]
15. CROSS-EXAMINATION ON AFFIDAVITS.
 - (a) *On Notice at Trial.*
 - (b) *By Order.*
 - (c) *By Consent before Examiner* [see *sup.*, II., 3 (a)]

IV. DOCUMENTARY EVIDENCE.

1. ADMITTING DOCUMENTS.
2. PROBATE OF WILL.
3. PUBLIC DOCUMENTS.
4. ACTS OF PARLIAMENT.
5. DECREES AND ORDERS.
6. PROCEEDINGS IN OTHER CAUSES.
7. DOCUMENTS DEPOSITED IN COURT.
8. RECORDS IN CENTRAL OFFICE.
9. EXHIBITS AT THE HEARING.
10. NOTICE TO PRODUCE.
11. DISPENSING WITH ATTESTING WITNESS.

V. IN HOUSE OF LORDS [see APPEAL.]

VI. IN COURT OF APPEAL [see APPEAL.]

VII. IN CHAMBERS [see CHAMBERS.]

VIII. ON TAXATION.

IX. ON REVIEWING TAXATION.

X. BEFORE REFEREE.

XI. BEFORE ARBITRATOR.

XII. ACTION TO PERPETUATE TESTIMONY.

1. WHERE IT LIES.
2. AFFIDAVIT ON SEALING WRIT.
3. HOW ACTION PROCEEDS.
4. EXAMINATION OF WITNESSES.
5. WHEN ACTION ENDS.
6. FILING EVIDENCE.
7. ORDER TO READ EVIDENCE.

XIII. EXAMINING WITNESSES IN AID OF TRIBUNALS ABROAD.

1. FOREIGN COURTS.
2. COURTS IN QUEEN'S DOMINIONS.

I. FORMER RULES UNAFFECTED.

Nothing in this Act or in the first schedule hereto, or in any rules of court to be made under this Act, save as far as relates to the power of the court for special reasons to allow depositions or affidavits to be read, shall affect the mode of giving evidence by the oral examination of witnesses in trials by jury, or the rules of evidence, or the law relating to juries or juries: (J. A., 1875, s. 20.)

II. *VIVÂ VOCE* EVIDENCE.

1. AT TRIAL OR ASSESSMENT OF DAMAGES.

In the absence of any agreement between the parties, and subject to these rules, the witnesses at the trial of any action or at any assessment of damages, shall be examined *vivâ voce* and in open court: (O. XXXVII., r. 1.)

2. AT ANY TIME BY ORDER.

(a) *General Power.*

The court or a judge may, in cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the court, or any other person or persons, and at any place, of any witness or person, and may order any deposition so taken to be filed in the court, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the court or a judge may direct: (O. XXXVII., r. 4.)

The form of order is given in Schedule H. 34, to the Rules of April, 1880.

In a summons under the Vendors and Purchasers Act, 1874, the evidence of a witness who refused to make an affidavit was ordered to be taken before an examiner: (*Re Springall and Goldsack's Contract*, W. N. 1875, p. 225.)

The court or a judge may at any time, for sufficient reason order . . . that any witness whose attendance in court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner: (O. XXXVII., r. 1.)

The court, or the judge in chambers, may direct that the oral examination and cross-examination of any witness (whether a party or not) . . . shall be taken before an examiner of the court or a special examiner, in the manner prescribed by the stat. 15 & 16 Vict. c. 86, in case it shall appear to the judge that, owing to the age, infirmity, or absence out of the jurisdiction of such witness or person, or for any other cause which to the judge shall appear sufficient, it is expedient that such direction should be given. Such direction may be obtained on application to the court or the judge in chambers, on notice: (Ch. Order, 5th Feb. 1861, r. 11.)

In the case of the examination or cross-examination, under the last preceding rule, of any person in England or Wales, the party requiring such examination or cross-examination may apply to the court or the judge in chambers for an order that one of the examiners of the court may attend, for the purpose of such examination or cross-examination, at any place or places in England or Wales to be named in such order: (*Id.*, r. 12.)

The expenses of the examiner shall be paid to him by the party obtaining such order; and, subject to any direction of the court, or of the judge in chambers to the contrary, shall be costs in the cause: (*Id.*, r. 13.)

The rule applies both to examiners of the court and special examiners: (*Palmer v. Moore*, W. N. 1875, p. 125.)

Any fit person may be appointed a special examiner, but a barrister or solicitor is generally appointed: (Dan. 801.)

The application for his appointment is by motion on notice or summons, supported by an affidavit of his fitness, and that he has no adverse interest: (*Id.*)

When the judge in chambers directs the examination of a witness before the examiner, the latter may require a note to that effect, signed by the chief clerk, as his authority: (Dan. 1061.)

(b) *Examination De Bene Esse.*

(1) When allowed.

The court will permit depositions to be taken before the cause is at issue, of important witnesses whose testimony is in danger of being lost from death, by reason of old age or dangerous illness; because they are about to go abroad; or because the death of one witness would destroy

the only evidence of a fact, though he is neither old, ill, nor going abroad : (Dan. 814-6.)

(2) When and How Application made.

The application may be made any time after the writ is issued, by any party : (Dan. 817.)

If the ground is that the witness is over seventy years of age, or dangerously ill, or going abroad, the application is by motion *ex parte*, or motion or petition of course : (*Id.*)

This order must be served on the other side : (Dan. 818.)

In other cases the application is by motion on notice, or summons. An affidavit is always required in support as to the facts forming the ground of application, the age of the witness, and that he is a material witness : (Dan. 818.)

When the ground is that the witness is the only witness, the affidavit must show the particular points to which the evidence is to apply, and the ground for believing that he is the only person : (*Id.*)

(3) How Attendance of Witnesses procured.

[See *post*, 5.]

(4) How Examination Conducted.

[See *post*, 3.]

(5) Order to Read Depositions.

An order is necessary before the depositions can be used as evidence : (Dan. 819; O. XXXVII., r. 4; see *sup.* (a).)

The order may be obtained on motion with notice, or summons : (see O. XXXVII., r. 4.)

Evidence of death, or absence abroad is generally necessary : (Dan. 819, *et seq.*)

As to when the order will be made and its form, see *Moggridge v. Hall* (L. Rep. 13 Ch. Div. 380).

(c) *Special Examiner Abroad.*

The Court of Chancery, although it had power to issue a commission to examine witnesses abroad, generally appointed a special examiner for the purpose : (Dan. 812.)

The Chancery Division may still adopt either course : (see *sup.* (a).)

For a form of order for special examiner, see *London Bank of Mexico v. Hart* (L. Rep. 6 Eq. 467; 18 L. T. Rep. N. S. 553).

But such a form is not always necessary : (*Banque Franco-Egyptienne v. Lutscher*, 41 L. T. Rep. N. S. 468; 28 W. R. 133.)

In the case last cited a commission was granted.

The power of the courts abroad may be called in as in the case of commissions : (*Campbell v. Attorney-General*, L. Rep. 2 Ch. App. 571; see *post*, 5.)

If the depositions are taken in a foreign language, they must be translated either before they are filed, or at the central office afterwards : (Dan. 813.)

The order for a translation may be obtained on motion or petition of course : (*Id.*)

The translation must be sworn to and annexed to the deposition, and an office copy of it may be read at the hearing, saving all just exceptions, when, as is usually the case, the order so directs : (*Id.*)

The costs of a special examiner are taxed in England, on the scale allowed in the country where the evidence was taken : (Dan. 814.)

The costs of a solicitor here of attending the examination abroad were not allowed in Chancery : (*Id.*)

(d) *Commissions.*

(1.) To India and the Colonies.

Whenever any person commences any action in the High Court of Justice, for which cause has arisen in India, the High Court may, on motion, award a writ in the nature of a *mandamus* or commission to the chief justice and judges of the High Court of Judicature at Fort William, Madras, or Bombay, for the examination of witnesses: (13 Geo. 3, c. 63, s. 44; Taylor on Evidence, 7th edit., 443, 441 n.)

The above provision has been extended to all colonies, islands, plantations, and places under the dominion of Her Majesty in foreign parts, and to the judges of the several courts therein, and to all actions depending in the High Court of Justice, in what place or country soever the cause of action may have arisen, whether within the jurisdiction of the court to the judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses, under a writ or commission issued in pursuance of the authority given will be necessary or conducive to the due administration of justice in the matter wherein such writ shall be applied for: (1 Will. 4, c. 22, s. 1.)

(2) To other Places.

[Any division of the High Court of Justice, or any judge of any such division, may] in every action depending in such court, upon the application of any of the parties to such suit . . . order the examination on oath, upon interrogatories or otherwise, before the master or prothonotary of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court where the action may be depending, or . . . order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction, by interrogatories or otherwise, and by the same or any subsequent order or orders . . . give all such directions touching time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations as may appear reasonable and just: (1 Will. 4, c. 22, s. 4.)

Interpleader is not an action within the meaning of this Act: (*Re Mersey Dock Board*, 11 W. R. 283.)

(3) In what cases granted.

It [was] not . . . necessary to sue out any commission for the examination of any witnesses within the jurisdiction of the . . . Court [of Chancery]; and any examiner appointed by any order of the court [had] the like power of administering oaths as commissioners [had] under commissions issued by the court for the examination of witnesses: (15 & 16 Vict. c. 86, s. 35.)

It is in the discretion of the court whether a commission to examine witnesses abroad shall be ordered: (Per Malins, V.C.; *Re Imperial Land Company of Marseilles*, W. N. 1877, p. 236; 37 L. T. Rep. N. S. 588.)

Where the Court of Appeal was of opinion that the application was made *bonâ fide*, and that the applicants were able and willing to bear the expense of the commission, a commission was ordered, notwithstanding the judge below had refused it: (*Re Imperial Land Company of Marseilles*, W. N. 1877, p. 244; 37 L. T. Rep. N. S. 588.)

An order for examination, either *vivâ voce* or by interrogatories, will be made when a material witness is, from ill health, unlikely to be able to attend at the trial safely: (*Davies v. Lowndes*, 6 Scott, 738; *Pond v. Dimes*, 2 Dowl. 730.)

The sickness need not be incurable, but only so far permanent as to be

likely to last beyond the trial, and the decision of the judge is liable to review on appeal: (*Duke of Beaufort v. Crawshaw*, H. & R. 638.)

The order may be made whether the witness is in Scotland or Ireland (*Wainwright v. Bland*, 3 Dowl. 653); in a colony (*Farnworth v. Hyde*, 14 C. B. N. S. 719); or out of the Queen's dominions (*Duckett v. Williams*, 1 Dowl. 291; unless at war with this country (*Barrick v. Buba*, 16 C. B. 492).

Mere residence abroad is insufficient, if it appear that the witness can attend at the trial: (*Castelli v. Groom*, 18 Ad. & El. 490.)

A party who is going abroad will sometimes be ordered to be examined (*Pirie v. Iron*, 8 Bing. 143); but if on his own behalf, special terms will be imposed, and an affidavit of *bona fides* required: (*Fischer v. Hahn*, 13 C. B. N. S. 659.)

The order will not be granted when it will cause delay, and the applicant has been dilatory in trying to obtain it: (*Stewart v. Gladstone*, L. Rep. 7 Ch. Div. 395; 37 L. T. Rep. N. S. 575; 47 L. J. 154, Ch.; 26 W. R. 277.)

(4.) When Application Made.

The application should be made as soon as possible after issue joined: (*Brydges v. Fisher*, 4 M. & Scott, 458, and see cases cited Taylor, 447.)

Where some of the plaintiffs in an action were abroad, and having a small interest in the action did not intend to appear at the trial; on the application of the remaining plaintiff, a commission was appointed to take the evidence of those plaintiffs who were abroad: (*Banque Franco-Egyptienne v. Lutscher*, 41 L. T. Rep. N. S. 468; 28 W. R. 133.)

(5.) How Application Made.

The application may be by motion on notice, or by summons.

(6.) Evidence.

Evidence must be given by affidavit that the witnesses, some of whom, unless under very special circumstances must be named or described, are material and necessary witnesses, that the application is *bonâ fide*, and that the evidence to be taken under the commission cannot otherwise be obtained without great inconvenience and expense: (Taylor, 448; *Spiller v. Paris Skating Rink Company*, W. N., 1878, p. 228; 27 W. R. 225.)

The affidavit must further disclose either that the witness is out of the jurisdiction of the court, or that he will be so at the time of the trial, being about to leave the country, or that he is in such a precarious state of health as to render it highly improbable that he will be able to attend the trial: (Taylor, 449)

In case of ill-health the affidavit of a medical man should be produced: (*Davies v. Lowndes*, *sup.*)

(7.) Forms of Orders.

The following forms of order for a commission to issue are given in the schedule to the Rules of April, 1880.

FIRST OR SHORT ORDER.

In the High Court of Justice.

Division.
Master in Chambers.

18

No. .

Between

and

Plaintiff,

Defendant.

Upon hearing
day of

, and upon reading the affidavit of
18 , and

filed the

It is ordered that the be at liberty to issue a commission for the examination of the witnesses on behalf at

Dated the day of 18 .
(Sched. H. 35, rr. April, 1880.)

In the High Court of Justice.

18 No. .

Between

Plaintiff,

and

Defendant.

Upon hearing _____ and upon reading the affidavit of _____
day of _____ 18 __ and _____ filed the

It is ordered as follows :

1. A commission may issue directed to _____ of _____ and _____ of _____ commissioners named by and on behalf of the _____ and to _____ of _____ and _____ of _____ commissioners named by and on behalf of the _____ for the examination upon interrogatories and *vidâ voce* of witnesses on behalf of the said _____ and _____ respectively at _____ aforesaid before the said commissioners, or any two of them, so that one commissioner only on each side be present and act at the examination.

2. Both the said _____ and _____ shall be at liberty to examine upon interrogatories and *vivâ voce* upon the subject-matter thereof or arising out of the answers thereto such witnesses as may be produced on their behalf, with liberty to the other party to cross-examine the said witnesses upon cross interrogatories and *vivâ voce* on the subject matters thereof or arising out of the answers thereto, the party producing the witness for examination being at liberty to re-examine him *vivâ voce*; and all such additional *vivâ voce* questions, whether on examination, cross-examination, or re-examination, shall be reduced into writing, and, with the answers thereto, returned with the said commission.

3. Within _____ days from the date of this order, the solicitors or agents of the said _____ and _____ shall exchange the interrogatories they propose to administer to their respective witnesses, and shall also within _____ days from the exchange of such interrogatories, exchange copies of the cross-interrogatories intended to be administered to the said witnesses.

4. _____ days previously to the sending out of the said commission, the solicitor of the said _____ shall give to the solicitor of the said _____ notice in writing of the mail or other conveyance by which the commission is to be sent out.

5. days previously to the examination of any witness on behalf of the said or respectively, notice in writing signed by any one of the commissioners of the party on whose behalf the witness is to be examined and stating the time and place in which the intended examination, and the names of the witnesses intended to be examined, shall be given to the commissioners of the other party by delivering the notice to them personally, or by leaving it at their usual place of abode or business, and if the commissioners of that party neglect to attend pursuant to the notice, then one of the commissioners of the party on whose behalf the notice is given shall be at liberty to proceed with and take the examination of the witness or witnesses *ex parte*, and adjourn any meeting or meetings, or continue the same, from day to day until all the witnesses intended to be examined by virtue of the notice have been examined, without giving any further or other notice of the subsequent meeting or meetings.

6. In the event of any witness on his examination, cross-examination, or re-examination producing any book, document, letter, paper, or writing, and refusing for good cause to be stated in his deposition, to part with the original thereof,

then a copy thereof, or extract therefrom, certified by the commissioners or commissioner present to be a true and correct copy or extract, shall be annexed to the witnesses' deposition.

7. Each witness to be examined under the commission shall be examined on oath, affirmation, or otherwise in accordance with his religion by or before the said commissioners or commissioner.

8. If any one or more of the witnesses do not understand the English language (the interrogatories, cross-interrogatories and *vivâ voce* questions, if any, being previously translated into the language with which he or they is or are conversant), then the examination shall be taken in English through the medium of an interpreter or interpreters, to be nominated by the commissioners or commissioner, and to be previously sworn according to his or their several religions by or before the said commissioners or commissioner truly to interpret the questions to be put to the witness or witnesses, and his and their answers thereto.

9. The depositions to be taken under and by virtue of the said commission shall be subscribed by the witness or witnesses, and by the commissioners or commissioner who shall have taken such depositions.

10. The interrogatories, cross-interrogatories, and depositions, together with any documents referred to therein, or certified copies thereof, or extracts therefrom, shall be sent to the Senior Master of the Supreme Court of Judicature on or before the day of , or such further or other day as may be ordered, enclosed in a cover under the seal or seals of the said commissioners or commissioner, and office copies thereof may be given in evidence on the trial of this action by and on behalf of the said and respectively, saving all just exceptions, without any other proof of the absence from this country of the witness or witnesses therein named, than an affidavit of the solicitor or agent of the said or respectively, as to his belief of the

11. The trial of this cause is to be stayed until the return of the said commission.

12. The costs of this order, and of the commission to be issued in pursuance hereof, and of the interrogatories, cross-interrogatories, and depositions to be taken thereunder, together with any such document, copy or extract as aforesaid, and official copies thereof, and all other costs incidental thereto, shall be

Dated the day of 18
(Schedule H. 30, Rules, April, 1880.)

(8) Præcipe for Writ.

The form of præcipe, on sealing a commission, is given in Schedule E. 16, to the Rules of April, 1880.

(9) Date and Teste of Commission.

[The writ of commission] shall bear date on the day on which the same shall be issued, and shall be tested in the name of the Lord Chancellor, or if the office of Lord Chancellor shall be vacant, in the name of the Lord Chief Justice of England: (O. II., r. 8.)

(10) Form of Commission.

The following form of a commission is given in Schedule G. 11, to the Rules of April, 1880.)

In the High Court of Justice.

Between	Division.	18	No.
		Plaintiff,	
and			

Defendant.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to of and of Commissioners named by and on behalf of the and to of and of Commissioners named by and on behalf of the greeting: Know ye that we in confidence of your prudence and fidelity have

appointed you and by these presents give you power and authority to examine on interrogatories and *vivâ voce* as hereinafter mentioned witnesses on behalf of the said and respectively at before you or any two of you, so that one Commissioner only on each side be present and act at the examination.—And we command you as follows :

1. Both the said and the said shall be at liberty to examine on interrogatories and *vivâ voce* on the subject matter thereof or arising out of the answers thereto such witnesses as shall be produced on their behalf with liberty to the other party to cross-examine the said witnesses on cross-interrogatories and *vivâ voce* on the subject matters thereof or arising out of the answers thereto, the party producing any witness for examination being at liberty to re-examine him *vivâ voce* ; and all such additional *vivâ voce* questions, whether on examination, cross-examination, or re-examination, shall be reduced into writing, and with the answers thereto shall be returned with the said commission.

2. Not less than days before the examination of any witness on behalf of either of the said parties, notice in writing, signed by any one of you, the Commissioners of the party on whose behalf the witness is to be examined, and stating the time and place of the intended examination and the names of the witnesses to be examined, shall be given to the Commissioners of the other party by delivering the notice to them, or by leaving it at their usual place of abode or business, and if the Commissioners or Commissioner of that party neglect to attend pursuant to the notice, then one of you, the Commissioners of the party on whose behalf the notice is given, shall be at liberty to proceed with and take the examination of the witness or witnesses *ex parte*, and adjourn any meeting or meetings, or continue the same from day to day until all the witnesses intended to be examined by virtue of the notice have been examined, without giving any further or other notice of the subsequent meeting or meetings.

3. In the event of any witness on his examination, cross-examination, or re-examination producing any book, document, letter, paper, or writing, and refusing for good cause, to be stated in his deposition, to part with the original thereof, then a copy thereof, or extract therefrom, certified by the commissioners or commissioner present and acting to be a true and correct copy or extract shall be annexed to the witnesses' deposition.

4. Each witness to be examined under this commission shall be examined on oath, affirmation, or otherwise in accordance with his religion by or before the commissioners or commissioner present at the examination.

5. If any one or more of the witnesses do not understand the English language (the interrogatories, cross-interrogatories, and *vivâ voce* questions, if any, being previously translated into the language with which he or they is or are conversant), then the examination shall be taken in English through the medium of an interpreter or interpreters to be nominated by the commissioners or commissioner present at the examination, and to be previously sworn according to his or their several religions by or before the said commissioners or commissioner truly to interpret the questions to be put to the witness and his answers thereto.

6. The depositions to be taken under this commission shall be subscribed by the witness or witnesses, and by the commissioners or commissioner who shall have taken the depositions.

7. The interrogatories, cross-interrogatories, and depositions, together with any documents referred to therein, or certified copies thereof or extracts therefrom, shall be sent to the senior master of the Supreme Court of Judicature on or before the day of inclosed in a cover under the seals or seal of the commissioners or commissioner.

8. Before you or any of you, in any manner act in the execution hereof you shall severally take the oath hereon indorsed on the Holy Evangelists or otherwise in such other manner as is sanctioned by the form of your several religions and is considered by you respectively to be binding on your respective consciences.

And we give you or any one of you authority to administer such oath to the other or others of you.

Witness, HUGH MACCALMONT, EARL CAIRNS, Lord High Chancellor of Great Britain, the day of , in the year of Our Lord One thousand eight hundred and

This writ was issued by
of
agent for
of
solicitor for the
who reside at

WITNESSES' OATH.

You are true answer to make to all such questions as shall be asked you, without favour or affection to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth. So help you God.

COMMISSIONERS' OATH.

You shall, according to the best of your skill and knowledge, truly and faithfully, and without partiality to any or either of the parties in this cause, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the commission within written. So help you God.

INTERPRETERS' OATH.

You shall truly and faithfully, and without partiality to any or either of the parties in this cause, and to the best of your ability, interpret and translate the oath or oaths, affirmation or affirmations which shall be administered to, and all and every the questions which shall be exhibited or put to, all and every witness and witnesses produced before and examined by the commissioners named in the commission within written, as far forth as you are directed and employed by the said commissioners, to interpret and translate the same out of the English into the language of such witness or witnesses, and also in like manner to interpret and translate the respective depositions taken and made to such questions out of the language of such witness or witnesses into the English language. So help you God.

CLERK'S OATH.

You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take, write down, transcribe, and engross all and every the questions which shall be exhibited or put to all and every witness and witnesses, and also the depositions of all and every such witness and witnesses produced before and examined by the said commissioners named in the commission within written, as far forth as you are directed and employed by the commissioners to take, write down, transcribe or engross the said questions and depositions.

So help you God.

Direction of Interrogatories, &c., when returned by the Commissioners.
THE SENIOR MASTER OF THE SUPREME COURT OF JUDICATURE, ROYAL COURTS
OF JUSTICE, LONDON.

It is in the discretion of the court to order examination to be by written interrogatories or orally, either altogether, or as to particular portions of the evidence: (Taylor, 451.)

But the manner must be stated: (*Atkins v. Palmer*, 4 B. & Ald. 377.)

The order must state the place to which the commission is directed, and, where the examination is within the jurisdiction, the names of the commissioners: (Powell on Evidence, 3rd ed., 410.)

(11) Disallowing Questions.

After a commission has been granted to examine witnesses in a foreign

country, the court, before its execution, has a discretionary power to disallow any interrogatories or cross-interrogatories, which are likely to deter a witness from giving evidence before the commission: (Taylor, 451.)

(12) Proceedings before Commissioners.

The commissioners must substantially follow the instructions which they have received by the instrument appointing them, though the court will not look out critically for objections to their conduct, but will rather in their favour presume that they have discharged their duty: (Taylor, 451.)

The evidence must be such, in substance, as would be received according to the English law: (*Id.*)

But if hearsay or secondary evidence is taken without objection being made by a party who has joined in procuring the commission, he cannot object afterwards: (See *post*, 6 (e).)

For directions for holding the court in India and the colonies, see 13 Geo. 3, c. 63, ss. 40, 44; 1 Will. 4, c. 22, s. 1; Taylor, 441.

Under a commission under 1 & 2 Will. 4, c. 22, the examination is to be on oath or affirmation, when such is allowed (s. 7); and the person taking the examination must make, if need be, a special report to the court touching the examination and the conduct or absence of any witness or other person thereon, or relating thereto, and the court may make order thereon as in case of contempt of court: (s. 8.)

(13) Compelling Attendance of Witnesses. [See *post*, 5.]

3. BEFORE EXAMINER BY CONSENT.

(a) *How Consent given.*

If at any time after issue joined the parties shall, by writing signed by them or their respective solicitors, and filed at the [Central Office] agree that the oral examination in chief and cross-examination of any witness or witnesses (whether a party or parties, or not), or the cross-examination of any person or persons who shall have made an affidavit or affidavits, or who shall have been examined *ex parte* before an examiner, shall be taken before one of the examiners of the court, or a special examiner, in manner provided by the stat. 15 & 16 Vict. c. 86, such examination may be taken accordingly: (Ch. O., 5th Feb. 1861, r. 10.)

(b) *Appointment for Examination.*

An appointment for the examination must be obtained from the examiner, and notice thereof given to the opposite party and the witnesses: (Dan. 802; and see *post*, 5 (b) as to the notices required.)

(c) *Subpcenas.*

As to the fees payable on an examination, see FEES.

If it is supposed a witness will not attend voluntarily, he must be served personally with a *subpcena ad testificandum* or *duces tecum*, his reasonable expenses being paid or tendered, whether he is a party to the cause or not: (Dan. 802-3, and see *post*, 5 (e).)

(d) *Order to Attend.*

If after service the witness neglect or refuse to attend, a certificate of non-attendance must be procured from the examiner, and an application made to the court, on motion, *ex parte*, or on notice to the witness, for an order on the witness to attend and be sworn and examined at such time and place as the examiner may appoint: (Dan. 804-5.)

The application must be supported by an affidavit of due service, and production of the certificate of non-attendance, or an office copy thereof: (Dan. 804.)

A further appointment must be obtained, and notice thereof, and of the order served on the witness : (*Id.*)

If he then makes default, a further certificate of non-attendance must be filed, after which an order for committal or an attachment may be applied for : (see ARREST, EXECUTION.)

If a witness attending on *subpoena duces tecum* refuse, without sufficient cause, to produce the documents required, he may be ordered, on motion with notice, to attend again and produce it, and to pay all the costs occasioned : (Dan. 805.)

The examination usually takes place at the examiner's office, and a witness, by appearing, waives any irregularity in the process. He need wait only half an hour : (Morg. & Ch. 177.)

In case, by virtue of any such agreement, any witness or person shall be examined in chief before the examiner or special examiner, the cross-examination and re-examination of such witness or person shall be taken before the same examiner or special examiner, or his successor in office; and the cross-examination of every witness so examined in chief shall immediately follow his examination in chief, and the re-examination of every witness or person so cross-examined shall immediately follow his cross-examination : (Ch. O., Feb. 1861, r. 10.)

(e) *How Examination Conducted.*

All witnesses to be examined orally under [15 & 16 Vict. c. 86] shall be so examined by or before one of the examiners of the court, or by or before an examiner to be specially appointed by the court, the examiner being furnished by the plaintiff with a copy of the [pleadings], if any, in the cause; and such examination shall take place in the presence of the parties, their counsel, solicitors, or agents, and the witnesses so examined orally shall be subject to cross-examination and re-examination : (15 & 16 Vict. c. 86, s. 31.)

The examiner's office is not a public court, and he has no discretion to admit any persons other than the parties and their counsel, solicitors, and agents : (*Re Western of Canada Oil Lands and Works Company Limited*, L. Rep. 6 Ch. Div. 109; 46 L. J. 683, Ch.; 25 W. R. 787.)

The depositions taken upon any such oral examination as aforesaid shall be taken down in writing by the examiner, not ordinarily by question and answer, but in the form of a narrative : (15 & 16 Vict. c. 86, s. 32.)

Depositions of witnesses are to be written on foolscap paper, book wise or brief wise, as the examiner may think fit; [but the masters] may receive and file depositions written otherwise . . . if in their opinion the circumstances of the case render such reception and filing desirable or necessary : (Ch. O., 6th March, 1860, r. 16.)

The examiner need not take down the evidence in writing himself. If the other parties are present when it is taken down, and the examiner certifies that the deposition has been read over to the witness and signed by him in the examiner's presence it is sufficient : (*Bolton v. Bolton*, L. Rep. 2 Ch. Div. 217; 34 L. T. Rep. N. S. 123; 24 W. R. 426.)

It shall be in the discretion of the examiner to put down any particular question or answer, if there should appear any special reason for doing so; and any question or questions which may be objected to shall be noticed or referred to by the examiner in or upon the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement on the face of the depositions, but he shall not have power to decide upon the materiality or relevancy of any question or questions : (15 & 16 Vict. c. 86, s. 32.)

When a witness refuses to be sworn or to answer any lawful question the same course is to be adopted with respect to him as at the time of

passing of the Act was pursued in the case of a witness produced for examination before an examiner of the court upon written interrogatories, and so refusing : (15 & 16 Vict. c. 86, s. 33.)

The practice in such cases was to obtain the examiner's certificate, and upon that and an affidavit of service of the subpoena, an order of course was obtained for the witness to comply within four days or stand committed; and if after service of that order he still refused, either another order for his committal might be obtained upon a similar certificate of the examiner, and an affidavit of service of the order, or the first order might be enforced by attachment under the general orders of the court : (Jarm. 139.)

Demurrers or objections of witnesses to questions put to them are to be taken down by the examiner and transmitted by him to the [proper] office of the court, to be there filed, and their validity shall be decided by the court, and the costs of and occasioned by such demurrers or objections shall be in the discretion of the court : (15 & 16 Vict. c. 86, s. 33.)

The demurrer may be set down for hearing on an order obtained on petition of course : (Dan. 825.)

The order need only be served on the witness, unless privilege is claimed by the solicitor of the party, when the party also should be served : (*Id.*)

If the court considers the demurrer bad it will overrule it, in which case an order will be made for attendance and examination, which may be enforced by committal : (*Id.*)

Instead of setting down the demurrer, the party who asked the question may move, on notice to the witness, that the witness may attend the examiner at his own expense, and be further examined. (Dan. 826.)

This is ordered, unless the objection is allowed : (*Id.*)

The proceedings before the examiner may at any stage be transferred from his office into court : (*Commercial Union Assurance Company v. Uzielli*, 39 L. T. Rep. N. S. 665; 27 W. R. 356.)

(f) *Signing Depositions.*

[The depositions] when completed shall be read over to the witness, and signed by him in the presence of the parties, or such of them as may think fit to attend : (*Id.*)

In case the witness shall refuse to sign the said depositions, then the examiner shall sign the same, and such examiner may, upon all examinations, state any special matter to the court as he shall think fit : (*Id.*)

If the examiner omits to sign the depositions, the court may order them to be filed : (Dan. 806.)

If the examiner dies before signing the depositions they must be signed by his successor : (*Id.*)

(g) *Filing Depositions.*

When the examination of witnesses before any examiner shall have been concluded, the original depositions, authenticated by the signature of such examiner, shall be transmitted by him to the [Central Office], to be there filed, and any party to the suit may have a copy thereof or of any part or portion thereof upon payment for the same : (15 & 16 Vict. c. 86, s. 34; and see COPIES.)

(h) *Printing Depositions.* [See post, 6 (b).]

(i) *Costs.*

The court [has] power to deal with the costs of immaterial or irrelevant depositions as [is] just : (*Id.*, s. 32.)

4. CROSS-EXAMINATION OUT OF COURT.

(a) *On Affidavit.* [See post III., 15.]

(b) *On Account.* [See ACCOUNT.]

5. COMPELLING ATTENDANCE OF WITNESSES.

(a) *At the Trial.*

A witness required to attend at the trial of a cause, and who will not be likely to attend voluntarily, must be served with a *subpcena ad testificandum*: or if he is also required to produce documents, with a *subpcena duces tecum*.

As to the preparation and service of subpcenas, see *post* (e).

(b) *Before Examiners.*

Any party . . . requiring the attendance of any witness, whether a party or not, before one of the examiners of the court, or a special examiner, for the purpose of being examined or cross-examined, shall give to the opposite party forty-eight hours' notice at least of his intention to examine or cross-examine such witness, such notice to contain the name and description of the witness, and the time and place of such examination, or cross-examination unless the court shall . . . think fit to dispense with such notice: (Ch. O., Feb. 1861, r. 22.)

The rule as to forty-eight hours' notice may be relaxed: (*De Brito v. Hillel*, L. Rep. 15 Eq. 213; 28 L. T. Rep. N. S. 59.)

The witness is entitled only to reasonable notice: (*Re North Wheel Exmouth Mining Co.*, 31 Beav. 628; 7 L. T. Rep. N. S. 306.)

Any party in any cause or matter depending in the said court may, by a writ of *subpcena ad testificandum* or *duces tecum*, require the attendance of any witness before an examiner of the said court, or before an examiner specially appointed for the purpose: (15 & 16 Vict. c. 86, s. 40.)

A general form of *subpcena ad test.* is given in Schedule G. 1 to the Rules of April, 1880. In filling it up, regard must be had to the form in Schedule E. 3 to the Consolidated Orders.

The names of three witnesses may be inserted: (C. O. XXVIII., r. 3; Rules of April, 1880, Schedule G. 1.)

A general form of *subpcena duces tecum* is given in Schedule G. 2 to the Rules of April, 1880. In filling it up regard must be had to the form in Schedule E. 3 to the Consolidated Orders.

The names of three witnesses may be inserted, [and] documents to be produced must be specified: (Note to Schedule G. 2, Rules of April, 1880.)

(c) *At Chambers.*

Where a *subpcena* is required for the purpose of proceedings in Chambers, such *subpcena* shall be issued from the [Central] Office upon a note from the Judge: (C. O. 35, r. 29.)

(d) *On Commissions.*(1) *Abroad.*

Where any writ or commission [issued under the Act of Geo. 3, or of Will. 4] the judge or judges to whom the same shall be directed shall have the like power to compel and enforce the attendance and examination of witnesses as the court whereof they are judges does or may possess for that purpose in suits or causes depending in such court: (1 Will. 4, c. 22, s. 2. And see *post*, XIII.)

(2) *In Scotland or Ireland.*

If any person, after being served with a written notice to attend any commissioner or commissioners appointed to execute any . . . commission for the examination of witnesses [issued by the courts of law or equity in England or Ireland, or by the courts of law in Scotland, to be executed in a part of the realm subject to different laws from that in which the commission was issued] (such notice being signed by the commissioner or commissioners, and specifying the time and place of

attendance), shall refuse or fail to appear and be examined under such commission, such refusal or failure to appear shall be certified by such commissioner or commissioners, and it shall thereupon be competent, to or on behalf of any party suing out such commission, to apply to any of the superior courts of law in that part of the kingdom within which such commission is to be executed, or any one of the judges of such courts, for a rule or order to compel the person or persons so refusing or failing as aforesaid to appear before such commissioner or commissioners, and to be examined under such commission; and it shall be lawful for the court or judge to whom such application shall be made by rule or order to command the attendance and examination of any person to be named, or the production of any writings or documents to be mentioned in such rule or order: (6 & 7 Vict. c. 82, s. 5.)

Upon the service of such rule or order upon the person named therein, if he or she shall not appear before such commissioner or commissioners as aforesaid for examination, or to produce the writings or documents mentioned in such rule or order, the disobedience to such rule or order shall, if the same shall happen in England or in Ireland, render the person disobeying, subject and liable to such pains and penalties as he or she would be subject and liable to by reason of disobedience to a writ of subpcena in England or in Ireland; and if such disobedience shall happen in Scotland it shall be competent to the Lord Ordinary on the bills, upon an application made to him by or on behalf of any party suing out such commission, and upon proof of such disobedience made before him, to direct the issue of letters of second diligence, according to the forms of the law of Scotland, to be used against the person disobeying such rule or order: (*Id.*, s. 6.)

Every person whose attendance shall be so required shall be entitled to the like conduct-money and payment of expenses and for loss of time as for and upon attendance at any trial in a court of law: (*Id.*, s. 7.)

No person shall be compelled to produce under such rule or order any writing or other document that he or she would not be compellable to produce at a trial, nor to attend on more than two consecutive days, to be named in such rule or order: (*Id.*)

Attendance may also be compelled under 22 Vict. c. 20: (see *post*, XIII., and *Campbell v. Attorney-General*, L. Rep. 2 Ch. App. 571.)

(3) In England.

When any rule or order shall be made for the examination of witnesses within the jurisdiction of the court wherein the action shall be depending, by authority of this Act, it shall be lawful for the court, or any judge thereof, in and by the first rule or order to be made in the matter, or any subsequent rule or order, to command the attendance of any person to be named in such rule or order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order, and to direct the attendance of any such person to be at his own place of abode, or elsewhere if necessary or convenient so to do: (1 Will. 4, c. 22, s. 5.)

The wilful disobedience of any such rule or order shall be deemed a contempt of court, and proceedings may be thereupon had by attachment (the judge's order being made a rule of court before or at the time of the application for an attachment), if, in addition to the service of the rule or order, an appointment of the time and place of attendance in obedience thereto, signed by the person or persons appointed to take the examination, or by one or more of such persons, shall be also served together with or after the service of such rule or order: (*Id.*)

Every person whose attendance shall be so required shall be entitled to

the like conduct money and payment for expenses and loss of time as upon attendance at a trial : (*Id.*)

No person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compellable to produce at a trial of the cause : (*Id.*)

(4) When Witness in Prison.

Any sheriff, gaoler, or other officer having the custody of any prisoner [may] take such prisoner for examination under the authority of [the] Act, by virtue of a writ of *habeas corpus*, to be issued for that purpose, which writ shall and may be issued by any court or judge under such circumstances and in such manner as such court or judge may issue a writ of *habeas corpus ad testificandum* : (1 Will. 4, c. 22, s. 6.)

(e) *Subpœnas*.

(1) Generally.

Where it is intended to sue out a *subpœna*, a *præcipe* for that purpose, in the usual form, and containing the name or firm and the place of business or residence of the solicitor or solicitors intending to sue out the same, and where such solicitor or solicitors is or are agent or agents only, then also the name or firm and place of business or residence of the principal solicitor or solicitors, shall in all cases be delivered and filed at the [Central Office] : (C. O. 28, r. 1 ; J. A., 1879.)

The form of *præcipe* on issuing a *subpœna* is given in Schedule E. 20, to the Rules of April, 1880.

Every *subpœna* other than a *subpœna duces tecum* [may] contain three names, where necessary or required : (C. O. 28, r. 3 ; note to forms in schedule to Rules of April, 1880.)

For general form see Schedule G. 1, Rules of April, 1880 ; for form for attendance at the sittings of the High Court, see Schedule G. 5 to the same rules ; for form for attendance at assizes, see Schedule G. 3, to the same rules.

No more than three persons shall be included in one *subpœna duces tecum* ; and the party suing out the same shall be at liberty to sue out a *subpœna* for each person, if it shall be deemed necessary or desirable : (C. O. 28, r. 4 ; note to form in schedule to Rules of April, 1880.)

For general form, see Schedule G. 2, to Rules of April, 1880 ; for form for attendance at sittings of the High Court, see Schedule G. 6 to the same rules ; for form for attendance at assize, see Schedule G. 4 to the same rules.

The documents to be produced must be specified : (Notes to forms, *sup.*)

In the interval between the suing out and service of any *subpœna*, the party suing out the same may correct any error in the names of parties or witnesses, and may have the writ re-sealed upon leaving a corrected *præcipe* of such *subpœna*, marked with the words "altered and re-sealed," and signed with the name and address of the solicitor or solicitors suing out the same : (C. O. 28, r. 5.)

The service of any *subpœna*, except a *subpœna* for costs, shall be of no validity if not made within twelve weeks after the *teste* of the writ : (C. O. 28, r. 9.)

The service of *subpœnas* shall be effected by delivering a copy of the writ and of the indorsement thereon, and at the same time producing the original writ : (C. O. 28, r. 6.)

The reasonable expenses of the witness must be paid or tendered on service : (Dan. 803.)

Affidavits filed for the purpose of proving the service of a *subpœna* upon any defendant, must state when, where, and how such *subpœna* was served, and by whom such service was effected : (C. O. 28, r. 8.)

(2) For whole of United Kingdom.

If, in any action or suit . . . depending in any [Division of the High Court of Justice in England or Ireland], or the Court of Session or Exchequer in Scotland, it shall appear to the court in which such action is pending, or, if such court is not sitting, to any judge of any of the said courts respectively, that it is proper to compel the personal attendance at any trial of any witness who may not be within the jurisdiction of the court in which such action is pending, it shall be lawful for such court or judge, if in his or their discretion it shall so seem fit, to order that a writ, called a writ of *subpœna ad testificandum*, or of *subpœna duces tecum*, or warrant of citation, shall issue in special form, commanding such witness to attend such trial wherever he shall be within the United Kingdom, and the service of any such writ or process in any part of the United Kingdom shall be as valid and effectual to all intents and purposes as if same had been served within the jurisdiction of the court from which it issues: (17 & 18 Vict. c. 34, s. 1.)

The application should be made on an affidavit showing that the attendance is reasonably necessary, and what the witness is required to prove: (*Allen v. Duke of Hamilton*, L. Rep. 2 C. P. 630.)

The order for the writ is absolute in the first instance: (*Harris v. Barker*, 25 L. J. 98, Q. B.; *Readman v. Broers*, 1 Jur. N. S. 1052, cited Day, 487.)

Every such writ shall have at foot thereof a statement or notice that the same is issued by the special order of the court or judge, as the case may be; and no such writ shall issue without such special order: (*Id.*, s. 2.)

In case any person so served shall not appear according to the exigency of such writ or process, it shall be lawful for the court out of which the same issued, upon proof made of the service thereof, and of such default, to the satisfaction of the said court, to transmit a certificate of such default under the seal of the same court, or under the hand of one of the judges or justices of the same, to any [Division of the High Court of Justice], in case such service was had in England, or in case such service was had in Scotland to the Court of Session or Exchequer at Edinburgh, or in case such service was had in Ireland to any [Division of the High Court of Justice there]; and the court to which such certificate is so sent shall and may thereupon proceed against and punish the person so having made default in like manner as they might have done if such person had neglected or refused to appear in obedience to a writ of *subpœna* or other process issued out of such last-mentioned court: (*Id.*, s. 2.)

A sufficient sum to defray expenses must be tendered on service: (*Id.*, s. 3.)

(3) Penalties for Disobeying.

A witness not attending after due service of a *subpœna* is liable to: (1) an action for a penalty (5 Eliz. c. 9, s. 12); (2) an action for damages (Powell, 554); (3) attachment for contempt of court: (*Id.*)

On a motion for attachment, service, payment or tender of expenses, and that everything reasonable to procure attendance has been done, must be proved: (*Id.*)

(f) Where Witness in Prison.

If a witness is in prison he may be brought up under a writ of *habeas corpus ad testificandum*: (Dan. 805.)

The order is obtained on motion or petition of course, supported by an affidavit of the facts: (*Id.*)

The order must be produced on getting the writ sealed: (*Id.*)

The form of *præcipe* is given in Schedule E. 15, to the Rules of April, 1880.

The form of writ is given in Schedule G. 12 to the same rules.

6. DEPOSITIONS.

(a) *Filing*. [See *sup.*, 2 (a); 2 (c); 2 (d) (7) and (9); 3 (g).]

(b) *Printing*.

Where any written deposition of a witness has been filed for use on a trial, such deposition shall be printed unless otherwise ordered: (Add. R. Aug., 1875, O. I.)

The Rules of Court as to printing depositions . . . to be used on a trial shall not apply to depositions . . . which have previously been used upon any proceeding without having been printed: (*Id.*, O. II.)

Where pursuant to Rules of Court, any . . . deposition . . . is to be printed, and where any printed or other office copy thereof is to be taken . . . the party on whose behalf the deposition is taken and filed is to print the same in the manner provided by Rule 2 of O. LVI. in the first schedule to the Supreme Court of Judicature Act, 1875: (*Id.*, O. V., r. 1; and see PRINTING.)

To enable the party printing to print any deposition, the officer with whom it is filed shall, on demand, deliver to such party a copy written on draft paper on one side only: (*Id.*, r. 2.)

(c) *Copies*.

The party by or on whose behalf any deposition . . . is filed, shall leave a copy with the officer with whom the same is filed, who shall examine it with the original and mark it as an office copy—such copy shall be a copy printed . . . where such deposition . . . is to be printed: (Add. R., Aug. 1875; O. V., r. 6.)

(d) *Production of Office Copies*.

The party or solicitor who has taken any printed or written office copy of any deposition . . . is to produce the same upon every proceeding to which the same relates: (Add. R., Aug. 1875; O. V., r. 8.)

(e) *Admissibility of Depositions*.

(1) When taken on Commission.

No examination or deposition, to be taken by virtue of the Act shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge, that the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial; in all or any of which cases the examinations and depositions certified under the hand of the commissioners, master, prothonotary, or other person taking the same, shall and may, without proof of the signature to such certificate be received and read in evidence saving all just exceptions: (1 & 2 Will. 4, c. 22, s. 10; and compare O. XXXVII., r. 4, and Taylor, 453, as to whether these conditions are now binding.)

[An examination taken under 13 Geo. 3, c. 63] being duly returned, shall be allowed and read, and shall be deemed good and competent evidence at any trial or hearing between the parties in such cause or action: (13 Geo. 3, c. 63, s. 44.)

It is the practice to require an affidavit by the solicitor or agent as to his belief of the continued absence or illness of the witness: (see form of long order, *sup.*, 2 (d) (7).)

If on the trial it appears either on the face of the deposition, or by extrinsic proof, that the commissioners have admitted illegal, or rejected

legal evidence, the judge, in the exercise of his discretion, may suppress the depositions either wholly or in part: (Taylor, 451.)

Where evidence has been taken before commissioners, without objection, by a party joining in the commission, it cannot be afterwards objected to: (*Robinson v. Davies*, L. Rep. 5 Q. B. Div. 26; 49 L. J. 218, Q. B.; 28 W. R. 255.)

(2.) Where taken before Examiner or other Officer.

[Where the deposition is taken by order, under O. XXXVII., r. 4, as to which see *sup.*, 2.]—the court or a judge . . . may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the court or a judge may direct.

Where the deposition is taken *de bene esse*, before an examiner, an order is necessary for leave to read it: (see *sup.*, 2 (b), (5).)

Where the deposition is taken before an examiner by consent, it is unnecessary to obtain an order to read the deposition: (see *sup.*, 3.)

[In cases of depositions taken before an examiner] under 15 & 16 Vict. c. 86], the court . . . always has a discretionary power of acting upon such evidence as may be before it at the time, and of making such interim orders, or otherwise, as may appear necessary to meet the justice of the case: (15 & 16 Vict. c. 86, s. 40.)

7. HOW WITNESSES ARE SWORN AND GIVE EVIDENCE.

(a) *Swearing and Affirming.*

Such infidels who believe a God, and that he will punish them if they swear falsely, may and ought to be admitted to be sworn as witnesses; but such infidels who do not believe a God, or, if they do, do not think that he will either reward or punish them in this world or the next, cannot be sworn as witnesses: (*Omichund v. Barker*, Willes, 538; 1 Sm. L. C., 7th edit. 455.)

As to the different ceremonies on administering an oath, see Taylor on Evidence.

If any person called as a witness, or required or desiring to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge, or other presiding officer, or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following: *videlicet*,

“I, A.B., do solemnly, sincerely and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely and truly affirm and declare, &c.” which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form: (C. L. P. A. 1854, s. 20.)

This statute does not affect the statutory exemptions of Quakers, Moravians, and Separatists—3 & 4 Will. 4, cc. 49 and 82; and 1 & 2 Vict. c. 77: (Powell, 33.)

If any person called to give evidence in any court of justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration: “I solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth”: (32 & 33 Vict. c. 68, s. 4.)

The words "court of justice," and the words "presiding judge" . . . include any person or persons having by law authority to administer an oath for the taking of evidence: (33 & 34 Vict. c. 49, s. 1.)

(b) *Examination in Chief.*

A witness after being sworn is first examined in chief by the party calling him, the principal rule being that the examining party must not ask the witness leading questions, that is, suggest answers to, or frame the question in such a way that the witness by answering merely "yes" or "no" shall give the reply desired: (Powell, 567.)

A witness in examination in chief must be asked only questions of fact relevant and pertinent to the issue, and cannot be asked questions as to his own inferences from, or personal opinions of, facts, unless he is a skilled or scientific witness: (*Id.*, 570-1.)

Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute: (C. L. P. A., 1854, s. 27.)

A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement: (C. L. P. A. 1854, s. 22.)

This section applies where evidence is taken before an examiner: (*Buckley v. Cooke*, 1 K. & J. 29.)

(c) *Cross-examination.*

When the examination in chief is concluded, the opposite party has a right to cross-examine the witness, and may ask him leading questions: (Powell, 572-3.)

But when the witness appears to be favourable to the cross-examiner, the latter will not be allowed to lead him: (*Id.*, 574.)

A rambling, prolix, or irrelevant cross-examination may be stopped: (*Id.*, 576.)

It is irrelevant when it tends neither to contradict nor to qualify the evidence in chief, nor to impeach the credit of the witness: (*Id.*)

A witness may be asked whether he has been guilty of any crime or other immoral conduct; but, generally, his answer in the negative cannot be contradicted unless it is material to the issue: (Powell, 577-8.)

A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanour, and, upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same: (C. L. P. A. 1854, s. 25.)

If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement: (*Id.*, s. 23.)

As to calling witnesses to contradict answers to questions tending to impeach the witness's general veracity, see Powell, 580.

A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit: (C. L. P. A. 1854, s. 24.)

(d) *Re-examination.*

After cross-examination, the party calling the witness may re-examine him on all matters arising out of the cross-examination, for the purpose of reconciling discrepancies, and removing or diminishing suspicions, but the re-examining counsel cannot ask the witness as to new matters: (Powell, 583.)

(e) *Recalling Witnesses.*

The judge has a discretionary power to recall a witness at any time for the purpose of putting a question to him: (Powell, 584.)

And where a party has omitted to put a question on examination in chief, a judge will usually put it if requested to do so: (*Id.*)

(f) *Rebutting Evidence.*

Where the plaintiff is taken by surprise by the defendant's evidence, the court may allow rebutting evidence to be given: (*Penn v. Jack*, L. Rep. 2 Eq. 314; 14 L. T. Rep. N. S. 495.)

Where the case to be proved by the defendant is fairly disclosed by the pleadings, leave will not be given: (*Vernon v. St. James's Vestry*, 42 L. T. Rep. N. S. 82.)

Where a defendant made a statement contrary to that of a witness for the plaintiff whom the defendant had not cross-examined on the point, leave was given: (*Rogers v. Manley*, W. N. 1880, p. 106; 42 L. T. Rep. N. S. 584.)

(g) *Examination in case of Counter-claim.*

Where the court ordered the claim and counter-claim to be tried separately on the ground that the questions raised were distinct, on the trial of the claim the defendant's counsel was made to confine his cross-examination of the plaintiff's witness to the questions raised by the claim, being allowed, on the trial of the counter-claim, to call the plaintiff's witness in chief, examining him only as his own witness: (*Re Woodfine*, 38 L. T. Rep. N. S. 753; 47 L. J. 832, Ch.; 26 W. R. 678.)

Where the issues of facts on the claim and counter-claim are identical the plaintiff cannot adduce fresh evidence in reply on the counter-claim: (*Green v. Sevin*, L. Rep. 13 Ch. Div. 589; 41 L. T. Rep. N. S. 724; 49 L. J. 166, Ch.)

II. AFFIDAVIT EVIDENCE.

1. AT THE TRIAL.

(a) *By Consent.*

In the absence of any agreement between the parties the witnesses at the trial of an action or at any assessment of damages [cannot give their evidence by affidavit]: (O. XXXVII., r. 1.)

When, at the trial, it was proposed to read an affidavit which had been used on an interlocutory application, it was held that the court had no power to order it to be read, if the opposite party *bonâ fide* wished to cross-examine the deponent: (*Blackburn Union v. Brooks*, L. Rep. 7 Ch. Div. 68; 37 L. T. Rep. N. S. 427; 47 L. J. 156, Ch.; 26 W. R. 57.)

The consent must be a formal written one, and not merely gathered from correspondence: (*New Westminster Brewery Company v. Hannah*, L. Rep. 1 Ch. Div. 278.)

A consent that evidence shall be taken by affidavit may be given, without leave of the court, by the *guardian ad litem* of a party under disability: (*Knatchbull v. Fowle*, L. Rep. 1 Ch. Div. 604; *Fryer v. Wiseman*, W. N. 1876, p. 3; 45 L. J. 199, L.J.).

When the parties have agreed to have the evidence taken by affidavit, the action cannot be tried before a jury, but must be before a judge alone: (*Brooke v. Wigg*, L. Rep. 8 Ch. Div. 510; 38 L. T. Rep. N. S. 732; 47 L. J. 749, Ch.; 26 W. R. 729.)

Where the agreement does not specify that the evidence shall be taken by affidavit "alone," it is competent to a witness who has made an affidavit to supplement his evidence by evidence given *vivâ voce*: (*Glossop v. Heston Local Board*, W. N. 1878, p. 72; 47 L. J. 536, Ch.; 26 W. R. 433.)

In the absence of agreement between the parties, affidavits used on a motion cannot be used at the hearing of the action: (*Perkins v. Slater*, 45 L. J. 224, Ch.)

But where the interlocutory motion had been ordered to stand over till the hearing, and the deponent had died in the meantime, the court allowed the affidavit to be read at a trial with evidence *vivâ voce*, although the deponent had not been cross-examined: (*Elias v. Griffith*, 46 L. J. 806, Ch.)

(b) *Without consent.*

Any party may at the trial of an action or issue, use in evidence any one or more of the answers of the opposite party to interrogatories without putting in the others: Provided always, that in such case the judge may look at the whole of the answers, and if he shall be of opinion that any other of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in: (O. XXXI., r. 23.)

(c) *By order.*

The court or a judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the court or judge may think reasonable . . . provided that where it appears to the court or judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit: (O. XXXVII., r. 1.)

The judge should in every case of fairly contested or disputed fact coming on to be tried, take the evidence orally, unless some good reason to the contrary is shown: (*Attorney-General v. Metropolitan District*

Railway Company, L. Rep. 5 Ex. Div. 218; 42 L. T. Rep. N. S. 342; 28 W. R. 376.)

See also *Blackburn Union v. Brooks*, cited *sup.* (a).

2. ON INTERLOCUTORY PROCEEDINGS.

Upon any motion, petition, or summons, the evidence may be given by affidavit; but the court may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit: (O. XXXVII., r. 2.)

As to the cross-examination, see *post*, 15 (g).

On appeal from a decision given on affidavit evidence the court may allow the deponent to supplement such evidence by *vivâ voce* evidence: (*Cusden v. Clapham*, W. N., 1877, p. 90.)

3. ON FURTHER CONSIDERATION.

The . . . court, at the hearing of any cause or of any further directions therein, [may] receive proof by affidavit of all proper parties being before the court, and of all such matters as are necessary to be proved for enabling the court to order payment of any moneys belonging to any married woman, and of all such other matters not directly in issue in the cause as in the opinion of the . . . court may safely and properly be so proved: (13 & 14 Vict. c. 35, s. 28; Dan. 816; Morg. & Chute, 119; and Comp. O. XXXVII., r. 1.)

Any matter required on further consideration as to costs, under Order XV., r. 1, may be proved by affidavit: (*Beaney v. Elliott*, W. N. 1880, p. 99.)

Affidavits referred to in the chief clerk's certificate cannot be used at the hearing on further consideration, unless notice of the intention to use them has been given: (*Re Chennell*, L. Rep. 8 Ch. Div. 492; 38 L. T. Rep. N. S. 494; 47 L. J. 583, Ch.; 26 W. R. 595.)

4. ON APPLICATION TO SIGN JUDGMENT ON SPECIALLY INDORSED WRIT.

[See O. XIV.; JUDGMENT; WRIT OF SUMMONS.]

5. PREPARATION OF AFFIDAVITS.

(a) *When Belief may be Stated.*

Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same: (O. XXXVII., r. 3.)

Evidence on information and "belief" is not admissible upon a motion which, although interlocutory in form, finally decides the rights of the parties; and the party against whom it is adduced is not bound to contradict it; but, if he deals with the evidence as admissible, and argues the case on the merits in the court below, he is precluded from objecting to such evidence on appeal: (*Gilbert v. Endean*, L. Rep. 9 Ch. Div. 259; 39 L. T. Rep. N. S. 404; 27 W. R. 252.)

(b) *To Show Means of Knowledge.*

Every statement in an affidavit which is to be used as evidence at the hearing of a cause or matter, or of a motion . . . or on any other proceeding before the court, or before the judge in chambers, shall show the means of knowledge of the person making such statement: (Ch. O., 5th Feb., 1861, r. 23.)

(c) *To be in First Person.*

Every affidavit shall be drawn up in the first person: (O. XXXVII., r. 3a, April, 1880.)

For consequences of neglect, see *post* (h).

(d) Deponent's Addition.

Every affidavit shall state the description and true place of abode of the deponent : (O. XXXVII., r. 3a, April, 1880.)

For consequences of neglect, see *post* (h).

(e) Paragraphs.

Every affidavit shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject : (O. XXXVII., r. 1.)

For consequences of neglect, see *post* (h).

(f) Dates.

Dates and sums may be written either in words or figures, except in affidavits for use in the Paymaster-General's office which must be in words : (Dan. 790.)

(g) Quotations.

Every quotation must be placed between inverted commas : (Dan. 790.)

(h) How Written or Printed.

Every affidavit shall be written or printed bookwise. No costs shall be allowed for any affidavit or part of an affidavit substantially departing from this rule : (O. XXXVII., r. 3a, April, 1880.)

(i) Interlineations and Erasures.

No affidavit having in the jurat or body thereof any interlineations, alteration, or erasure shall without leave of the court or a judge be read or made use of in any matter depending in court unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, or, if taken at the Central Office, either by his initials or by the stamp of that office, nor in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialled in the margin of the affidavit by the officer taking it : (Order XXXVII., r. 3e, April 1880.)

Every alteration in an account verified by affidavit to be left at chambers is to be marked with the initials of the commissioners or officers before whom the affidavit is sworn, and such alterations are not to be made by erasures with the knife or other instrument : (Ch. Reg., Aug. 1857, r. 10.)

(k) Jurat.

The jurat must be at the end of the affidavit. It may be at either corner, or in the margin, but must be on the same page as some part of the statement : (Dan. 792.)

It must state the time when, and the place where the affidavit is sworn, including the name of the city, borough, or county : (*Id.*)

In every affidavit made by two or more deponents the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents : (Order XXXVII., r. 3c, April 1880.)

The deponent must sign at the side of the jurat; the person taking the affidavit underneath the jurat : (*Id.*)

And see *sup.* (i).

(l) Schedules.

Schedules referred to in an affidavit as "hereunder written" should be placed after the jurat, and the officer before whom the affidavit is sworn must sign his name at the end of each schedule. If a schedule is placed before the jurat, it should be referred to as "the schedule (or, first, &c.,

schedule) set forth in this my affidavit." The schedules may also be embodied in the affidavit: (Dan. 791.)

(m) *Exhibits.*

A document may be referred to as an exhibit thus "produced and shown to me at the time of swearing this my affidavit and marked with the letter A." or as "hereunto annexed." In the former case the exhibit is not filed: (Dan. 791.)

Accounts, extracts from parish registers, particulars of creditors' debts, and other documents referred to by affidavit [to be used in chambers] are not to be annexed to the affidavit, or referred to in the affidavit as annexed, but are to be referred to as exhibits: (Ch. Reg., Aug. 1857, r. 11.)

Any document referred to must be distinguished by some mark placed upon it, and signed by the person before whom the affidavit is sworn: (Dan. 791.)

[According to usual practice in every case, and according to rule in the case of affidavits used in chambers] every certificate on an exhibit referred to in an affidavit signed by the commissioner or officer before whom the affidavit is sworn, must have the short title of the cause or matter: (Dan. 791; Ch. Reg. Aug. 1857, r. 12.)

6. SWEARING.

Any affidavit may be sworn to either in print or in manuscript, or partly in print and partly in manuscript: (O. LVI., r. 3.)

Every person who at the commencement of this Act shall be authorised to administer oaths in any of the courts whose jurisdiction is hereby transferred to the High Court of Justice shall be a commissioner to administer oaths in all causes and matters whatsoever which may from time to time be depending in the said High Court or in the Court of Appeal: (J. A. 1873, s. 82.)

Oath shall include solemn affirmation and statutory declaration: (J. A. 1873, s. 100.)

Affidavit must not be sworn before the solicitor in the cause, or his clerk or agent: (Morg. & Ch. 203.)

An affidavit sworn before a country solicitor, when the suit was carried on by the London agent, whose name alone was on the record, notwithstanding that the solicitor himself was not concerned in the suit, and all transactions were carried on by his partner, was held not to be admissible in evidence: (*Duke of Northumberland v. Todd*, L. Rep. 7 Ch. Div. 777; 38 L. T. Rep. N. S. 746; 47 L. J. 443, Ch.; 26 W. R. 350.)

Where a plaintiff was a solicitor, but not the solicitor in the cause, an affidavit sworn before his clerk was allowed to be put in: (*Foster v. Harvey*, 11 W. R. 899, cited Morg. & Ch. 203.)

The Lord Chancellor may appoint the warden, keeper, or other chief officer of every prison within the City of London, or the bills of mortality, and their deputies, to be commissioner for the purpose of taking such affidavits as any person or persons, within any such prison, shall be willing and desirous to make: (Dan. 647-8.)

Every master, and every first and second-rate clerk in the filing and record department [of the Central Office] shall, by virtue of his office, have authority to take oaths in the Supreme Court: (O. LXA., r. 4, Dec. 1879.)

All . . . district registrars . . . shall have power to administer oaths: (J. A. 1873, s. 62.)

Every chief clerk [has] for the purpose of any proceeding . . . before him full power to . . . take affidavits: (15 & 16 Vict. c. 80, s. 30.)

The taxing officers of the Supreme Court or of any division thereof,

shall, for the purpose of any proceeding before them, have power and authority to administer oaths: (Add. Rules, Aug. 1875, Sp. All. R. 23.)

All . . . affidavits, declarations, affirmations . . . may be taken or sworn, and taken in Scotland or Ireland, or the Channel Islands [the Isle of Man], or in any colony, island, plantation, or place under the dominion of Her Majesty in foreign parts, before any judge, court, notary public, or person lawfully authorised to administer oaths in such country [&c.] or before any of Her Majesty's consuls or vice-consuls in any foreign parts out of Her Majesty's dominions; and the judges and other officers of the Court shall take judicial notice of the seal or signature, as the case may be, of any such court [&c.]: (15 & 16 Vict. c. 86, s. 22; 16 & 17 Vict. c. 78, s. 6.)

An affidavit may also be taken in the Channel Islands, the Isle of Man, Scotland, or Ireland, by commissioners appointed by the Lord Chancellor to act thus: (See Dan. 647.)

The Probate Division declined to receive an affirmation, which did not allege a conscientious scruple, in lieu of an affidavit from a natural-born subject of the Emperor of Germany, although by the laws of Germany voluntary oaths are forbidden, and he was domiciled in Germany and was actually residing there at the time he was required to make such affidavit: (In *b. Prince Henry the 69th of Reuss-Kostritz*, 41 L. T. Rep. N. S. 803.)

British Ambassadors and other diplomatic and consular agents abroad may administer oaths. The documents are evidence without proof of seal or signature of the ambassador or other official person: (6 Geo. 4, c. 87, s. 20; 18 & 19 Vict. c. 42.)

Affidavits may also be sworn before persons abroad authorised by the law of the country to administer oaths; but the power of such person to administer must be proved: (See Dan. 787.)

Oaths shall be administered in a reverent manner: (C. O. 19, r. 14.)

Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his or her signature in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the court or a judge is otherwise satisfied that the affidavit was read over to and, apparently perfectly understood by the deponent: (O. XXXVII., r. 3f., April 1880.)

If the deponent is blind, the affidavit must be read over to him by some other person, who must attest the mark or signature, and must be first sworn that he has so read over the affidavit, and that the mark or signature was made in his presence, and this must be expressed in the jurat: (Dan. 792.)

If the deponent be a foreigner, the contents of the affidavit must be interpreted to him; and the interpreter must be sworn that he has truly, distinctly, and audibly done so, and that he will truly interpret the oath about to be administered, and then the deponent may be sworn, and that these formalities have been complied with must be stated in the jurat: (Dan. 792-3.)

For form, see Dan. Forms, 3rd edit. 395.

For forms in case of deaf and dumb person, see Dan. Forms, 3rd edit. 394-5.

7. FILING.

Every affidavit shall be filed in the central office. There shall be appended to every affidavit a note showing on whose behalf it is filed: (O. XXXVII., r. 3d, April, 1880.)

As to the time for filing where whole evidence by affidavit, see *post*, 11.

8. NOTICE OF FILING.

It is the usual practice to give notice of filing to the adverse party in all cases, but is not always necessary : (see Dan. 795 ; CHAMBERS.)

9. USING ORIGINAL AFFIDAVITS.

In cases in which by the present practice an original affidavit is allowed to be used, it shall, before it is used, be stamped with a proper filing stamp, and shall, at the time when it is used, be delivered to and left with the proper officer in court or in chambers, who shall send it to the central office. An office copy of an affidavit may in all cases be used, the original affidavit having been previously filed in the central office, and the copy duly authenticated with the seal of that office : (O. XXXVII., r. 3g, April, 1880.)

10. TAKING OFF FILE AND EXPUNGING.

A lengthy irrelevant affidavit may, if the judge thinks fit, be ordered to be taken off the file : (*Taylor v. Keily*, W. N. 1876, p. 139.)

The Court of Appeal will not interfere with the judge's discretion : (*Owens v. Emmens*, W. N. 1875, pp. 210, 234.)

In one case Malins, V.C. refused to make the order on motion before the hearing, directing that attention should then be called to the matter, when a direction might be given to the chief clerk to mark the too lengthy portion for the guidance of the taxing master : (*Id.*)

The court may, on its own motion, or the motion of the party aggrieved, order a scandalous affidavit to be taken off the file (Dan. 789); or the scandalous matter to be expunged : (Dan. 789, 290 ; *Cracknall v. Janson*, 39 L. T. Rep. N. S. 31 ; 48 L. J. 168, Ch.)

If any party wishes to complain of any matter introduced into any affidavit . . . before the judge in chambers, on the ground that it is scandalous, he shall be at liberty to take out a summons for the judge to examine such matter, and the judge may cause any such matter which he shall deem to be scandalous to be expunged : (C. O. 35, r. 60.)

As to how the officer expunges the matter, and how necessary alterations are made in office copies, see Dan. 296.

11. DELIVERING LISTS.

(a) *Plaintiff's Affidavits in Chief.*

Within fourteen days after a consent for taking evidence by affidavit as between the plaintiff and the defendant has been given, or within such time as the parties may agree upon, or a judge in chambers may allow, the plaintiff shall file his affidavits and deliver to the defendant or his solicitor a list thereof : (O. XXXVIII., r. 1.)

(b) *Defendant's Affidavits.*

The defendant within fourteen days after delivery of such list, or within such time as the parties may agree upon, or a judge in chambers may allow, shall file his affidavits and deliver to the plaintiff or his solicitor a list thereof : (O. XXXVIII., r. 2.)

(c) *Plaintiff's Affidavits in Reply.*

Within seven days after the expiration of the said fourteen days, or such other time as aforesaid, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the defendant or his solicitor a list thereof : (O. XXXVIII., r. 3.)

Affidavits may be filed in reply which are entirely in confirmation of the plaintiff's evidence in chief, and do not tend to the cutting down of the defendant's evidence : (*Peacock v. Harper*, L. Rep. 7 Ch. Div. 648 ; 38 L. T. Rep. N. S. 143 ; 47 L. J. 238, Ch. ; 26 W. R. 109.)

12. PRINTING.

When the evidence in any action is under this order taken by affidavit, such evidence shall be printed: (O. XXXVIII., r. 6.)

The rules of court as to printing . . . affidavits to be used on a trial shall not apply to . . . affidavits which have been previously used upon any proceeding without having been printed: (Add. R. Aug. 1875, O. II.)

Other affidavits than those required to be printed by O. XXXVIII., r. 6 . . . may be printed if all the parties interested consent thereto, or the court or judge so order: (*Id.* O. III.)

As to what affidavits answering interrogatories require printing, see DISCOVERY, II., 2, (b.)

As to printing evidence for the Court of Appeal, see APPEAL, VI., 10, (b.)

When, pursuant to Rules of Court, any . . . affidavit is to be printed . . . the party on whose behalf the . . . affidavit is taken and filed is to print the same in the manner provided by rule 2 of O. LVI.: (Add. R. Aug. 1875, O. V., r. 1. See PRINTING.)

13. OFFICE COPIES.

The party by or on whose behalf any . . . affidavit . . . is filed shall leave a copy with the officer with whom the same is filed, who shall examine it with the original and mark it as an office copy: (Add. R. Aug. 1875, O. V., r. 6.)

Such copy shall be a copy printed . . . where such affidavit is to be printed: (*Id.*)

[Where copies of affidavits are brought in with the originals and left to be examined as office copies] (1) After the original affidavit has been marked at the divisional seat, the copy and original must be taken to the stationer by the solicitor. (2) Copies left on a day preceding a motion day, and required for use on the hearing of a motion, and other copies required for immediate use, are to be marked with a special mark at the divisional seat. (3) The stationer is to number the copies in each class (those specially marked and those not so marked) in the order in which the copies in that class are left with him, and at once hand them to the examiners, who will examine them in order, according to their class and number. Copies specially marked will be examined in priority to all copies not specially marked, left the same day. (4) All copies should be left before two p.m. of the day preceding that on which they are required to be delivered out. If left after two p.m., it may be found impossible to examine them before six p.m., the hour at which (according to the office regulations) the examiners and writers leave; and consequently the clerks of records and writs cannot undertake that such copies shall be ready for delivery at the opening of the office next day. (5) No person shall be entitled to have a copy belonging to either class examined out of its turn: (Masters' Regulations, April, 1879.)

The party or solicitor who has taken any printed or written office copy of any . . . affidavit must produce the same upon every proceeding to which the same relates: (Add. R., Aug. 1875, O. V., r. 7.)

14. FURNISHING COPIES.

[See COPIES.]

15. CROSS-EXAMINATION ON AFFIDAVIT.

(a) *On Notice at Trial.*

When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, may serve upon the party by whom such affidavit has been

filed, a notice in writing, requiring the production of the deponent for cross-examination before the court at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the court or a judge may specially appoint: (O. XXXVIII., r. 4.)

The form of notice is given in Schedule B. 21, to the Rules of April, 1880.

The party to whom such notice as is mentioned in the last preceding rule is given shall be entitled to compel the attendance of the deponent for cross-examination in the same way as he might compel the attendance of a witness to be examined: (O. XXXVIII., r. 5.)

Unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the court: (O. XXXVIII., r. 4; and see *Phosphate Sewage Company v. Hartmont*, W. N. 1875, p. 235.)

The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production: (*Id.*)

If the deponent is not produced, an order will not be made to take his affidavit off the file, and a motion therefor is irregular: (*Meyrick v. James*, W. N. 1877, p. 120; 46 L. J. 579, Ch.)

(b) *By Order.*

[Where] upon any motion, petition, or summons, evidence [is] given by affidavit . . . the court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit: (O. XXXVII., r. 2.)

The rule applies to an ordinary witness only, not to a party: (*Storer v. Simmons*, W. N. 1876, p. 40.)

The court or a judge may direct that . . . the cross-examination of any person who has . . . made an affidavit, shall be taken before an examiner of the court or a special examiner in the manner prescribed by the statute 15 & 16 Vict. c. 86, . . . in case it shall appear to the judge that owing to the age, infirmity, or absence out of the jurisdiction of such witness or person, or for any other cause which to the judge shall appear sufficient, it is expedient that such directions should be given: (Ch. O., 5th Feb. 1861, r. 11.)

Such direction may be obtained on application to the court or the judge in chambers on notice: (*Id.*)

As to the expenses of the examiner, see *sup.* II., 2 (a)

(c) *By Consent before Examiner.*

[See *sup.* II., 3 (a).]

III. DOCUMENTARY EVIDENCE.

1. ADMITTING DOCUMENTS.

(See ADMISSIONS, II.)

The notice to admit must be given a reasonable time before trial: (*Tynn v. Billingsley*, 3 Dowl. 310.)

A notice to admit holds good upon a subsequent trial: (Day, 3rd edit. 103.)

2. PROBATE OF WILL.

In any action . . . where . . . it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition to give to the opposite party, ten days at least before the trial or

proceeding in which the said proof shall be intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence as proof of the devise or other testamentary disposition the probate of the said will or the letters of administration with the will annexed, or a copy thereof, stamped with any seal of the Court of Probate; and in every such case such probate or letters of administration, or copy thereof respectively, stamped as aforesaid, shall be sufficient evidence of such will and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition: (20 & 21 Vict. c. 77, s. 64.)

As to whether service should be on the solicitor or the party, see *Barracrough v. Greenough* (L. Rep. 2 Q. B. 612).

Although the opposite party has not given a counter notice within four days, he may contest the validity of the will at the trial: (*Id.*)

3. PUBLIC DOCUMENTS.

Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents proveable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words: (14 & 15 Vict. c. 99, s. 14.)

4. ACTS OF PARLIAMENT.

All copies of private and local and personal Acts of Parliament not public Acts, if purporting to be printed by the Queen's printers, and all copies of the journals of either House of Parliament, and of Royal proclamations, purporting to be printed by the printers to the Crown or by the printers to either House of Parliament, or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others without any proof being given that such copies were so printed: (8 & 9 Vict. c. 113, s. 3.)

5. DECREES AND ORDERS.

Office copies of decrees and orders from the registrar's books are to be certified by the masters: (18 & 19 Vict. c. 134, s. 6.)

6. PROCEEDINGS IN OTHER CAUSES.

To read depositions or proceedings in another cause, an order must be obtained on motion or petition of course: (*Dan.* 767.)

It is made "saving all just exceptions," and must be served on the opposite party, who may use the same, unless prohibited for some reason from doing so: (*Id.* 767-8; C. O. 19, r. 5.)

7. DOCUMENTS DEPOSITED IN COURT.

As to producing documents deposited in court, see DISCOVERY, V. 3 (a).

8. RECORDS IN CENTRAL OFFICE.

When a record in the Central Office is required, an order of the

court must be obtained on motion or petition of course, supported by an affidavit that the evidence is necessary : (Dan. 768.)

No such order is made when a copy will suffice : (*Id.*)

The attendance of the officer is produced by service of the order and a memorandum bespeaking attendance : (Dan. 769.)

9. EXHIBITS AT THE HEARING.

Where written documents which require only evidence of signature, and do not admit of cross-examination, have been neglected to be proved before the closing of the evidence, they may be proved by *vivâ voce* evidence or affidavit at the hearing : (Ayck. 161.)

An order is necessary, which may be obtained on motion or petition of course : (*Id.* 163 ; Dan. 779.)

The order most minutely describes the exhibits : (*Id.*)

A copy of the order must be served on the opposite party two clear days before the hearing : (Ayck. 163.)

10. NOTICE TO PRODUCE.

In order to entitle a party to give secondary evidence of the contents of a written document, on the ground of its being in possession of his adversary, notice must be given to him to produce it : (Dan. 774.)

But when, from the nature of the proceeding, the party must know that the contents of a written document in his possession will come into question, although no notice to produce has been given, it is not necessary to give any notice for its production : (*Id.*)

When, either from the pleadings or depositions, a party is apprised that it is the intention of the opposite party to make use of secondary evidence of the contents of a document in his possession, such secondary evidence may be used at the hearing, without serving the party in whose possession it is with notice to produce the document : (*Id.*)

To render a notice to produce available, it must be proved that the original instrument is in the hands of the opposite party, or of some person in privity with him : (Rosc. N. P. 13th edit., 10.)

The form of notice generally is given in Schedule B. 10a. to the Rules of April, 1880.

The notice must not be too general : (Rosc. N. P. 10 ; *Conybeare v. Farrier*, L. Rep. 5 Ex. 16 ; *Gardner v. Wright*, 15 L. T. Rep. N. S. 325.)

It may generally be served either on a party or his solicitor : (Rosc. N. P. 12.)

The notice must be given in such time as to satisfy the judge that the party called upon to produce the document might, by using reasonable diligence, have done so : (Rosc. N. P. 13.)

11. DISPENSING WITH ATTESTING WITNESS.

It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite ; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto : (C. L. P. A. 1854, s. 26.)

V. IN HOUSE OF LORDS.

[See APPEAL.]

VI. IN THE COURT OF APPEAL.

[See APPEAL.]

VII. IN CHAMBERS.

[See CHAMBERS.]

VIII. ON TAXATION.

The taxing officers of the Supreme Court, or of any division thereof, shall, for the purpose of any proceeding before them, have power and authority to administer oaths, and shall in respect [of their duties have certain powers] including examining witnesses . . . (Add. Rules, Aug. 1875, Sp. All. r. 23.)

IX. ON REVIEWING TAXATION.

An application [to review a taxation] shall be heard and determined by the judge upon the evidences which shall have been brought in before the taxing officer, and no further evidence shall be received upon the hearing thereof, unless the judge shall otherwise direct: (Add. R., Aug. 1875, Sp. All. r. 33.)

X. BEFORE REFEREE.

Subject to any order to be made by the court or judge ordering the same, evidence shall be taken at any trial before a referee, and the attendance of witnesses may be enforced by *subpcena*, and every such trial shall be conducted in the same manner, as nearly as circumstances will admit, as trials before a judge of the High Court, but not so as to make the tribunal of the referee a public court of justice: (O. XXXVI., r. 31.)

XI. BEFORE ARBITRATOR.

[See ARBITRATION, VIII., IX.]

A form of order for examination of witnesses and production of documents is given in Schedule H. 24 to the Rules of April, 1880.

XII. ACTION TO PERPETUATE TESTIMONY.

1. WHERE IT LIES.

The action lies where there is danger of the testimony of any witness being lost, by death or otherwise, before the time arrives for the matter to which it relates to be judicially investigated.

Any person who would, under the circumstances alleged by him to exist, become entitled upon the happening of any future event, to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, shall be entitled, from and after the passing of [the] Act, to [commence an action in the Chancery Division] to perpetuate any testimony which may be material for establishing such claim or right; and all laws, rules and regulations not contrary to the provisions of [the] Act . . . in force or in use in suits to perpetuate testimony, or respecting depositions taken in such suits, or the punishment of perjury committed in making such depositions, shall be in force and used and applied in all suits to be instituted under the authority of [the] Act, and in respect to depositions taken in such suits: (5 & 6 Vict. c. 69, s. 1.)

In all suits which may be so instituted under the authority of [the] Act, touching any honour, title, dignity, or office, or any other matter or thing in which Her Majesty, her heirs or successors, may have any estate or interest, it shall be lawful to make the Attorney-General for the time being a party defendant thereto; and in all proceedings in which the depositions taken in any such suit in which the Attorney-General for the time being was so made a defendant may be offered in evidence, such depositions may be admissible, notwithstanding any objection to such depositions upon the ground that Her Majesty, her heirs or successors, were not parties to the suit in which such depositions were taken: (*Id.*, s. 2.)

Proceedings under the statute must be jealously watched. The statute does not give a party seeking to perpetuate testimony stronger rights than

those which would belong to him in an actual and present litigation : (*Campbell v. Earl of Dalhousie*, L. Rep. 1 Sc. App. 462 ; 22 L. T. Rep. N. S. 879.)

2. AFFIDAVIT ON SEALING WRIT.

An affidavit of the circumstances by which the evidence intended to be perpetuated is in danger of being lost, must be filed when the writ is sealed, to which the writ must be made an exhibit : (Dan. 1420 ; Dan. Forms, 3rd edit. 123.)

3. HOW ACTION PROCEEDS.

The action proceeds in the usual way, except that it cannot be set down for hearing : (Dan. 1420.)

The statement of claim must show that the facts to which the testimony of the witnesses proposed to be examined is conceived to relate, cannot be immediately investigated in any court, or that, before the facts can be adjudicated upon, the evidence of a material witness is likely to be lost by his death or departure from the realm ; and it is demurrable unless it alleges :

That the plaintiff has an interest which is not capable of being barred by the defendant ;

That the matter cannot be made the subject of present judicial investigation ;

That the defendant has or claims to have an interest to contest the title of the plaintiff in the subject of the proposed testimony : (Dan. 1419-20.)

If the defendant neglects to take any step which ought to be taken by him, within the proper time, the court will order the examination of the witnesses to proceed : (Dan. 1420.)

In Chancery, where a plaintiff neglected to proceed with the suit, the defendant could not move to dismiss for want of prosecution, but only for an order on the plaintiff to proceed within a limited time, or in default to pay defendant the costs of the suit : (*Id.*)

4. EXAMINATION OF WITNESSES.

Both parties are entitled to examine witnesses under the order : (Dan. 1421.)

In suits to perpetuate testimony, evidence is taken before an examiner of the court or special examiner, or wholly or partially by affidavit, the deponents being liable to cross-examination : (*Id.*)

If the witness is resident out of the jurisdiction, the provisions of 22 Viet. c. 20 may be used : (*Id.* ; *Campbell v. Attorney-General*, L. Rep. 2 Ch. App. 571 ; see *post*, XIII.)

5. WHEN ACTION ENDS.

When the witnesses have been examined the cause is at an end : (Dan. 1421.)

If the defendant had not examined any witnesses in chief, he was entitled to an order for his costs on motion or petition of course : (*Id.*)

6. FILING EVIDENCE.

The evidence must be filed in the Central Office : (Dan. 1421.)

7. ORDER TO READ EVIDENCE.

The order to publish and use the depositions, when they are required, is obtained by motion on notice, supported by evidence that they are necessary, and showing that the witnesses cannot be procured for examination, either from death, infirmity, or otherwise : (Dan. 1421 ; *Vane v. Vane*, W. N. 1876, pp. 109, 132.)

XIII. EXAMINING WITNESSES IN AID OF TRIBUNALS ABROAD.

1. FOREIGN COURTS.

When upon an application for this purpose, it is made to appear to [any division of the High Court of Justice or any judge thereof] that any court or tribunal of competent jurisdiction in a foreign country, before which any civil or commercial matter is pending, is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction of [the High Court of Justice, such court or a judge thereof may] order the examination upon oath upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly; and [may] by the same . . . or . . . any subsequent order . . . command the attendance of any person to be named in such order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and . . . give all such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just; and any such order may be enforced in like manner as an order . . . in a cause depending in [the High Court of Justice]: (19 & 20 Vict. c. 113, s. 1.)

A certificate under the hand of the ambassador, minister, or other diplomatic agent of any foreign power, received as such by Her Majesty, or in case there be no such diplomatic agent, then of the consul-general or consul of any such foreign power at London, received and admitted as such by Her Majesty, that any matter in relation to which an application is made . . . is a civil or commercial matter pending before a court or tribunal in the country of which he is the diplomatic agent or consul having jurisdiction in the matter so pending, and that such court or tribunal is desirous of obtaining the testimony . . . [is] evidence of the matter so certified; but where no such certificate is produced other evidence to that effect [is admissible]: (*Id.*, s. 2.)

Every person authorised to take the examination . . . [may take it] upon oath . . . or affirmation . . . where affirmation is allowed by law instead of oath: (*Id.*, s. 3.)

Courts in other parts of the United Kingdom and in the colonies have the same powers: (*Id.*, s. 6.)

2. COURTS IN QUEEN'S DOMINIONS.

When upon an application for this purpose it is made to appear to any [division or judge of the High Court of Justice] that any court or tribunal of competent jurisdiction in Her Majesty's dominions has duly authorised by commission, order, or other process, the obtaining the testimony, in or in relation to any action, suit, or proceeding pending in or before such court or tribunal, of any witness or witnesses out of the jurisdiction of such court or tribunal, and within the jurisdiction of [the High Court of Justice, such court or a judge thereof may] order the examination, before the person or persons appointed, and in manner and form directed by such commission, order, or other process as aforesaid, of such witness or witnesses accordingly, and . . . by the same . . . or . . . any subsequent order . . . command the attendance of any person to be named in such order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and . . . give all such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just; and any such order may be enforced and any disobedience

thereof punished in like manner as in case of an order . . . in a cause [depending in the High Court]: (22 Vict. c. 20, s. 1.)

The superior courts in Scotland and Ireland, and certain courts in the colonies have the same powers: (*Id.*, s. 5.)

It is for the court compelling the attendance to determine what witnessess are to be summoned and what documents produced, and to decide questions of privilege: (*Campbell v. Attorney-General*, L. Rep. 2 Ch. App. 571.)

EXECUTION.

- I. MEANING OF "WRIT OF EXECUTION" AND "ISSUING EXECUTION."
- II. SAVING OF EXISTING RIGHTS OF ENFORCING JUDGMENTS AND ORDERS.
- III. WHAT MAY BE ENFORCED BY EXECUTION.
- IV. EXECUTION ON JUDGMENT SUBJECT TO CONDITION OR CONTINGENCY.
- V. EXECUTION IN CONSOLIDATED ACTIONS.
- VI. EXECUTION AGAINST PARTNERSHIP FIRM.
- VII. EXECUTION AGAINST COMPANIES.
 1. RAILWAY AND SIMILAR COMPANIES.
 2. BANKING COMPANIES UNDER 7 GEO. 4, c. 46.
 3. COMPANIES UNDER 7 WILL. 4 & 1 VICT. c. 73.
- VIII. EXECUTION BY OR AGAINST THIRD PERSONS NOT PARTIES.
- IX. EXECUTION ON JUDGMENT FOR DEFAULT OF APPEARANCE TO SPECIALLY INDORSED WRIT BY ONE OF SEVERAL DEFENDANTS.
- X. EXECUTION ON JUDGMENT FOR COSTS IN INTERPLEADER.
- XI. GENERAL RULES AS TO ISSUING EXECUTION.
 1. ORDER IN WHICH WRITS ARE ISSUED.
 2. WHERE ISSUED.
 3. WHEN ISSUED.
 4. HOW ISSUED.
 - (a) *Production of Judgment or Order.*
 - (b) *Præcipe.*
 5. DATE AND FORM.
 6. INDORSEMENT.
 7. RENEWAL.
 8. EXPEDITING AND STAYING EXECUTION.
 9. POUNDAGE, FEES, AND EXPENSES.
 10. SETTING ASIDE FOR IRREGULARITY.
- XII. HOW DIFFERENT JUDGMENTS ARE ENFORCED.
 1. FOR RECOVERY OR PAYMENT OF MONEY OR COSTS.
 - (a) *General Rules.*
 - (b) *Fieri Facias and Elegit.*
 - (c) *Venditioni Exponas and other Writs in Aid of Fieri Facias and Elegit.*
 - (d) *Receiver or Equitable Execution.*
 - (e) *Sequestration.*
 - (f) *Attachment of Debts.*
 - (g) *Charging Order on Stock or Shares.*
 - (h) *Solicitor's Charging Order for Costs.*
 - (i) *Arrest and Imprisonment.*

2. FOR PAYMENT OF MONEY INTO COURT.
3. FOR RECOVERY OR DELIVERY OF POSSESSION OF LAND.
4. FOR RECOVERY OF PROPERTY OTHER THAN MONEY OR LAND.
5. REQUIRING PERSON TO DO ACT OTHER THAN PAYMENT OF MONEY.

(a) *Sequestration.*

(b) *Attachment or Committal.*

XIII. WRIT OF FIERI FACIAS.

1. IN WHAT CASES ISSUED.
2. WHEN ISSUED.
3. WHERE ISSUED.
4. HOW ISSUED.
 - (a) *Production of Judgment or Order* [see *sup.*, X. 4 (a)]
 - (b) *Præcipe.*
5. DATE AND FORM.
6. INDORSEMENTS.
7. DELIVERY TO SHERIFF.
8. EXECUTION OF WRIT.
9. POUNDAGE, FEES, AND EXPENSES.
10. RETURN.
11. FILING.
12. EFFECT.

XIV. WRIT OF ELEGIT.

1. IN WHAT CASES ISSUED.
2. WHEN ISSUED.
3. WHERE ISSUED.
4. HOW ISSUED.
 - (a) *Production of Judgment or Order* [see *sup.*, X. 4 (a), (2)].
 - (b) *Præcipe.*
5. DATE AND FORM.
6. INDORSEMENTS (see *sup.* XI., 6.)
7. DELIVERY TO SHERIFF (like XIII., 7).
8. EXECUTION OF WRIT.
9. POUNDAGE, FEES, AND EXPENSES.
10. RETURN.
11. FILING (like XIII., 11).
12. EFFECT.
13. REGISTRATION.
14. SALE.

XV. PROCESS IN AID OF FIERI FACIAS OR ELEGIT.

1. VENDITIONI EXPOSAS.
2. DISTINGAS NUPER VICE COMITEM.
3. FIERI FACIAS DE BONIS ECCLESIASTICIS, AND SEQUESTRARI FACIAS DE BONIS ECCLESIASTICIS.

XVI. EQUITABLE EXECUTION.

XVII. WRIT OF SEQUESTRATION.

1. IN WHAT CASES ISSUED.
2. WHERE ISSUED (see *sup.*, XI. 2.)
3. WHEN ISSUED.
4. HOW ISSUED.
5. DATE AND FORM.
6. INDORSEMENTS (see *sup.*, XI. 6.)
7. EXECUTION AND EFFECT.
8. RETURN.
9. DISCHARGING.

XVIII. ATTACHMENT OF DEBTS.

1. ORDER FOR EXAMINATION OF JUDGMENT DEBTOR.
2. ORDER FOR ATTACHMENT OF DEBTS AND TO SHOW CAUSE.

3. DEBTS WHICH MAY BE ATTACHED.
4. DEBTS WHICH MAY NOT BE ATTACHED.
5. SERVICE OF GARNISHEE ORDER.
6. ORDER FOR PAYMENT AND EXECUTION.
7. ORDERING TRIAL OF ISSUE OR QUESTION.
8. ORDER AS TO THIRD PARTIES.
9. EFFECT OF PAYMENT BY OR EXECUTION ON GARNISHEE.
10. DEBT ATTACHMENT BOOK.

XIX. CHARGING ORDER.

1. IN WHAT CASES MADE.
2. APPLICATION FOR ORDER NISI.
3. EFFECT OF ORDER NISI.
4. MAKING ORDER ABSOLUTE.
5. EFFECT OF ORDER ABSOLUTE.

XX. WRIT OF ATTACHMENT.

1. IN WHAT CASES ISSUED.
2. MATTERS PRELIMINARY TO APPLICATION.
3. APPLICATION AND ORDER.
4. HOW ISSUED.
 - (a) *Production of Order* [see *sup.*, XI. 4, (a)]
 - (b) *Præcipe*.
5. DATE AND FORM.
6. INDORSEMENT.
7. DELIVERY, EXECUTION AND EFFECT.
8. ARREST.
9. BAIL.
10. RETURN OF WRIT.
11. PROCEDURE ON RETURN THAT BAIL HAS BEEN TAKEN.
12. PROCEDURE ON RETURN THAT DEFENDANT IS IN PRISON.
13. PROCEDURE ON RETURN OF NON EST INVENTUS (SERJEANT-AT-ARMS).
14. STAYING PROCESS.
15. DISCHARGE FROM CUSTODY.
 - (a) *General rules*.
 - (b) *On Compliance with Order*.
 - (c) *For Irregularity of Process*.

XXI. COMMITTAL.

1. IN WHAT CASES ORDERED.
2. ORDER FOR PAYMENT OF DEBT BY INSTALMENTS.
3. REQUISITES OF JUDGMENT OR ORDER.
 - (a) *Judgment or Order to Limit Time for Payment or Performance*.
 - (b) *Indorsement*.
4. SERVICE OF JUDGMENT OR ORDER DIRECTING PAYMENT.
5. NOTICE OF MOTION.
6. SERVICE OF NOTICE OF MOTION.
7. MOTION FOR ORDER OF COMMITTAL.
8. EVIDENCE.
9. EXAMINATION OF DEBTOR TOUCHING MEANS.
10. DISCRETION AS TO GRANTING ORDER.
11. ADJOURNMENT, REQUIRING FURTHER EVIDENCE, AND DIRECTING INQUIRIES.
12. WHAT ORDER MADE.
13. FORM OF ORDER.
14. ISSUING ORDER.
15. INDORSEMENT ON COPY FOR SHERIFF, &c.
16. DELIVERY TO SHERIFF, &c.
17. CONCURRENT DELIVERY OF COPIES TO SHERIFF, &c.
18. STAYING OPERATION OF ORDER.

19. EXECUTION OF ORDER.
20. INDORSEMENT AND RETURN BY SHERIFF, &c.
21. DISCHARGE FROM ARREST.
22. COMMITTAL TO PRISON.
23. FEES TO SHERIFF, &c.
24. EFFECT OF PROCEEDINGS.
25. DISCHARGE FROM IMPRISONMENT.
 - (a) Upon Payment.
 - (b) By Order.
26. DEFAULT IN PAYMENT OF SUBSEQUENT INSTALMENTS.
27. COSTS AND FEES OF COURT.

XXII. WRIT OF POSSESSION.

1. IN WHAT CASES ISSUED.
2. HOW ISSUED.
 - (a) Recovery of Possession under Judgment therefor.
 - (b) Delivery of Possession where Directed.
3. PRÆCIPE.
4. FORM OF WRIT.

XXIII. WRIT OF ASSISTANCE.

XXIV. WRIT OF DELIVERY.

1. IN WHAT CASES ISSUED.
2. HOW ISSUED.
3. PRÆCIPE.
4. FORM OF WRIT.
5. HOW ENFORCED.

I. MEANING OF "WRIT OF EXECUTION," AND "ISSUING EXECUTION."

The term "writ of execution" shall include writs of *feri facias, capias, elegit*, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto. And the term "issuing execution against any party" shall mean the issuing of any such process against his person or property as under the rules of this Order shall be applicable to the case: (Order XLII., r. 6.)

This title is not confined to the kinds of process mentioned in the rule.

II. SAVING OF EXISTING RIGHTS OF ENFORCING JUDGMENTS AND ORDERS.

Nothing in any of the rules of this order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever: (O. XLII., r. 23.)

(See *post*, XVI., XXI., XXIII.)

III. WHAT MAY BE ENFORCED BY EXECUTION.

A judgment is enforced by execution.

Every order of the court or a judge, whether in an action, cause, or matter, may be enforced in the same manner as a judgment to the same effect: (O. XLII., r. 20.)

An interlocutory order to pay the amount claimed into court in an action on a contract, whereby a *prima facie* case of liability is made out, can be enforced by attachment: (*Hutchinson v. Hartmont*, W. N. 1877, p. 29.)

On a motion to commit for contempt, an attachment may be issued: (*Piper v. Piper*, W. N. 1876, p. 202.)

IV. EXECUTION ON JUDGMENT SUBJECT TO CONDITION OR CONTINGENCY.

Where the judgment is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the court or a judge for leave to issue execution against such party. And the court or judge may, if satisfied that the right to relief has arisen according to the terms of the judgment, order that execution issue accordingly, or may direct that any issue or question necessary for the determination of the rights of the parties be tried in any of the ways in which questions arising in an action may be tried : (O. XLII., r. 7.)

Judgment entered to be dealt with as the court shall direct, will not be enforced without the direction of the court : (*Hedges v. Fincham*, L. Rep. 1 Ch. Div. 9.)

V. EXECUTION IN CONSOLIDATED ACTIONS.

Where the actions are against several defendants, execution may issue only against the defendants who are included in the consolidation order, by leave of the court : (Ch. Arch. 12th edit. 590.)

VI. EXECUTION AGAINST PARTNERSHIP FIRM.

Where a judgment is against partners in the name of the firm, execution may issue in manner following :

- (a.) Against any property of the partners as such ;
- (b.) Against any person who has admitted on the pleadings that he is, or has been adjudged to be, a partner ;
- (c.) Against any person who has been served, as a partner, with the writ of summons, and has failed to appear.

If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the court or a judge for leave so to do ; and the court or judge may give such leave if the liability be not disputed, or if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined : (O. XLII., r. 8.)

VII. EXECUTION AGAINST COMPANIES.

[See *post*, XVII.]

1. RAILWAY AND SIMILAR COMPANIES.

If any execution has been issued against the property or effects of the company, and sufficient cannot be found whereon to levy, execution may be issued against any of the shareholders to the extent of their shares in the capital of the company not then paid up : (8 & 9 Vict. c. 16, s. 36.)

An order must be obtained by motion on notice (*Id.*), which need not be personally served : (Ch. Archb., 13th edit. 970.)

In order to ascertain the names of the shareholders, the register may be inspected without fee : (8 & 9 Vict. c. 16, s. 36.)

In a clear case the court will order execution without *scire facias* ; but if circumstances require it, procedure by *scire facias* will be ordered : (Ch. Archb. 13th edit. 969.)

The order is made absolute in the first instance : (*Id.*)

2. BANKING COMPANIES UNDER 7 GEO. 4, c. 46.

Execution upon any judgment obtained against the public officer for

the time being may be issued against any member or members for the time being; and if it is ineffectual, execution may be issued against any person or persons who was or were a member or members when the contract or contracts, or engagement or engagements in which judgment was obtained was or were entered into, or became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained: (7 Geo. 4, c. 46, s. 12.)

In the last case the leave of the court where judgment was obtained must be had by order obtained on motion on notice, and the execution must be issued within three years next after a person has ceased to be a member: (*Id.*)

The order is made absolute in the first instance: (Ch. Archb. 13th edit. 982.)

Scire facias is not generally necessary: (*Id.* 982.)

3. COMPANIES UNDER 7 WILL. 4 & 1 VICT. c. 73.

All judgments and orders against the public officer have the same effect against the property and effects of the company, and the persons, property, and effects of the individual existing or former members, as if obtained against the company in proceedings to which all the persons liable as existing or former members had been parties; but where the liability of members is limited, execution can only issue in respect of the unpaid residue per share: (See 7 Will. 4 & 1 Vict. c. 73, s. 24.)

VIII. EXECUTION BY OR AGAINST THIRD PERSONS NOT PARTIES.

In cases other than those mentioned in Rule 18 (original parties to a judgment) any person not being a party in an action, who obtains any order, or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the action; and any person not being a party in an action, against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order as if he were a party to the action: (O. XLII., r. 21.)

IX. EXECUTION ON JUDGMENT FOR DEFAULT OF APPEARANCE TO SPECIALLY INDORSED WRIT BY ONE OF SEVERAL DEFENDANTS.

When there are several defendants to a writ specially indorsed for a debt or liquidated demand in money . . . and . . . final judgment [has been entered] against such as have not appeared, [the plaintiff] may issue execution upon such judgment without prejudice to his right to proceed with his judgment against such as have appeared: (O. XIII., r. 4.)

X. EXECUTION ON JUDGMENT FOR COSTS IN INTERPLEADER.

With respect to interpleader, the procedure and practice used by courts of common law under the Interpleader Acts, 1 & 2 Will. 4, c. 58, and 23 & 24 Vict. c. 126, shall apply to all actions and all the divisions of the High Court: (O. I., r. 2.)

Every . . . rule or order . . . entered shall have the force and effect of a judgment, except only as to becoming a charge on any lands, tenements, or hereditaments; and in case any costs shall not be paid within fifteen days after notice of the taxation and amount thereof given to the party ordered to pay the same, his agent or [solicitor], execution may issue for the same by *feri facias* . . . adapted to the case, together

with the costs of such entry, and of the execution . . . and such writ and writs may bear teste on the day of issuing the same, whether in term or vacation; and the sheriff or other officer executing any such writ shall be entitled to the same fees, and no more, as upon any similar writ grounded upon a judgment of the court: (1 & 2 Will. 4, c. 58, s. 7.)

XI. GENERAL RULES AS TO EXECUTION.

1. ORDER IN WHICH WRITS ARE ISSUED.

Nothing in this order shall affect the order in which writs of execution may be issued: (O. XLII., r. 24.)

2. WHERE ISSUED.

Where an action proceeds in the district registry all writs of execution for enforcing any judgment or order therein shall issue from the district registry, unless the court or a judge shall otherwise direct: (O. XXXV., r. 3.)

Where an action proceeds in a district registry, all proceedings relating to . . . leave to issue . . . writs of execution, shall, unless the court or a judge otherwise order, be taken in the district registry: (O. XXXV., r. 3a, April, 1880.)

3. WHEN ISSUED.

As between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment: (O. XLII., r. 18.)

Where six years have elapsed since the judgment, or any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the court or a judge for leave to issue execution accordingly. And such court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties, shall be tried in any of the ways in which any question in an action may be tried. And in either case such court or a judge may impose such terms as to costs or otherwise, as shall seem just: (O. XLII., r. 19.)

Where the plaintiff died, his executor was allowed to issue execution by order made on motion, *ex parte*, and production of the probate: (*Mercer v. Lawrence*, W. N. 1878, p. 103; 26 W. R. 506.)

4. HOW ISSUED.

(a) *Production of Judgment or Order.*

No writ of execution shall be issued without the production to the officer by whom the same should be issued, of the judgment upon which the writ of execution is to issue, or an office copy thereof, showing the date of entry. And the officer shall be satisfied that the proper time has elapsed to entitle the judgment creditor to execution: (O. XLII., r. 9.)

(b) *Præcipe.*

No writ of execution shall be issued without the party issuing it, or his solicitor, filing a *præcipe* for that purpose. The *præcipe* shall contain the title of the action, the reference to the record, the date of the judgment, and of the order, if any, directing the execution to be issued, the names of the parties against whom, or of the firms against whose goods, the execution is to be issued; and shall be signed by or on behalf of the solicitor of the party issuing it, or by the party issuing it, if he do so in person. The forms in Appendix (E) [to the rules of 1875] may be used with such variations as circumstances may require: (O. XLII., r. 10, as amended by the rules of June, 1876, r. 17.)

A form of *præcipe* on issuing a writ of *distringas* to the sheriff is given by the rules of April, 1880, Sched. F. 12.

5. DATE AND FORM.

Every writ of execution shall bear date of the day on which it is issued. The forms in Appendix (F) [to the Rules of 1875] may be used, with such variations as circumstances may require: (O. XLII., r. 12.)

Additional forms are given by the Rules of April, 1880.

6. INDORSEMENT.

Every writ of execution shall be indorsed with the name and place of abode or office of business of the solicitor actually suing out the same, and when the solicitor actually suing out the writ shall sue out the same as agent for another solicitor, the name and place of abode of such other solicitor shall also be indorsed upon the writ; and in case no solicitor shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's or defendant's residence, if any such there be: (O. XLII., r. 11.)

Every writ of execution for the recovery of money shall be indorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of 4*l.* per cent. per annum from the time when the judgment was entered up, provided that in cases where there is an agreement between the parties that more than 4*l.* per cent. interest shall be secured by the judgment, then the indorsement may be accordingly to levy the amount of interest so agreed: (O. XLII., r. 14.)

7. RENEWAL.

A writ of execution if unexecuted shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided; but such writ may, at any time before its expiration, by leave of the court or a judge, be renewed, by the party issuing it, for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal of the court bearing the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his attorney, and bearing the like seal of the court; and a writ of execution so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof: (O. XLII., r. 16.)

When an action proceeds in a district registry, all proceedings relating to . . . leave to . . . renew writs of execution shall, unless the court or a judge otherwise order, be taken in the district registry: (O. XXXV., r. 3a., April, 1880.)

A form of notice of renewal is given in Schedule B. 22 to the Rules of April, 1880.

The production of a writ of execution, or of the notice renewing the same, purporting to be marked with such seal as in the last preceding rule mentioned, showing the same to have been renewed, shall be sufficient evidence of its having been so renewed: (O. XLII., r. 17.)

8. EXPEDITING AND STAYING EXECUTION.

No proceeding by *audita querela* shall hereafter be used; but any party against whom judgment has been given may apply to the court or a judge for a stay of execution or other relief against such judgment, upon the

ground of facts which have arisen too late to be pleaded; and the court or judge may give such relief and upon such terms as may be just: (O. XLII., r. 22.)

The court or judge at the time of giving judgment [for a sum of money or costs], or the court or a judge afterwards, may give leave to issue execution before, or may stay execution until any time after the expiration of the periods hereinbefore prescribed: (O. XLII., r. 15.)

As to the power of the Court of Appeal to stay execution, see APPEAL.

Pending an appeal to the House of Lords, the Court of Appeal will stay proceedings which might otherwise prevent a successful appellant from obtaining the fruits of his litigation: (*Wilson v. Church*, No. 2; L. Rep. 12 Ch. Div. 454.)

9. POUNDAGE, FEES, AND EXPENSES.

In every case of execution the party entitled to execution may levy the poundage, fees, and expenses of execution, over and above the sum recovered: (O. XLII., r. 13.)

[See Chitty's Archbold's Practice, 13th edit. tit. "Execution."]

10. SETTING ASIDE FOR IRREGULARITY.

If the writ of execution be irregular, or ought not to have issued, the court or a judge will in general set it aside, and if goods or money have been levied under it, order them to be restored, or if the party be in custody under it, order him to be discharged: (Ch. Archb. 13th edit. 546.)

If the execution has been irregularly executed, such restoration or discharge will generally be ordered: (*Id.*)

The application should be made as early as possible, and cannot generally be made by third parties: (*Id.*)

On setting aside the execution, the court, unless the applicant was entitled to it as a matter of right, will generally impose as a term that no action shall be brought, and even when he is entitled to the order *ex debito justitiæ*, costs will generally be refused, unless he consents not to bring an action: (*Id.*)

The setting aside does not prevent another writ being issued: (Ch. Archb. 548.)

XII. HOW DIFFERENT JUDGMENTS ARE ENFORCED.

1. FOR RECOVERY OR PAYMENT OF MONEY OR COSTS.

(a) General Rules.

A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any court whose jurisdiction is transferred by the said Act might have been enforced at the time of the passing thereof: (Order XLII., r. 1.)

Upon any judgments drawn up by the Chancery registrars for the recovery of a sum of money and costs there may continue to be, at the election of the claimant, either one writ or separate writs of execution for the recovery of the sum, and for the recovery of the costs, but a second writ shall only be for costs, and shall be issued not less than eight days after the first writ: (O. XLII., r. 15a, April, 1880.)

(b) *Fieri Facias* and *Elegit*.

Every person to whom any sum of money or any costs shall be payable under a judgment, shall, immediately after the time when the judgment was duly entered, be entitled to sue out one or more writ or writs of *fieri facias*, or one or more writ or writs of *elegit* to enforce payment thereof subject [as mentioned *sup.*]: (O. XLII., r. 15.)

[See *post*, XIII., XIV.]

(c) *Venditioni Exponas and other writs in aid of Fieri Facias or Elegit.*

Writs of "*venditioni exponas*," "*distringas nuper vice comitem*," "*fieri facias de bonis ecclesiasticis*," "*sequestrari facias de bonis ecclesiasticis*," and all other writs in aid of a writ of *fieri facias* or of *elegit*, may be issued and executed in the same cases and in the same manner as heretofore: (O. XLIII., r. 2.)

[See *post*, XV., 1.]

(d) *Receiver or Equitable Execution.*

Where the interests of the debtor in the land are of such a nature that they cannot be taken in *elegit* the proper remedy is to commence an action for a receiver: [see *post*, XVI.]

(e) *Sequestration.*

Where any person is by a decree or order made in any suit or matter directed to pay money or costs in a limited time, and, after due service of such decree or order, refuses or neglects to make such payment according to the exigency of such decree or order, the person prosecuting such decree or order shall, at the expiration of the time limited for such payment, be entitled to a commission of sequestration: (Ch. O., Jan., 1870, r. 3.)

No subpoena for the payment of costs, and, unless by leave of the court or a judge, no sequestration to enforce such payment shall be issued: (O. XLVII., r. 2, April, 1880.)

[See *post*, XVII.]

(f) *Attachment of Debts.*

Where a judgment is for the recovery by or payment to any person of money, the party entitled to enforce it may apply to the court or a judge for an attachment of debts: (O. XLV., r. 1.)

[See *post*, XVIII.]

(g) *Charging Order on Stock or Shares.*

A judgment for payment of money may also be enforced by a charging order: (O. XLVI., r. 1.)

[See *post*, XIX.]

(h) *Solicitors' Charging Order for Costs.*

In every case in which a . . . solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such . . . solicitor entitled to a charge upon the property recovered or preserved . . . for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding: (23 & 24 Vict. c. 127, s. 28.)

[Interest on taxed costs may be directed to be paid, and in such case will] be payable and recoverable out of the same fund, or in the same manner as the amount of such costs: (*Id.*, s. 27.)

[See SOLICITORS.]

(i) *Arrest and Imprisonment.*

A person may be arrested and imprisoned for—

Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract;

Default in payment of any sum recoverable summarily before a justice or justices of the peace;

Default by a trustee or person acting in a fiduciary capacity, and ordered to pay, by a court of equity, any sum in his possession; or

Default by a . . . solicitor in payment of costs when ordered to

pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order;

Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any court having jurisdiction in bankruptcy is authorised to make an order: (D. A. 1869, s. 4.)

Default in payment of a debt [not exceeding 50*l.*, exclusive of costs, if on a judgment of a Superior Court] or instalment of any debt due from him in pursuance of an order or judgment of [the court] or any other competent court [where means of payment are proved]: (Deb. A. 1869, s. 5.)

[See *post*, XX. and XXI., and ARREST.]

2. FOR PAYMENT OF MONEY INTO COURT.

A judgment for the payment of money into court may be enforced by writ of sequestration, or in cases in which attachment is authorised by law, by attachment: (O. XLII., r. 2.)

[See *post*, XVII., XX.]

3. FOR RECOVERY OR DELIVERY OF POSSESSION OF LAND.

A judgment for the recovery or for the delivery of the possession of land may be enforced by writ of possession: (O. XLII., r. 3.)

[See *post*, XXII.]

4. FOR RECOVERY OF PROPERTY OTHER THAN MONEY OR LAND.

A judgment for the recovery of any property other than land or money may be enforced:

By writ for delivery of the property;

By writ of attachment;

By writ of sequestration: (O. XLII., r. 4; *post* XXIV., XX., XVII.)

5. REQUIRING PERSON TO DO ACT OTHER THAN PAYMENT OF MONEY.

(a) *Sequestration.*

Where any person is by any judgment directed to pay money into court or to do any other act in a limited time, and after due service of such judgment refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment shall at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person: (O. XLVII.; see *post*, XVII.)

(b) *Attachment or Committal.*

A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal: (O. XLII., r. 5.)

[See *post*, XX., XXI.]

XIII. WRIT OF FIERI FACIAS.

1. IN WHAT CASES ISSUED.

Every person to whom any sum of money or any costs shall be payable under a judgment, shall . . . be entitled to sue out one or more writ or writs of *fiery facias* . . . to enforce payment thereof: (O. XLII., r. 15.)

Upon every [judgment] or order hereafter to be entered, one of the entering clerks shall, at the request of the party leaving the same, mark the day of the month and year on which the same is so left for entry; and no writ of *fiery facias* shall be sued out upon any such judgment or order, unless the date of such entry is so marked thereon: (C. O. 29, r. 7.)

2. WHEN ISSUED.

[The writ may be generally issued] immediately after the time when the judgment was entered : (O. XLII., r. 15.)

If the judgment is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period : (*Id.*)

[See also *sup.*, IV., XI., 3, 8.]

3. WHERE ISSUED.

[See *sup.*, XI., 2.]

4. HOW ISSUED.

(a) *Production of Judgment or Order.* [See *sup.* XI., 4, a.]

(b) *Præcipe.* [See XI., 4 (b).]

The form is given in Appendix E. 1, to the rules of 1875.

5. DATE AND FORM.

[See *sup.*, XI., 5.]

The form of ordinary *fi. fa.* is given in the Appendix F. 1, to the rules of 1875.

Other forms in particular cases are given in Schedules F. 1a, and F. 13, to the rules of April, 1880.

6. INDORSEMENTS.

[See *sup.*, XI., 6.]

7. DELIVERY TO SHERIFF.

Such writs when sealed shall be delivered to the sheriff or other officer to whom the execution of the like writs belongs : (C. O. 29, r. 8.)

8. EXECUTION OF WRIT.

Writs of *fi. facias* . . . shall be executed in the same manner in which the like writs have heretofore been executed : (O. XLIII., r. 1.)

[See Ch. Arch. 13th edit. 552-580.]

If two writs of *fi. fa.* against the same person are delivered to the sheriff, he must execute that first which was first delivered to him, and apply the proceeds of any sale in satisfaction of the writs in order of priority of delivery to him : (Ch. Arch. 13th edit. 578.)

9. POUNDAGE, FEES, AND EXPENSES.

[See *sup.*, XI., 9.]

A sheriff may levy for his fees, although not indorsed on the writ : (Ch. Arch. 13th edit., 552.)

Upon executing a *fi. facias* the sheriff is entitled to 1s. in the pound up to 100l., and 6d. in the pound beyond that amount as poundage : (28 Eliz. c. 4.)

The sheriff's fees are regulated by 1 Vict. c. 55. [See FEES].

Delivery of the writ, without seizure, does not give the sheriff a right to poundage : (*Nash v. Dickenson*, L. Rep. 2 C. P. 252.)

Where there has been seizure, but no sale, the sheriff is entitled to poundage : (*Bissicks v. Bath Colliery Company*, L. Rep. 2 Ex. Div. 459 ; 3 Ex. Div. 174 ; 38 L. T. Rep. N. S. 163 ; 47 L. J. 408, Ex. ; *Mortimore v. Cragg* L. Rep. 3 C. P. Div. 216 ; 38 L. T. Rep. N. S. 116 ; 47 L. J. 348, C. P. ; overruling *Roe v. Hammond*, L. Rep. 2 C. P. Div. 300.)

10. RETURN.

It is not usual for the sheriff to return the writ unless ordered : (Ch. Arch. 13th edit., 532.)

Pending an interpleader issue as to the goods seized the execution creditor has not an immediate right to the return of the writ : (*Id.*, 580.)

An action lies in case of a false return : (Ch. Arch. 13th edit., 582.)

In default of return after the common order, an order *nisi* may be obtained on motion, *ex parte*, for return within six days after personal service on the sheriff, or for committal in default: (*Re Heiron*, L. Rep. 12 Ch. Div. 795.) But notice of motion for the attachment must be given: (*Jupp v. Cooper*, L. Rep. 5 C. P. Div. 26.)

11. FILING.

Such writs, when returned by such sheriff or other officer, shall be delivered to the parties or solicitors by whom respectively they were sued out, and shall thereupon be filed as of record in [the Central Office]: (C. O. 29, r. 8.)

12. EFFECT.

Writs of *fi. facias* and of *elegit* shall have the same force and effect as the like writs have heretofore had: (O. XLIII., r. 1.)

If *nulla bona* be returned to the *fi. fa.* the parties may sue out an *alias fi. fa.*, and upon the return of *nulla bona* to that a *pluries fi. fa.* may be issued. When nothing has been levied it is usual to issue the subsequent writ without getting the return previously made. If part is levied, on return, a *fi. fa.* may be issued for the residue, but the return must be first made: (Ch. Arch. 13th edit., 585.)

If *fi. feci* be returned as to part, the plaintiff may sue out *elegit* for the residue: (*Id.*, 586.)

Goods taken in execution on a judgment of a Superior Court cannot be replevied: (*Id.*, 587.)

XIV. WRIT OF ELEGIT.

1. IN WHAT CASES ISSUED.

Every person to whom any sum of money or any costs shall be payable under a judgment shall . . . be entitled to sue out . . . one or more writ or writs of *elegit* to enforce payment thereof: (O. XLII., r. 15.)

The day of the month and year of entry must have been marked on the judgment as in case of *fi. facias* (see *sup.* XIII., 1.)

2. WHEN ISSUED.

[The writ may generally be issued] immediately after the time when the judgment was entered: (O. XLII., r. 15.)

If the judgment is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period: (*Id.*)

[See also *sup.* XI., 3, 8.]

3. WHERE ISSUED. [See *sup.* XI., 2.]

4. HOW ISSUED.

(a) *Production of Judgment or Order.*

[See *sup.* XI., 4 (a).]

(b) *Præcipe.*

[See *sup.* XI., 4 (b).]

The form is given in Appendix E. 2, to the Rules of 1875.

5. DATE AND FORM.

[See *sup.* XI., 5.]

The form is given in Appendix F. 2, to the Rules of 1875.

6. INDORSEMENTS.

See *sup.* XI., 6.

7. DELIVERY TO THE SHERIFF.

As in case of *fi. facias*; *sup.* XIII.

8. EXECUTION OF WRIT.

Writs of *elegit* . . . shall be executed in the same manner in which the like writs have heretofore been executed: (O. XLIII., r. 1.)

Upon the receipt of the *elegit*, the sheriff must empanel a jury, who are to inquire of all the goods and chattels of the debtor, and appraise the same, and also to inquire as to his lands and tenements, and their value. At the time appointed for executing the writ, the creditor or his solicitor attends with evidence what goods (if any) the debtor is entitled to, and their value. Proof of possession of the land or receipt of rents or profits by the debtor is *primâ facie* evidence of the debtor's title. No notice of the taking of the inquisition need be given to the judgment debtor: (Ch. Arch. 13th edit., 597.)

Upon the inquisition had, the sheriff delivers to the creditor all the goods and chattels of the debtor (except his oxen and beasts of the plough) at the value set on them by the jury: (*Id.*)

If the goods are sufficient to satisfy the debt, the lands cannot be extended: (*Id.* 598.)

If the goods are not sufficient, the sheriff proceeds to make and deliver execution to the creditor of all the debtor's lands, after their being valued by the jury: (*Id.*)

The sheriff retains only legal possession of lands, not actual possession: (*Id.*)

The inquisition must find the lands with certainty, the place and county where they lie; and when the inquisition is taken, the estate the defendant has in them, whether seised in severalty or as joint tenant or tenant in common, and their value: (*Id.*)

When the whole of the lands are extended, it is sufficient to describe them by their names, or in some other manner by which they may be identified: (Ch. Arch. 598.)

The whole of the judgment debtor's lands may now be delivered in execution, and such lands may be held subject to such account in the court out of which execution is delivered as a tenant by *elegit* was formerly subject to in a court of equity: (See 1 & 2 Vict. c. 110, s. 11.)

The following may be extended: Estate in reversion on lease for lives or years, the plaintiff being entitled to the rent falling due after the return of the inquisition, but not previous arrears; rentcharges; lands in ancient demesne; wife's lands, which the husband has during the coverture; lands of a bishop; a term of years (either as land or personalty): (Ch. Arch. 591.)

9. POUNDAGE, FEES, AND EXPENSES.

[See *sup.*, XI., 9.]

Upon executing an *elegit* the sheriff is entitled to 12*d.* in every 20*s.* of the yearly value of the lands, &c., whereof possession of seisin is given, if such yearly value exceed not the sum of 100*l.*; and 6*d.* in every 20*s.* of the yearly value above that sum. But when the goods are taken the sheriff is entitled *pro tanto* to poundage as he would under a *fi. fa.*: (3 Geo. 1, c. 15, s. 16; Ch. Arch. 545.)

10. RETURN.

If lands be extended, the *elegit* and the inquisition held under it must be returned, otherwise the tenant by *elegit* will have no title: (Ch. Arch. 532, 599.)

If chattels have been approved and delivered to the creditor, the sheriff should return to the writ that he delivered the goods at a reasonable price fixed by the jury: (*Id.*)

As to compelling return, see Chitty's Arch. 13th edit.

11. FILING.

As in case of *fieri facias*, *sup.*, XIII., 11.

Any objection to the inquisition for matter extrinsic must be made before it is filed: (Ch. Arch. 599.)

12. EFFECT.

Writs . . . of *elegit* shall have the same force and effect as the like writs have heretofore had: (O. XLIII., r. 1.)

If no land be extended upon an *elegit*, the creditor may have an *elegit* into another county, or, even if land be extended upon the first *elegit*, he, on a suggestion that the debtor has more land either in the same or in another county, may have another *elegit* directed to the sheriff of such county: (Ch. Arch. 599.)

But when land is extended upon an *elegit*, no other writ of execution but an *elegit* can be sued out against the debtor's person or property, unless the creditor be evicted from the land extended: (*Id.*)

If the *elegit* be ineffective, the creditor may issue a *fi. fa.* (*Id.*)

If the inquisition is avoided for other matter extrinsic, the creditor may issue a new *fi. fa.* or an *elegit*: (*Id.*)

If the inquisition is void for matter on the face of it, the writ should be vacated on a suggestion, and another awarded: (*Id.*)

If *nihil* be returned, or that goods as to part have been levied, and *nihil* as to lands, the creditor may issue a *fi. fa.*, or another *elegit*.

When the execution debtor is in possession, the creditor may enter and take possession under the *elegit*, or he may bring an action (after the return and filing of the writ, and an entry upon the roll of an award of the writ and the inquisition: (Ch. Arch. 600.)

Such an action cannot be brought where a reversion is extended: (*Id.*)

13. REGISTRATION.

Every writ, by virtue whereof any land shall have been actually delivered in execution must be registered in the name of the debtor in the Common Pleas Division: (27 & 28 Vict. c. 112, s. 3.)

14. SALE.

Every creditor to whom any land of his debtor shall have been actually delivered in execution by virtue of any judgment, statute, or recognizance, and whose writ or other process of execution shall be duly registered, shall be entitled forthwith, or at any time afterwards while the registry of such writ or process shall continue in force, to obtain from the court . . . upon petition in a summary way, an order for the sale of his debtor's interest in such land, and every such petition may be served upon the debtor only; and thereupon the court shall direct all such inquiries to be made as to the nature and particulars of the debtor's interest in such land, and his title thereto, as shall appear to be necessary or proper; and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the said court with respect to sales of real estates of deceased persons for the payment of debts shall be adopted and followed, so far as the same may be found conveniently applicable: (27 & 28 Vict. c. 112, s. 4.)

This only applies where judgment has been entered after the 29th July, 1864: (Ch. Arch. 594.)

The return of the sheriff to an *elegit* constitutes actual delivery: (Williams on Petitions, 148.)

If it shall appear on making such inquiries that any other debt due on any judgment, statute or recognisance, is a charge on such land, the creditor entitled to the benefit of such charge (whether prior or sub-

sequent to the charge of the petitioner) shall be served with notice of the said order for sale, and shall after such service be bound thereby, and shall be at liberty to attend the proceedings under the same, and to have the benefit thereof; and the proceeds of such sale shall be distributed among the persons who may be found entitled thereto, according to their respective priorities: (27 & 28 Vict. c. 112, s. 5.)

Every person claiming any interest in such land through or under the debtor, by any means subsequent to the delivery of such land in execution as aforesaid, shall be bound by every such order for sale, and by all the proceedings consequent thereon: (*Id.*, s. 6.)

The petitioner, if successful, is generally allowed to add his costs to his debt: (Williams on Petitions, 150.)

XV. PROCESS IN AID OF *FIERI FACIAS* OR *ELEGIT*.

Writs of *venditioni exponas*, *distringas nuper vice comitem*, *fieri facias de bonis ecclesiasticis*, *sequestrari de bonis ecclesiasticis*, and all other writs in aid of a writ of *fieri facias* or of *elegit*, may be issued and executed in the same cases and in the same manner as heretofore: (O. XLIII., r. 2.)

1. VENDITIONI EXPONAS.

Where it appears, upon the return of any writ of *fieri facias* . . . that the sheriff or other officer has by virtue of such writ seized but not sold any goods of the person directed to pay such sum of money or costs as aforesaid, the person to whom such sum of money or costs is payable, shall, immediately after such writ with such return shall have been filed as of record, be at liberty to sue out a writ of *venditioni exponas*: (C. O. 29, r. 9.)

He ought to sell without this writ being issued: (Ch. Arch., 13th edit., 583.)

After delivery of the writ to the sheriff, he is bound to sell the goods, and leave the money in court on the return day of it: (*Id.*, 584.)

The form of *præcipe* is given in Appendix E. 3 to the rules of 1875, and the form of writ in Appendix F. 3 to the same rules.

2. DISTRINGAS NUPER VICE-COMITEM.

This writ is issued in lieu of a *venditioni exponas* where the sheriff goes out of office while the goods are still on his hands, and is directed to his successor commanding him to distrain the late sheriff to sell the goods: (Ch. Arch. 13th edit., 585.)

The form of *præcipe* is given in Schedule E. 10, and the form of writ in Schedule F. 12, to the rules of April, 1880.

3. FIERI FACIAS DE BONIS ECCLESIASTICIS OR SEQUESTRARI FACIAS DE BONIS ECCLESIASTICIS.

Where it appears, upon the return of any writ of *fieri facias* or any writ of *elegit*, that the person against whom such writ was so issued, is a beneficed clerk, and has no goods or chattels nor any lay fee in the bailiwick of the sheriff to whom such writ was directed, the person to whom the sum of money or costs mentioned in such writ is or are payable, shall, immediately after such writ with such return shall have been filed as of record, be at liberty to sue out one or more writ or writs of *fieri facias de bonis ecclesiasticis*, or one or more writ or writs of *sequestrari facias*: (C. O. 29, r. 11.)

This writ may also be issued after a return by sequestrator, that the defendant is a beneficed clerk, and has no lay property: (Dan. 927.)

For forms of *præcipes*, see Appendices E. 4 and E. 5, to the rules of

1875, and for forms of writ, see Appendices F. 4, F. 5, and F. 6 to the same rules.

Indorsements.

[See *sup.* XI., 6.]

On every such writ of *fieri facias de bonis ecclesiasticis* or writ of *sequestrari facias* so to be issued as aforesaid, there shall be indorsed, in addition to the particulars required, the words "by the court," and also thereunder the calling, if any, and place of residence, if any, of the person against whom such writ shall be issued: (C. O. 29, r. 12.)

Delivery to Bishop or Archbishop.

Such writs, when served, shall be delivered to the bishop [or archbishop]: (C. O. 29, r. 13.)

Execution.

In practice the writs are delivered to the registrar of the diocese, who will thereupon issue the sequestration: (Dan. 927.)

Filing.

Such writs, when returned by the bishop, shall be delivered to the parties or solicitors by whom respectively they were sued out, and shall thereupon be filed as of record in the [Central Office]: (C. O. 29, r. 13.)

XVI. EQUITABLE EXECUTION.

WHERE ALLOWED.

If the interest of the debtor, from being merely an equitable life interest, or a partial equitable interest only, or an equity of redemption of freeholds or leaseholds, or an interest in remainder only, or from having been already extended under a prior *elegit*, cannot be actually delivered, the judgment creditor, although he has sued out and delivered to the sheriff a writ of *elegit*, cannot petition for a sale: (Seton, 4th edit., 1144.)

The proper remedy is for the judgment creditor to apply for a receiver: (*Anglo-Italian Bank v. Davis*, L. Rep. 9 Ch. Div. 275; 39 L. T. Rep. N. S. 244; 47 L. J. 833; 27 W. R. 3.)

And he may do this, in the case of personality in the hands of trustees, on trust to pay the dividends to the judgment debtor (*Bryant v. Bull, inf.*), or to enforce payment of alimony under an order of the Probate Division: (*Oliver v. Lowther*, 42 L. T. Rep. N. S. 47; 28 W. R. 281.)

HOW OBTAINED.

It is unnecessary to first sue out a writ of *elegit*: (*Id.*, *Ex parte Evans*, 13 Ch. Div. 252; 41 L. T. Rep. N. S. 565.)

If the judgment was obtained in the Chancery Division the application may be made in that action without commencing a fresh action for a receiver: (*Bryant v. Bull*, L. Rep. 10 Ch. Div. 155; 39 L. T. Rep. N. S. 470; 48 L. J. 325, Ch.; 27 W. R. 246.)

The court will appoint an *interim* receiver on an *ex parte* application: (*Ex parte Evans, sup.*)

The appointment of the receiver operates as from its date, not from the date of the security being perfected: (*Id.*)

The appointment of a receiver constitutes "actual delivery" in execution so as to entitle the plaintiff to partition for a sale, as to which see *sup.*, XIV., 14.

XVII. WRIT OF SEQUESTRATION.

1. IN WHAT CASES ISSUED.

A writ of sequestration is issued:

(1) In case of nonpayment of money or costs directed to be paid within a limited time: (Ch. O., Jan., 1870, rr. 3, 7.)

(2) In case of nonpayment into court where payment directed by judgment or order: (O. XLII., r. 2; O. XLVII.)

(3) To enable a person to recover any property other than land or money: (O. XLII., r. 4.)

(4) In case of disobedience to a judgment or order directing any other act to be done within a limited time: (O. XLVII.)

(5) In case of disobedience after, or return of *non est inventus* to a writ of attachment for disobedience of judgment or order directing any act other than payment of money or costs: (Ch. O., Jan., 1870., r. 6.)

Where the plaintiff has accepted payment of part of the debt, under a composition, the writ cannot be issued: (*Roe v. Davies*, W. N. 1878, p. 147.)

A sequestration may now be issued against a corporate body without previously issuing a *distringas*: (Seton, 4th edit., 1558.)

A sequestration cannot be issued on a judgment for a sum of money simply: (per James, L.J., *Ex parte Nelson*, L. Rep. 14 Ch. Div. 41; 42 L. T. Rep. N. S. 389; 28 W. R. 554.)

2. WHERE ISSUED.

[See *sup.* XI., 2.]

3. WHEN ISSUED.

[See *sup.* XI., 3.]

[Except in the case of costs (O. XLVII., r. 2, April, 1880).]

It may issue, without order, at the expiration of the time limited for payment of money . . . (Ch. O., Jan., 1870, r. 3), or payment of money into court, or performance of any other act: (O. XLVII.)

A writ of sequestration against a receiver or other person for disobedience of an order of the court may be issued without leave: (*Sprunt v. Pugh*, L. Rep. 7 Ch. Div. 567; 47 L. J. 325, Ch.; 26 W. R. 473.)

4. HOW ISSUED.

Requisites as to Judgment.

The decree or order must state the time within which any act is required to be done (Ch. O., Jan. 1870, r. 1), or the time must be fixed by subsequent order as in the case of an attachment: (See *post*, XX.)

Service of Judgment.

Before the writ of sequestration is issued in the case of judgments

For non-payment of money or costs within a limited time, whether by trustee, solicitor, or other person (Ch. O., Jan., 1870, rr. 3, 7.);

For payment of money into court, or doing other acts within a limited time (O. XLII.);

A copy of the judgment duly indorsed must be served upon the person required to obey in the same: (Ch. O., Jan. 1870, r. 1. See JUDGMENT.)

The service is generally personal, a copy, indorsed, being given, and the original or a sealed office copy being shown: (Dan. 905.)

Substituted service, is sometimes ordered on motion *ex parte* or summons: (*Id.*)

Order in Case of Costs.

No subpoena for the payment of costs, and, unless by leave of the court or a judge, no sequestration to enforce such payment, shall be issued: (O. XLVII., r. 2, April, 1880.)

The order may be obtained on motion, after notice, or summons.

Production of Judgment or Order. [See *sup.* XI., 4 (a).]

Evidence.

The evidence required by the master or district registrar must be the

same in the case of non-payment of money or costs within a limited time as in the case of attachment : (Ch. O., Jan., 1870, r. 3. See *post*, XX.)

Præcipe.

[See *sup.*, XI., 4 (b).]

If an order is not required the writ will be issued at the Central Office, upon production of evidence showing the contempt, and leaving a *præcipe* there to be filed : (Dan. 913).

If issued under an order, the order must be produced and a *præcipe* left : (*Id.*)

The form of *præcipe* is given in Appendix E. 6, to the Rules of 1875.

5. DATE AND FORM.

[See *sup.* XI., 5.]

It should be engrossed on parchment : (Dan. 913.)

The form of writ is given in Appendix F. 10, to the Rules of 1875.

6. INDORSEMENT. [See *sup.*, XI., 6.]

7. EXECUTION AND EFFECT.

The writ should be delivered to the sequestrators by the solicitor with proper instructions for carrying it into effect ; (Dan. 913.)

Such writ of sequestration shall have the same effect as a writ of sequestration in Chancery has heretofore had, and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration have heretofore been dealt with by the Court of Chancery : (O. XLVII.)

The sequestrators may take all goods and chattels in the possession of the disobedient person which may be got without action. Doors may be broken open, and boxes and rooms locked, and of which the keys are denied, may be opened, nothing being removed from the house without special leave of the court : (Dan. 914 ; Seton, 4th edit. 1578.)

The separate estate of a married woman may be taken : (Seton, 1578.)

Money or *choses in action* in the hands of a third person may be taken, if the third person admits possession and submits to the order : (*Id.*)

Pensions for past services may be seized (*Willcock v. Terrell*, L. Rep. 3 Ex. Div. 323 ; 39 L. T. Rep. N. S. 84) ; but the court will not make an order on the Lords of the Treasury or the Paymaster-General to pay over the pensions : (*Id.*, *Sansom v. Sansom*, L. Rep. 4 P. Div. 25 ; 39 L. T. Rep. N. S. 642 ; 48 L. J. 69, P. Div. & A. ; 27 W. R. 692.)

Rents and profits of real estates paid in kind, or the natural produce of a farm, are liable to sequestration, but the land, whether copyhold, freehold, or leasehold, or property which passes by title and not by delivery, cannot be sold : (Seton, 1579 ; and see *Johnson v. Burgess*, L. Rep. 15 Eq. 398 ; cited Seton, 1582.)

Application for permission to sell goods may be made by summons, or motion, on notice generally, or if the person cannot be served, *ex parte* : (Seton, 1582.)

Sequestrators will be ordered to account for whatever comes to their hands by virtue of their office, and must make returns from time to time : (*Id.*)

The proceeds received by them should be paid into court upon leave obtained on motion or summons : (*Id.*)

A person desirous of having the property applied in satisfaction of his demand must apply to the court : (Dan. 917.)

A third party claiming to be interested may apply by motion or summons for an inquiry as to his interest therein : (Seton, 1584 ; *Costa Rica v. Strousberg*, W. N. 1880, p. 155.)

The examination and inquiry, known as an examination *pro interesse suo*, is before the judge at chambers: (*Id.*, 1585.)

Where the right is clear, the examination is dispensed with: (*Id.*)

If the party examined has a title paramount to the sequestration, it will be discharged: (*Id.*)

8. RETURN.

The return to a writ of sequestration is indorsed on the commission, but it is not the practice to file it: (Dan. 913.)

The person prosecuting the decree or order must, if he wishes to have another sequestration or any other remedy, after the return of *nulla bona*, apply specially to the court: (*Id.*)

9. DISCHARGING.

When the contemnor has cleared his contempt, an order for discharge of the sequestration may be had on summons or motion, with directions for the sequestrators to withdraw from possession, and to pass their final accounts, and after retaining their costs, charges, and expenses, and any payments properly made by them, to pay the balance to the contemnor: (Seton, 1586.)

Where the contemnor desires to discharge the sequestration on the ground of irregularity, the application is by motion on notice: (*Id.*)

XVIII. ATTACHMENT OF DEBTS.

1. ORDER FOR EXAMINATION OF JUDGMENT DEBTOR.

Where a judgment is for the recovery by or payment to any person of money, the party entitled to enforce it may apply to the court or a judge for an order that the judgment debtor be orally examined as to whether any and what debts are owing to him before an officer of the court, or such other person as the court or judge shall appoint; and the court or judge may make an order for the examination of such judgment debtor, and for the production of any books or documents: (O. XLV., r. 1.)

Order to dismiss with costs for *non pros.* is not within the rule: (*Cremetti v. Crom*, L. Rep. 4 Q. B. Div. 225.)

For form of order see schedule H. 36 to the Rules of April, 1880.

The service of the order should either be personal or be brought to the knowledge of the judgment debtor.

Where an action proceeds in a district registry, all proceedings relating to . . . the examination of judgment debtors for garnishee purposes . . . shall, unless the court or judge otherwise orders, be taken in the district registry: (O. XXXV., r. 3a, April, 1880.)

2. ORDER FOR ATTACHMENT OF DEBTS AND TO SHOW CAUSE.

The court or a judge may, upon the *ex parte* application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his solicitor stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court or a judge or an officer of the court, as such court or judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt: (O. XLV., r. 2.)

When the action proceeds in a district registry, all proceedings relating to . . . garnishee orders . . . may, unless the court or a judge otherwise order, be taken in the district registry: (O. XXXV., r. 3a, April, 1880.)

The form of affidavit is given in schedule B. 26 to the Rules of April, 1880.

The form of order is given in schedule H. 37 to the Rules of April, 1880.

A garnishee order *nisi* does not create a charge until after service on the garnishee: (*Hamer v. Giles*, L. Rep. 11 Ch. Div. 942; *Re Stanhope Silkstone Collieries Company*, L. Rep. 11 Ch. Div. 942.)

As to the effect of the order on a solicitor's claim for costs, see *Shippey v. Grey*, W. N. 1880, p. 99.

3. DEBTS WHICH MAY BE ATTACHED.

The following debts are attachable—

A debt of unascertained amount;

A debt due to one or more of several joint judgment debtors;

A debt due, but not payable until a future time;

The proceeds of an execution in the hands of the sheriff;

Rent due in the hands of a tenant;

Funds in the hands of the official manager of a company in course of being wound up, may be attached by a judgment creditor of the company;

A debt due to the estate of a deceased [upon a judgment against his executor *quâ* executor] (Day, C. L. P. Act);

Wages may be attached only by a Superior Court (33 & 34 Vict. c. 30);

Equitable debts (*Wilson v. Dundas*, W. N. 1875, p. 232; *Nash v. Pease*, 47 L. J. 766, Q. B.);

Interest on stock of a railway company, in the hands of another company working their line by arrangement (*Bouch v. Sevenoaks Railway Company*, L. Rep. 4 Ch. Div. 133);

Income coming to the hands of a receiver in an administration action, which he has been ordered to pay to a tenant for life: (*Re Cowan, Rapier v. Wright*, W. N. 1880, p. 90.)

As to the order when an accruing debt is attached, see *Tapp v. Jones* (L. Rep. 10 Q. B. 591).

4. DEBTS WHICH MAY NOT BE ATTACHED.

Unliquidated demands (Day, C. L. P. Act);

Claims founded on a mere notice to treat under the Lands Clauses Act, where nothing further has been done: (*Richardson v. Elmit*, L. Rep. 1 C. P. Div. 9);

Mere possible liabilities (*Hall v. Pritchett*, L. Rep. 3 Q. B. Div. 215; 37 L. T. Rep. N. S. 671; 47 L. J. 15, Q. B.; 26 W. R. 95);

The surplus of a bankrupt's estate (against the trustee as garnishee) (*Re Greensill*, L. Rep. 8 C. P. 24).

The proceeds of a judgment paid into the County Court are not attachable by a third party as a debt due from the registrar to the judgment debtor: (*Dolphin v. Layton*, L. Rep. 4 C. P. Div. 130.)

5. SERVICE OF GARNISHEE ORDER.

Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the court or judge shall direct, shall bind such debts in his hands: (O. XLV., r. 3.)

If, after service, the judgment debtor becomes bankrupt, the judgment

creditor can, as a creditor holding security, realise the debt attached: (*Emmanuel v. Bridger*, L. Rep. 9 Q. B. 286; *Lowe v. Blakemore*, L. Rep. 10 Q. B. 485.)

As to the effect of a cheque given by the garnishee to the defendant, see *Cohen v. Hale*, L. Rep. 3 Q. B. Div. 371; 39 L. T. Rep. N. S. 35; 47 L. J. 496, Q. B.; 26 W. R. 680.

6. ORDER FOR PAYMENT AND EXECUTION.

If the garnishee does not forthwith pay into court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the court or judge may order execution to issue, and it may issue accordingly, without any previous writ or process, to levy the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the judgment debt: (O. XLV., r. 4.)

The form is given in schedule H. 38 to the Rules of April, 1880.

7. ORDERING TRIAL OF ISSUE OR QUESTION.

If the garnishee disputes his liability, the court or judge, instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined: (O. XLV., r. 5.)

The judge may order a special case to be stated: (*Wilson v. Dundas*, W. N. 1875, p. 232.)

8. ORDERS AS TO THIRD PARTIES.

Whenever in proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the court or judge may order such third person to appear, and state the nature and particulars of his claim upon such debt: (O. XLV., r. 6.)

After hearing the allegations of such third person under such order, and of any other person whom by the same or any subsequent order the court or judge may order to appear, or in case of such third person not appearing when ordered, the court or judge may order execution to issue to levy the amount due from such garnishee, or any issue or question to be tried or determined according to the preceding rules of this order, and may bar the claim of such third person, or make such other order as such court or judge shall think fit, upon such terms, in all cases, with respect to the lien or charge (if any) of such third person, and to costs, as the court or judge shall think just and reasonable: (O. XLV., r. 7.)

The decision of the judge, summarily, is final, if the parties have agreed to submit to it: (*Eade v. Winser*, 47 L. J. 584, Q. B.)

9. EFFECT OF PAYMENT BY OR EXECUTION ON GARNISHEE.

Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the judgment debtor, to the amount paid or levied, although such proceedings may be set aside, or the judgment reversed: (O. XLV., r. 8.)

10. DEBT ATTACHMENT BOOK.

There shall be kept by the proper officer a debt attachment book, and in such book entries shall be made of the attachment and proceedings thereon, with names, dates, and statements of the amount recovered, and otherwise; and copies of any entries made therein may be taken by any person upon application to the proper officer: (O. XLV., r. 9.)

XIX. CHARGING ORDER.

1. IN WHAT CASES MADE.

An order charging stock or shares may be made by any Divisional Court or by any judge, and the proceedings for obtaining such order shall be such as are directed, and the effect shall be such as is provided by 1 & 2 Vict. c. 110, ss. 14 and 15, and 3 & 4 Vict. c. 82, s. 1: (O. XLVI., r. 1.)

If any person against whom any judgment shall have been entered up in any of Her Majesty's Superior Courts at Westminster shall have any Government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name, in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered and interest thereon (1 & 2 Vict. c. 110, s. 14). The aforesaid provisions of the said Act shall be deemed and taken to extend to the interest of any judgment debtor whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stock, funds, annuities, or shares as aforesaid, as also in the dividends, interest, or annual produce of any such stock, funds, annuities, or shares; and whenever any such judgment debtor shall have any estate, right, title, or interest, vested or contingent, in possession, remainder, or reversion into or out of any such stock, funds, annuities, or shares as aforesaid, which now are, or shall hereafter be, standing in the name of the [Paymaster-General] or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such judge to make any order as to such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor: (3 & 4 Vict. c. 82, s. 1.)

A charging order may be obtained where the judgment is for payment on some future day: (*Younghusband v. Gisborne*, 1 De G. & S. 209; *Bagnall v. Carlton*, L. Rep. 6 Ch. Div. 130; 36 L. T. Rep. N. S. 730; 47 L. J. 51, Ch.; 26 W. R. 71.) But a charging order for debt and costs cannot be obtained until the amount of the debt has been ascertained, and the costs have been taxed: (*Widgery v. Tepper*, L. Rep. 6 Ch. Div. 364; 37 L. T. Rep. N. S. 297; *Mildmay v. Quicke*, L. Rep. 6 Ch. Div. 553.) The statute only applies to stock standing in the debtor's name in his own right beneficially: (*Re Blakely Ordnance Company*, 46 L. J. 367, Ch.; W. N. 1876, p. 290.)

2. APPLICATION FOR ORDER NISI.

And in order to prevent any person against whom judgment shall have been obtained from transferring, receiving, or disposing of any stock, funds, annuities, or shares . . . authorised to be charged for the benefit of the judgment creditor under an order of a judge . . . every order of a judge charging any Government stock, funds, or annuities, or any stock or shares in any public company under [the] Act, shall be made in the first instance *ex parte*, and without any notice to the judgment debtor, and shall be an order to show cause only: (1 & 2 Vict. c. 110, s. 15.)

The application is usually by petition, though it has sometimes been made by summons: (Dan. 901; Seton, 309.)

The form of order is given in Schedule H. 25 to the Rules of April, 1880.

When an action proceeds in a district registry, all proceedings relating

to . . . charging orders *nisi* shall, unless the court or a judge otherwise order, be taken in the district registry: (O. XXXV., r. 3a, April 1880.)

3. EFFECT OF ORDER *NISI*.

And such orders, if any Government stock, funds, or annuities standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the Governor and Company of the Bank of England from permitting a transfer of such stock in the meantime and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and . . . if after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorised agent of such corporation, and before the same order shall be discharged or made absolute, such corporation or person or persons shall permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and . . . no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor: (1 & 2 Vict. c. 110, s. 15.)

4. MAKING ORDER ABSOLUTE.

Unless the judgment debtor shall, within a time to be mentioned in such order [*nisi*] show to a judge of one of the said superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute. Provided that any such judge shall upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit: (1 & 2 Vict. c. 110, s. 15.)

No order charging stock will be made absolute where the judgment debtor has died before the order *nisi* has been obtained. Where an order *nisi*, charging certain stock standing in the name of a judgment debtor, had been made absolute at chambers, although at the time the order *nisi* had been obtained the judgment debtor was dead, the order was rescinded: (*Finney v. Hinde*, L. Rep. 4 Q. B. Div. 102; 40 L. T. Rep. N. S. 193; 48 L. J. 275, Q. B.; 27 W. R. 413.

The form of order absolute is given in schedule H. 26 to the Rules of April, 1880.

5. EFFECT OF ORDER ABSOLUTE.

Such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charges had been made in his favour by the judgment debtor; provided that no proceedings shall be taken to have the benefit of such charge, until after the expiration of six calendar months from the date of such order: (1 & 2 Vict. c. 110, s. 14.)

Provided always that no order of any judge as to any stock, funds, annuities, or shares standing in the name of the [Paymaster-General] or as to the interest, dividends, or annual produce thereof, shall prevent the Governor and Company of the Bank of England or any public company from permitting any transfer of such stock, funds, annuities,

or shares, or payment of the interest, dividends, or annual produce thereof in such manner as the court . . . may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment creditor with the amount of the sum to be mentioned in any such order: (3 & 4 Vict. c. 82, s. 1.)

The six months proviso in sect. 14 does not prevent the creditor from obtaining a stop order against receipt by the debtor within the six months of dividends on the stock charged: (Seton, 309.) And within this period a judgment creditor may commence an action for protection of his interest in the fund; but payment to the judgment creditor who has obtained a charging order will not be ordered on petition without the debtor's consent: (*Id.*)

A charging order when made absolute operates from the date of the order *nisi*, and can only be defeated by some prior charge showing that it ought not to have been made: (Seton, 310.)

XX. WRIT OF ATTACHMENT.

1. IN WHAT CASES ISSUED.

A writ of attachment may be ordered—

(1) For disobedience to a judgment or order directing payment within a limited time, by a trustee or other person acting in a fiduciary capacity, of any money in his possession or under his control; or by a solicitor of any costs for misconduct as such, or any sum of money as an officer of the court (O. XLII., r. 1; Ch. O., Jan. 1870, r. 7);

(2) For disobedience of a judgment or order directing payment of money into court (O. XLII., r. 2); where such payment into court was directed to be made within a limited time, and it is money payable by a trustee or solicitor as mentioned *sup.* (1) (*Hutchinson v. Hartmont*, W. N. 1877, p. 29);

(3) To enable a person to obtain recovery of any property other than land or money (O. XLII., r. 4);

(4) For disobedience of a judgment [or order] requiring any person to do any act other than the payment of money, or to abstain from doing anything (O. XLII., r. 5; Ch. O., Jan. 1870, r. 6);

(5) For failure by any party to comply with any order to answer interrogatories, or for discovery or inspection of documents (O. XXXI., r. 20);

(6) For neglect, without reasonable excuse, by a solicitor, to give notice to his client of such an order as mentioned *sup.* (5) (O. XXXI., r. 22, for discovery, &c);

(7) For nonpayment of subsequent instalments directed under sect. 5 of the Debtors Act, 1869 (Ch. O., Jan., 1870, r. 18, *post*, XXI., 26).

The Act of 1869 extends to an application under 41 Geo. 3, c. 90, s. 6, to commit for disobedience to a judgment of the High Court of Justice in Ireland: (*Ferguson v. Ferguson*, L. Rep. 10 Ch. App. 661.)

Where an order was made for the oral examination of a judgment debtor, and he, having no means, and receiving no means, to come up, did not come up to be examined, an attachment was refused: (*Protector Building Company v. Whitlam*, 36 L. T. Rep. N. S. 467.)

The money must be shown to have been in the trustee's possession, or under his control (*Middleton v. Chichester*, L. Rep. 6 Ch. App. 152.);

But not his sole possession or control: (*Evans v. Bear*, L. Rep. 10 Ch. App. 76.)

A "person acting in a fiduciary capacity" means a person who stands in a fiduciary relation towards any other person who may be

entitled to call upon him to pay, whether such other person is or is not the plaintiff, or one of the plaintiffs, in the action in which the order for payment has been made: (*Marris v. Ingram*, L. Rep. 13 Ch. Div. 338; 41 L. T. Rep. N. S. 613; 49 L. J. 123, Ch.; 28 W. R. 434.)

An agent who receives bills in order to discount them, and hand the proceeds to the owner, is a person acting in a fiduciary capacity: (*Hutchinson v. Hartmont*, W. N. 1877, p. 29.)

A director who has received gratuitous shares from his company, and been ordered in the winding-up to pay the value of them, is not in a fiduciary capacity: (*Metcalf's case*, L. Rep. 13 Ch. Div. 815; 42 L. T. Rep. N. S. 178; 28 W. R. 435; 49 L. J. 347, Ch.)

As to promoters of companies, see *Phosphate Sewage Company v. Hartmont* (W. N. 1877, p. 167; 25 W. R. 743); creditors receiving money under fraudulent preference, *Ex parte Hooson* (L. Rep. 8 Ch. App. 231).

Where one of a firm of solicitors has misappropriated money, the innocence of the other partner is no defence to a motion for leave to issue an attachment against the two partners: (*Re A. B.*, W. N. 1877, p. 207.)

A solicitor may be attached for default in payment of a balance found due from him upon taxation of his bill of costs under the common order: (*Re Rush*, L. Rep. 9 Eq. 147.)

But he cannot be attached for nonpayment of costs incurred simply as an unsuccessful litigant: (*Re Hope*, L. Rep. 7 Ch. App. 525.)

A man who makes default in payment of a sum of money which he has been ordered by the court to pay, cannot be attached for contempt, but must be proceeded against under the Debtors Act, s. 5: (see *post*, XXI.)

But where a judge made an order for the committal of a defaulting party under the Debtors Act, and the order was drawn up by the registrar in the presence of the debtor in the form of an attachment for contempt, from which the debtor appealed, the court dismissed the appeal and directed the order to be rectified: (*Esdaille v. Visser*, L. Rep. 13 Ch. Div. 421; 41 L. T. Rep. N. S. 745; 28 W. R. 281; *Hewitson v. Sherwin*, L. Rep. 10 Eq. 53; 22 L. T. Rep. N. S. 576.)

When an order alternatively directs an act, or payment of money (although not by a trustee or solicitor), an attachment may be issued for disobedience: (*Harvey v. Hall*, L. Rep. 11 Eq. 31.)

2. MATTERS PRELIMINARY TO APPLICATION.

Every [judgment] or order made in any suit or matter, requiring any person to do an act thereby ordered, shall state the time, or the time after service of the decree or order, within which the act is to be done; and upon the copy of the decree or order which shall be served upon the person required to obey the same, there shall be indorsed a memorandum in the words or to the effect following, viz.: "If you, the within-named A. B., neglect to obey this decree [or order] by the time therein limited, you will be liable to have your estate sequestered for the purpose of compelling you to obey the same decree [or order], and you may also be liable to be arrested and committed to prison: (Ch. O., Jan. 1870, r. 1.)

In case of a peer, M.P., or corporation, the reference to attachment is omitted: (Dan. 907.)

If the judgment or order omits to fix a time, the court will, on motion with notice, fix a time: (Dan. 904.)

A copy of such order must be indorsed and served (*Id.*) personally, the original order or a sealed office copy being at the same time shown: (Dan. 905.)

The copy served must be correct in every particular, even as to the indorsement: (*Re Holt*, L. Rep. 11 Ch. Div. 168.)

Substituted service may be ordered on motion *ex parte* or summons: (*Id.*)

Any judgment or order directing any trustee, person [in a fiduciary capacity], or solicitor, to make any such payment as [above] mentioned, shall state that such payment may be enforced by attachment: (Ch. O., Jan. 1870, r. 9.)

Unless the [judgment] or order contains such statement, no attachment shall be issued for enforcing such payment without leave of the court or the judge in chambers, to be applied for by motion or summons, which application may be granted *ex parte*, upon the court or judge being satisfied that the case comes within the exceptions contained in the 4th section of the Debtors Act, 1869, unless the court or judge thinks fit to require notice of such application to be served: (Ch. O., Jan., 1870, r. 9.)

Service of an order for discovery or inspection made against any party on his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order: (O. XXXI., r. 21.)

3. APPLICATION AND ORDER.

No writ of attachment shall be issued without the leave of the court or a judge, to be applied for on notice to the party against whom the attachment is to be issued: (O. XLIV., r. 2.)

Costs are no longer fixed, but in the court's discretion, and should be applied for on application for the writ: (*Abud v. Riches*, L. Rep. 2 Ch. Div. 528.)

The costs ordered will include those of the attachment, and, if for costs of a solicitor, will be as between solicitor and client: (*Tilney v. Stansfield*, W. N. 1880, p. 77; *Beall v. Smith*, L. Rep. 9 Ch. App. 85.)

Where the party has complied with the court's order after notice of motion, and no order is made on the motion, except that he is to pay the costs, he cannot be committed for nonpayment of such costs: (*Micklethwaite v. Fletcher*, 27 W. R. 793.)

The order cannot be issued on *ex parte* application, even in cases under the former practice: (*Re a Solicitor*, L. Rep. 1 Ch. Div. 445; *Dallas v. Glym*, L. Rep. 3 Ch. Div. 190; 46 L. J. 51; dissenting from *Garling v. Royds*, L. Rep. 1 Ch. Div. 81.)

Service of the notice of motion is sufficient if made on the solicitor on the record (*Browning v. Sabin*, L. Rep. 5 Ch. Div. 511; *Richards v. Kitchen*, W. N. 1877, p. 129; 26 W. R. 602; *Re Davies*, by Fry, J., Feb. 26, 1880), or by leaving the notice at the residence of the party, if the order on which the attachment was founded has been personally served: (C. O. 3, r. 6; *Re Ryan*, 28 W. R. 529; *Re a Solicitor*, L. Rep. 14 Ch. Div. 152; 42 L. T. Rep. N. S. 310.)

As to service when residence unknown, see *Tilney v. Stansfield* (W. N. 1880, p. 77).

The application is by motion, and must be supported by affidavit.

As to what circumstances amount to waiver of the right to apply, see *Harvey v. Hall* (L. Rep. 16 Eq. 324).

Any court or judge making the order for payment [by a trustee or solicitor as mentioned *sup.* 1 (I)] or having jurisdiction in the action or proceeding in which the order for payment is made, and may grant or refuse, either absolutely or upon terms, any writ of attachment: (Debtors Act, 1878, s. 1.)

Per Malins, V.C.. The policy of the Acts of 1869 and 1878 in leaving

a defaulting trustee exposed to imprisonment, is not vindictive, but only to produce payment, and where imprisonment will not produce payment, attachment will not be ordered: (*Barrett v. Hammond*, L. Rep. 10 Ch. Div. 285; 48 L. J. 249, Ch.; 27 W. R. 471.)

Per Jessel, M.R.: The Debtors Act, 1869, while abolishing the penalty of imprisonment for debt in the case of an honest debtor, is intended for the punishment of a fraudulent or dishonest debtor, and is in that sense vindictive: (*Marris v. Ingram*, L. Rep. 13 Ch. Div. 338; 41 L. T. Rep. N. S. 613; 49 L. J. 123, Ch.; 28 W. R. 434.)

4. HOW ISSUED.

(a) *Production of Order*. [See *sup.*, XI., 4 (a).]

(b) *Præcipe*. [See *sup.*, XI., 4 (b).]

Two *præcipes* are required, one of which is left with the Clerk of Entries, and the other of which is marked by him, and filed in the Central Office when the attachment is issued: (Dan. 389; J. A., 1879.)

The form of *præcipe* is given in Appendix E. 9 to the Rules of 1875.

5. DATE AND FORM.

[See *sup.*, XI., 5.]

The form is given in Appendix F. 9 to the Rules of 1875.

6. INDORSEMENT.

[See *sup.*, XI., 6.]

The indorsement on the writ expresses the object of it: (Morg. & Chute 579.)

As to naming return day, see *post*, 10.

7. DELIVERY, EXECUTION, AND EFFECT.

A writ of attachment shall have the same effect as a writ of attachment issued out of the Court of Chancery has heretofore had: (O. XLIV., r. 1.)

8. ARREST.

The writ when sealed is forwarded to the under-sheriff, who executes the same by his officer. If the defendant is already in the sheriff's custody the attachment is lodged with the gaoler: (Ayck. 64.)

The warrant cannot be executed on a Sunday: (*Id.*)

Attachment for nonpayment of money cannot be executed pending bankruptcy proceedings (32 & 33 Vict. c. 71, s. 12; B. Rules, 1870, r. 289), but composition has not the same effect: (*Pashler v. Vincent*, L. Rep. 8 Ch. Div. 825.)

9. BAIL.

The attachment is not bailable: (Ayck. 64.)

10. RETURN OF WRIT.

If the writ is returnable on a given day, the sheriff may after that day be called upon to return it. If returnable immediately he may be called upon to return it on the fifth day after it is lodged with him: (Ayck. 64.)

The sheriff will be ordered, when the time has expired, to make his return to the writ, by order obtainable on motion or petition of course, in case he neglects to return it; and such order being duly served may be followed up by a notice of motion for an order naming a further day for the return, or that he may stand committed, and subsequently he may, if he still neglects, be actually committed: (Jarm. 894; Ayck. 64.)

Since November, 1875, no particular return day has been inserted in writs of attachment (Seton, 1572); but after a reasonable interval, a return may be required: (*Owen v. Pritchard*, W. N. 1876, p. 147.)

The usual returns are:

- (1) That the sheriff has attached the defendant and taken bail;

(2) That he is in prison ;

(3) That he cannot be found : (Morg. & Chute, 579 ; Ayck. 64.)

11. PROCEDURE ON RETURN THAT BAIL HAS BEEN TAKEN.

When the sheriff returns that he has attached the defendant, whose body he has ready, a motion of course should be made for the messenger attending the court to bring the defendant to the bar of the court to answer his contempt : (Jarm. 894 ; Ayck. 65 ; Dan. 909.)

The defendant being brought up, the plaintiff moves that he may be turned over to the prison of the court until the contempt is cleared, which is ordered accordingly, and the messenger hands him to the tipstaff, by whom he is placed in the custody of the keeper of the prison : (Jarm. 895 ; Ayck. 65.)

12. PROCEDURE ON RETURN THAT DEFENDANT IS IN PRISON.

If the sheriff finds the disobedient person, he must send him to prison ; or if he is already there, he must lodge a detainer against him, and make his return to that effect ; and the person prosecuting the judgment or order may leave him there until he has cleared his contempt : (Dan. 909.) The prisoner need not be brought to the bar to be turned over to prison, but if he desires to be brought to the bar touching his contempt, or to be turned over from a country prison to Holloway Prison, a *habeas* is necessary : (Seton, 4th edit., 1574.)

In case such person who shall be taken or detained in custody for an act other than nonpayment of money does not obey the order, a sequestration may be issued : (Ch. O., Jan., 1870, r. 6 ; see *sup.*, XVII.)

13. PROCEDURE ON RETURN OF NON EST INVENTUS (SERJEANT-AT-ARMS).

In case of the return *non est inventus*, to a writ of attachment for disobedience of a judgment or order directing an act other than the payment of money or costs, the person prosecuting the order [is entitled at his option either to a commission of sequestration in the first instance, or otherwise to an order for the serjeant-at-arms and to such other process as he was formerly entitled to upon a return *non est inventus* made by the commissioners named in a Commission of Rebellion issued for the non-performance of a decree or order : (Ch. O., Jan., 1870, r. 6.)

If any order is now necessary for a sequestration it is on motion of course, supported by the production of the attachment with the sheriff's return : (Dan. 910.)

An order for the serjeant-at-arms may be obtained by motion *ex parte*, supported by the production of the attachment and the sheriff's return : (Dan. 910.)

For form of order see Seton, 4th edit., 1572.

After any order for a serjeant-at-arms shall be granted by the court, the registrar shall on request draw up the said order, and deliver the same to the serjeant-at-arms or his deputy, who shall thereupon endeavour to apprehend the party prosecuted and bring him into court to answer his contempt, if he can : (C. O. 30, r. 2.)

If the serjeant-at-arms apprehends the disobedient person he brings him to the bar of the court, and he will be thereupon, on the motion of the person prosecuting the judgment or order, turned over to prison : (Dan. 911.)

For form of order to turn over prisoner, see Seton, 4th edit., 1573.

If the defendant is already in custody, and the serjeant-at-arms lodges a detainer against him, he returns to that effect, and the plaintiff must on motion or petition of course, have the defendant brought up by *habeas corpus*, and, on motion, turned over to the prison of the court.

For form of order for *habeas*, see Seton, 4th edit., 1573.

If the defendant escape from the custody of the serjeant-at-arms, a second order for the serjeant-at-arms must be obtained : (*Morris v. Smith*, 8 Sim. 33.)

If the prisoner cannot answer his contempt, no such order for a serjeant-at-arms shall be discharged, nor the contempt thereupon, without a certificate under the hand of the serjeant-at-arms that his fees have been paid. And after the said order shall have been so drawn up and passed, no private or other agreement shall be made between the party prosecuting the contempt and the person standing in contempt, or on their behalf, for a compromise of the suit or the discharge of the contempt, unless such satisfaction shall be made, and a certificate thereof shall be produced to the court : (C. O. 30, r. 2.)

When a person is committed or brought up by the serjeant-at-arms for breach of a decree or order, he shall not be released until he has performed the decree or order in all things that are to be immediately performed, and given such security as the court shall direct to perform the other parts of the decree or order (if any) at the future days and times thereby appointed : (C. O. 29, r. 4.)

Upon production of the keeper's certificate, a sequestration may be had (Dan. 911), by order of course, if any order is now necessary.

If the serjeant-at-arms cannot find the disobedient person, he returns *non est investus*, on which sequestration may issue : (Dan. 912.)

If any order is necessary it is on motion of course supported by production of the return : (*Id.*)

14. STAYING PROCESS.

Any court or judge making the order for payment [by a trustee or solicitor] as mentioned *sup.* (1), or having jurisdiction in the action or proceeding in which the order for payment is made, may inquire into the case, and grant or refuse, either absolutely or upon terms, . . . any application to stay the operation of any . . . writ of attachment, process, or order : (Debtors Act, 1878, s. 1. See *Barrett v. Hammond*, and *Marris v. Ingram*, cited *sup.* 3.)

15. DISCHARGE FROM CUSTODY.

(a) General Rule.

In the usual form no period is specified as to the prisoner's detention, and an order of court must be obtained for his discharge, even in cases under the Debtors Act, 1869 (trustees' and solicitors' defaults), after the period of one year's imprisonment thereby limited has expired : (Seton, 4th edit., 1569.)

The fact that the debtor has since his imprisonment been adjudicated a bankrupt is no ground for his discharge : (*Earl of Lewis v. Barnett*, L. Rep. 6 Ch. Div. 252.)

The Debtors Act does not apply to Crown debts, and a person making default is not entitled to be discharged : (*Re Smith*, L. Rep. 2 Ex. Div. 47.)

Any court or judge making the order for payment [by a trustee or solicitor as mentioned *sup.*, 1], or having jurisdiction in the action or proceedings in which the order for payment is made, may inquire into the case, and grant or refuse, either absolutely or upon terms . . . any application to discharge from arrest under any . . . writ [of attachment], process, or order, or any application to discharge from imprisonment under such writ, process, or order : (Debtors Act, 1878, s. 1.)

[See cases *sup.*, 3.]

(b) *On Compliance with Order.*

Unless compliance with the order or performance of the act required has been certified by an officer whose certificate is evidence thereof (as the Chancery Paymaster), the application to discharge must be by motion on notice to the person prosecuting the contempt, supported, unless he consents, by affidavit.

In case of committal for marrying a ward of court, the contemnor will not be discharged until the certificate of marriage has been produced, and a settlement approved, but he will not afterwards be kept in prison until the costs have been taxed.

A defendant who has cleared his contempt cannot be detained in prison for nonpayment of the costs of his contempt, but the court in ordering his discharge will make it part of the order that he pay the costs of the contempt, and of the motion to discharge him: (*Jackson v. Mawby*, L. Rep. 1 Ch. Div. 86; *Micklethwaite v. Fletcher*, 27 W. R. 793.)

(c) *For Irregularity of Process.*

Irregularity in the order on which the attachment is grounded, or in the notice of motion for leave to issue the attachment, or in the affidavits in support, or in the issuing of the writ of attachment, are grounds for discharging it and releasing the prisoner from custody: (Seton, 4th edit., 1597.)

Where the copy of the order served differed from the original, the order was discharged: (*Re Holt*, L. Rep. 11 Ch. Div. 168; 40 L. T. Rep. N. S. 207; and see Seton, 4th edit. 1597.)

The application is by motion on notice, supported by affidavit: (Seton, 1597.)

XXI. COMMITTAL.

1. IN WHAT CASES ORDERED.

[The] court may commit to prison for a term not exceeding six weeks, or until payment, any person making default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of the court, or any other competent court, but this jurisdiction . . . shall only be exercised where it is proved to the satisfaction of the court that the person making default either has [at the date of the application to commit], or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same: (Debtors Act, 1869, s. 5.)

A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by . . . committal: (O. XLII., r. 5.)

An order may be made on a married woman: (*Dillon v. Cunningham*, L. Rep. 8 Ex. 23.)

2. ORDER FOR PAYMENT OF DEBT BY INSTALMENTS.

For the purposes of making an order of committal any court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent court to be paid by instalments, and may from time to time rescind or vary such order: (Debtors Act, 1869, s. 5.) The order may be made without proof of means: (*Dillon v. Cunningham*, L. Rep. 8 Ex. Div. 23.)

A form of order is given in schedule H. 45 to the Rules of April, 1880.

Each instalment becomes a separate debt for which committal may be ordered (*Horsnail v. Bruce*, L. Rep. 8 C. P. 378), but a second committal cannot be made in respect of the same debt: (*Evans v. Wills*, L. Rep. 1 C. P. Div. 229.)

Where a composition is agreed to after an order for payment by instalments, and default is made by the debtor in paying the composition, he is remitted to his former position, and may be committed : (*Newell v. Van Praagh*, L. Rep. 9 C. P. 96.)

3. REQUISITES OF JUDGMENT OR ORDER.

(a) *Judgment or Order to limit Time for Payment or Performance.*

Every decree or order made in any suit or matter, requiring any person to do an act thereby ordered, shall state the time, or the time after service of the decree or order, within which the act thereby required to be done is to be done : (Ch. O., Jan., 1870, r. 1.)

(b) *Indorsement.*

Upon the copy of the [judgment] or order which shall be served upon the person required to obey the same, there shall be indorsed a memorandum in the words or to the effect following : " If you, the within-named A. B., neglect to obey the decree [or order] by the time therein limited, you will be liable to have your property sequestered for the purpose of compelling you to obey the same decree [or order], and you may also be liable to be arrested and committed to prison : (Ch. O., Jan., 1870, r. 1.)

4. SERVICE OF JUDGMENT OR ORDER DIRECTING PAYMENT.

A copy, duly indorsed, of the judgment or order directing payment, must be served upon the person required to obey the same : (Ch. O., Jan., 1870, r. 1.)

5. NOTICE OF MOTION.

The notice of motion must be that the person may be committed to prison : (Dan. Ch. Pr. 928, 1534; Ch. O., Jan., 1870, r. 10.)

6. SERVICE OF NOTICE OF MOTION.

The notice of motion must be served personally on the party to be committed, unless an order for substituted service is obtained : (Dan. Ch. Pr. 928, 1535; Ch. O., Jan., 1870, r. 10.)

7. MOTION FOR ORDER OF COMMITTAL.

The application for an order of committal is made by motion, on notice, and the practice on motion to commit for breach of an injunction applies so far as not inconsistent with the Debtors Act, 1869, and the Order of the Court of Chancery of Jan., 1870 : (Ch. O., Jan., 1870, r. 10.)

Fry, J. has held that the order may be made in chambers : (*Burrows v. Burrows*, Seton, 1570.)

8. EVIDENCE.

The evidence, which may be by affidavit (O. XXXVII., r. 2) or in any other manner the court thinks just, must show (1) that the person making default has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default ; (2) that he has refused or neglected to pay the same ; and (3) affidavits must be produced deposing that he has been served with the order or judgment ; (4) that he has been personally served with the notice of motion : (Debtors Act, 1869, s. 5 ; Dan. Ch. Pr. 1535.)

Persons making affidavits are liable to be cross-examined : (see EVIDENCE.)

9. EXAMINATION OF DEBTOR TOUCHING MEANS.

For the purpose of proving means of payment the debtor and any witnesses may be summoned and examined on oath according to the prescribed rules : (Debtors Act, 1869, s. 5.)

It has been prescribed that the court, upon the hearing of the motion, may, if it shall see fit to do so, require the production and oral examination before itself of the person making default, and any persons who have given

evidence against or in support of the application, or of such of them as the court may think fit, in the same manner as such production and oral examination might be required at the hearing of a cause: (Ch. O., Jan., 1870, r. 11.)

Upon the hearing of any cause . . . the court . . . may require the production and oral examination before itself of any witness or party in the cause, and may direct the costs of and attending the production and examination of such witness or party to be paid by such of the parties to the suit, or in such manner as it may think fit: (15 & 16 Vict. c. 86, s. 39; see EVIDENCE.)

A form of the order for examination touching means is given in Schedule H. 44 to the Rules of April, 1880.)

10. DISCRETION AS TO GRANTING ORDER.

[The] court or judge making the order for payment or having jurisdiction in the action or proceeding in which the action is made, may inquire into the case, and grant or refuse, either absolutely or upon terms any . . . process or order of arrest or imprisonment: (Debtors Act, 1878, s. 1; *Ashworth v. Outram*, L. Rep. 5 Ch. Div. 943.)

Where the judge making the order has had the proper materials before him, and is satisfied that the debtor has the means to pay, the Court of Appeal will not interfere with his discretion: (*Esdaile v. Visser*, L. Rep. 13 Ch. Div. 421; 41 L. T. Rep. N. S. 745; 28 W. R. 281.)

11. ADJOURNMENT, REQUIRING FURTHER EVIDENCE, AND DIRECTING INQUIRIES.

The court may adjourn the hearing of the motion, and give leave to adduce further evidence; or direct an inquiry in chambers as to the means of the person making default, or require production and oral examination of such person and others [see 9.]; (Ch. O., Jan., 1870, r. 12.)

In case an inquiry as to means shall be directed, the general course of proceeding and practice at the judge's chambers, as provided by 15 & 16 Vict. c. 86, and the general orders of the Court of Chancery relative thereto shall apply to all proceedings under such inquiry: (Ch. O., Jan., 1870, r. 12; see CHAMBERS.)

12. WHAT ORDER MADE.

The court may grant an order committing the person making default in payment of a debt or instalment of a debt due under an order or judgment of the court, or any other competent court, to the prison in which they would have been confined if arrested on a *ca. sa.*: (Debtors Act, 1869, s. 5.)

The court in making an order for committal to prison may either

(1) Make such imprisonment determinable on payment in respect of which the person to be imprisoned is in default, together with such costs as the court shall think fit; or may

(2) Order the debt to be paid by such instalments as the court shall think fit, and make the imprisonment determinable on payment of such costs, and such of the said instalments as the court shall think fit; and

In either of such cases the court, if it shall think fit, may direct payment of a gross sum in lieu of taxed costs: (Ch. O., Jan. 1870, r. 13.)

13. FORM OF ORDER.

Forms of order are given in Schedules H. 46 and H. 47 to the Rules of April, 1880.

14. ISSUING ORDER.

Every order of committal by any superior court shall, subject to the prescribed rules, be issued in like manner as a writ of *ca. sa.*: (Debtors Act, 1869, s. 5.)

15. INDORSEMENT ON COPY FOR SHERIFF, &C.

Every office copy delivered to a sheriff or other officer for execution shall be indorsed by the clerks of records and writs with the direction of the sheriff or other officer by whom the same is to be executed: (Ch. O., Jan., 1870, r. 15.)

16. DELIVERY TO SHERIFF, &C.

An office copy of the order of committal, with the proper indorsement, shall be delivered to the sheriff or other officer required to execute the same: (Ch. O., Jan., 1870, r. 15.)

17. CONCURRENT DELIVERY OF COPIES TO SHERIFFS.

Office copies, each of which must have the proper indorsement [see *sup.* 15], may be delivered concurrently to different sheriffs for execution in different counties: (Ch. O., Jan., 1870, r. 15.)

18. STAYING OPERATION OF ORDER.

Any court or judge making the order for payment, or having jurisdiction in the action or proceedings in which the order for payment is made, may inquire into the case, and grant or refuse, either absolutely or upon terms, any application to stay the operation of any order of committal: (Debtors Act, 1878, s. 1.)

19. EXECUTION OF ORDER.

Every order of committal shall be obeyed and executed in the like manner as a writ of *ca. sa.*: (Debtors Act, 1870, s. 5.)

As to the time within which the order may be executed, see and compare *Hermitage v. Kilpin*, L. Rep. 9 Ex. 205, and O. XLII., r. 18 (*sup.*, XI., 3), and O. XLII., r. 16 (*sup.*, XI., 7).

20. INDORSEMENT AND RETURN BY SHERIFF, &C.

The sheriff or other officer to whom an order of committal is directed, shall, within two days after the arrest, indorse upon the office copy of the order delivered to him the true date of such arrest, and return the same so indorsed to the solicitor of the person prosecuting the decree or order, or to such person himself, if he acts in person: (Ch. O., Jan., 1870, r. 16.)

21. DISCHARGE FROM ARREST.

Any court or judge making the order for payment, or having jurisdiction in the action or proceeding in which the order for payment is made, may inquire into the case, and grant or refuse, either absolutely or upon terms . . . any application . . . for discharge from arrest: (Debtors Act, 1878, s. 1.)

22. COMMITTAL TO PRISON.

The person arrested may be committed to the prison in which he would have been confined if arrested on a writ of *ca. sa.*: (Debtors' Act, 1869, s. 5.)

23. FEES TO SHERIFF, &C.

The sheriff and officer shall be entitled to the same fees in respect of an order of committal as [were formerly] payable upon a writ of *ca. sa.* issued out of one of Her Majesty's Courts of Common Law: (Ch. O., Jan. 1870, r. 15.)

24. EFFECT OF PROCEEDINGS.

No application to commit, or any order made thereon, shall in any manner vary or suspend any of the remedies which the person prosecuting the decree or order which has been disobeyed, would, if no such application had been made, have been entitled to against the property of the person disobeying the same decree or order, but the person prosecuting such

decree or order may proceed to avail himself of such remedies without any regard to such application, or to any order made thereon, except so far as by consent, he may by such last-mentioned order, be expressly restrained from availing himself of such remedies: (Ch. O., Jan., 1870, r. 14.)

No imprisonment under an order of committal shall operate as a satisfaction or extinguishment of any debt or demand or cause of action, or deprive any person of any right to take out execution against the lands, goods, or chattels of the person imprisoned. in the same manner as if such imprisonment had not taken place: (Debtors Act, 1869, s. 5.)

25. DISCHARGE FROM IMPRISONMENT.

(a) Upon payment.

Any person imprisoned [for default in payment of a sum or instalment ordered to be paid] shall be discharged out of custody upon a certificate signed in the prescribed manner to the effect that he has satisfied the debt or instalment of the debt in respect of which he was imprisoned, together with the prescribed costs (if any): (Debtors Act, 1869, s. 5.)

Upon payment of the sum or sums in that behalf mentioned in the order of committal, including the sheriff's fees [see *sup.* 23] and the costs or gross sum in lieu of costs made payable by the order, the person committed shall be entitled to a certificate in the form B. in the schedule to the Order of the Court of Chancery of Jan., 1870, or to the like effect, signed by the solicitor of the person prosecuting the decree or order which has been disobeyed, or if such person be acting in person, then signed by him, and attested by a solicitor or justice of the peace: (Ch. O., Jan., 1870, r. 17.)

(b) By order.

Any court or judge making the order for payment, or having jurisdiction in the action or proceedings in which the order for payment is made, may inquire into the case, and grant or refuse, either absolutely or upon terms, any application for discharging from imprisonment thereunder: (Debtors Act, 1878, s. 1.)

[See cases, *sup.*, XX., 3.]

26. DEFAULT IN PAYMENT OF SUBSEQUENT INSTALMENTS.

In case any order is made for payment of a sum of money by instalments, and the person imprisoned, after his discharge from prison, neglects or refuses to pay the subsequent instalments, or any of them, the person prosecuting the decree or order for disobedience to which the committal was ordered shall, in addition to his remedies against the property of the person making default, be entitled to enforce payment of such subsequent instalments by attachment, as in the case of disobedience to an order directing the performance of some act other than payment of money [see ARREST]: (Ch. O., Jan., 1870, r. 18.)

See form of order, Sched. H. 47 to Rules of April, 1880.

27. COSTS AND FEES OF COURT.

The charges to be allowed to solicitors for duties performed in respect of the proceedings, and the fees of court in respect of the same proceedings, shall be the same as those allowable and payable in respect of other proceedings of the same nature in the causes or matters in which such proceedings respectively are taken: (Ch. O., Jan., 1870, r. 20.)

XXII. WRIT OF POSSESSION.

1. IN WHAT CASES ISSUED.

A judgment for the recovery, or for the delivery of the possession of land may be enforced by writ of possession: (O. XLII., r. 3.)

2. HOW ISSUED.

(a) *Recovery of Possession under Judgment therefor.*

A judgment that a party do recover possession of any land may be enforced by writ of possession in manner heretofore used in actions of ejectment in the superior courts of common law : (O. XLVIII., r. 1.)

The plaintiff having judgment may, if he can do so without force, enter without suing forth a writ of possession : (Ch. Arch. 852.)

There may be either one writ or separate writs for the recovery of possession, and for the costs at the claimant's election ; (C. L. P. A. 1852, s. 187.)

After the writ is issued, it is left at the sheriff's office, and a warrant obtained on it, which is given to the officer for execution : (Ch. Arch. 850.)

If there are several tenements in the possession of several, the officer must give separate possession of each : (Ch. Arch. 851.)

If the writ is not executed or only partly executed upon the return, an *alias* writ may be issued : (*Id.*)

If possession be once completely given under the writ, the plaintiff cannot sue out another writ of possession, although he is disturbed in his possession by the same defendant, although the sheriff has not returned the writ : (Ch. Arch. 851.)

(b) *Delivery of Possession when Directed.*

Where by any judgment any person therein named is directed to deliver up possession of any lands to some other person, the person prosecuting such judgment shall, without any order for that purpose, be entitled to sue out a writ of possession on filing an affidavit showing due service of such judgment and that the same has not been obeyed : (O. XLVIII., r. 2.)

3. PRÆCIPE.

A form of *præcipe* is given in Appendix E. 7 to the Rules of 1875.

4. FORM OF WRIT.

A form of writ is given in Appendix F. 7 to the Rules of 1875.

XXIII. WRIT OF ASSISTANCE.

Upon due service of a decree or order for delivery of possession, the person prosecuting the same shall be entitled to an order for a writ of assistance : (C. O. 29, r. 5.)

Since the Judicature Acts, the writ of possession has been superseded by the writ of possession : (Seton, 1664 ; *Hall v. Hall*, 47 L. J. 680, Ch.)

As to the practice, see Morg. & Chute, 5th edit. 589 ; Ayck. 247 ; C. O. 1, r. 37.)

XXIV. WRIT OF DELIVERY.

1. IN WHAT CASE ISSUED.

A judgment for the recovery of any property other than land or money may be enforced :

By writ for delivery of the property : (O. XLII., r. 4.)

It is doubtful whether an order for the writ is necessary : (*Ivory v. Cruikshank*, W. N., 1875, p. 249.)

2. HOW ISSUED.

A writ for delivery of any property other than land or money may be issued . . . in the manner heretofore in use in actions of detinue in the Superior Courts of Common Law : (O. XLIX.)

3. PRÆCIPE.

A form of *præcipe* is given in Appendix E. 8 to the Rules of 1875.

4. FORM OF WRIT.

A form is given in Appendix F. 8 to the Rules of 1875. See also Schedule F. 11 to the Rules of April, 1876.

5. HOW ENFORCED.

A writ for delivery . . . may be . . . enforced in the manner heretofore in use in actions of detinue in the Superior Courts of Common Law : (O. XLIX.)

The court or a judge [has] power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed, and that if the said chattel cannot be found, and unless the court or a judge should otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick, till the defendant render such chattel, or, at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel ; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interests in such action : (C. L. P. A., 1854, s. 78.)

The judgment does not change the property in the chattel until satisfaction of the value found by the judgment : (*Ex parte Drake*, L. Rep. 5 Ch. Div. 866.)

EXECUTOR.

Claims by or against executors, as such, may in certain cases be joined with personal claims : (see O. XVII., r. 5 ; WRIT OF SUMMONS.)

They may sue and be sued without beneficiaries being joined : (See ADMINISTRATION ACTION ; PARTIES.)

Denial of their right to claim in a representative character must be specific : (see O. XIX., r. 11 ; PLEADING.)

As to paying moneys in under the Trustee Relief Act, or summarily obtaining a judge's advice, see TRUSTEES.

And see, generally, *sup.* pp. 18-45 ; COSTS ; PARTIES.

EXHIBIT.

[See EVIDENCE.]

EX PARTE APPLICATION.

Except where by the practice existing at the time of the passing of the said Act any order or rule has heretofore been made *ex parte* absolute in the first instance, and except where by these rules it is otherwise provided, and except where the motion is for a rule to show cause only, no motion shall be made without previous notice to the parties affected thereby. But the court or judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order *ex parte* upon such terms as to costs or

otherwise, and subject to such undertaking, if any, as the court or judge may think just; and any party affected by such order may move to set it aside: (O. LIII., r. 3. And see APPEAL; MOTION.)

EXPERIMENT.

[See PROPERTY.]

EXPERT.

It shall be lawful for the . . . court, or any judge thereof, in such way as they may think fit, to obtain the assistance of accountants, merchants, engineers, actuaries, or other scientific persons, the better to enable such court or judge to determine any matter at issue in any cause or proceeding, and to act upon the certificate of such persons: (15 & 16 Vict. c. 80, s. 42; and see ACCOUNT, VI.)

The allowances in respect of fees to such . . . accountants, merchants, engineers, actuaries, and other scientific persons, shall be regulated by the taxing master . . . subject to an appeal to the judge to whose court the cause or matter shall be attached, whose decision shall be final: (15 & 16 Vict. c. 80, s. 43.)

EXTENSION OF TIME.

[See TIME.]

FEEES.

- I. INTERPRETATION CLAUSE.
 - II. ABOLITION OF FORMER FEES.
 1. GENERALLY.
 2. EXCEPTIONS.
 - (a) *Fees Payable to Sheriffs.*
 - (b) *Fees under Acts of Parliament.*
 - (c) *Paupers.*
 - III. WHAT FEES TO BE PAID.
 - IV. HOW FEES PAID.
 - V. SCALES OF FEES.
 1. LOWER SCALE.
 2. HIGHER SCALE.
 3. PAYMENT ON IMPROPER SCALE.
 - VI. DEPOSIT FOR PROBABLE FEES.
 - VII. SCHEDULE OF FEES AND STAMPS (ALPHABETICALLY ARRANGED).
-

I. INTERPRETATION CLAUSE.

The provisions of Order LXIII. in the first Schedule to the Supreme

Court of Judicature Act, 1875, shall apply to this order: (O. 28th Oct. 1875, r. 8.)

As to the meaning of the word "folio," see FOLIO.

II. ABOLITION OF FORMER FEES.

1. GENERALLY.

Save as otherwise provided by [the] Order, all former fees, and percentages which [might] be taken in any of the courts whose jurisdiction is, by the Judicature Acts, 1873 and 1875, transferred to the High Court of Justice or Court of Appeal, or in any office which is connected with any of those courts, or in which any business connected with any of those courts is conducted, or by any officer paid wholly or partly out of public moneys who is attached to any of those courts, or the Supreme Court, or any judge of those courts, or any of them . . . are . . . abolished: (O. 28th Oct. 1875, r. 6.)

2. EXCEPTIONS.

(a) Fees to Sheriffs.

The . . . fees and percentages authorised to be taken by any sheriffs, under-sheriffs, deputy-sheriffs, bailiffs, or other officers or ministers of sheriffs [before the passing of the Judicature Acts are not affected]: (O. 28th Oct. 1875, r. 4.)

The fees for the performance of official duties to be taken by sheriffs and their officers are sanctioned by an order of the 20th Dec. 1837, made pursuant to 1 Viet. c. 55. The table of fees is given in Baxter's Practice, 4th ed. App. clxxxix.

As to fees payable on a view, the following provision has been made: (R. G. H. T. 1853, r. 49.)

Upon any application for a view there shall be an affidavit stating the place at which the view is to be made, and the distance thereof from the office of the under sheriff, and the sum to be deposited in the hand of the under sheriff shall be 10*l.* in case of a common jury, and 16*l.* in case of a special jury, if such distance do not exceed five miles, and 15*l.* in case of a common jury, and 21*l.* in case of a special jury if it be above five miles. And if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the [solicitor] of the party who obtained the view; and if such sum shall not be sufficient to pay such expenses the deficiency shall forthwith be paid by such [solicitor] to the under-sheriff; and the under-sheriff shall pay and account for the money so deposited according to the scale following—that is to say:

£ s. d.

For travelling expenses to the under-sheriff, showers, and jurymen, expenses actually paid, if reasonable.

Fee to the under-sheriff, when the distance does not exceed five miles from his office 1 1 0

Where such distance exceeds five miles 2 2 0

And in case he shall be necessarily absent more than one day, then for each day after the first a further fee of 1 1 0

Fee to each of the showers the same as the under-sheriff, calculating the distance from their respective places of abode.

Fee to each common jurymen, *per diem* 0 5 0

For each special jurymen, *per diem* 1 1 0

Allowance for refreshment to the under-sheriff, showers, and jurymen, whether common, or special, each *per diem* 0 5 0

To the bailiff for summoning each jurymen whose residence is not more than five miles distant from the office of the under-sheriff 0 2 6

And to each whose residence does exceed five miles of such distance 0 5 0

(b) *Fees under Acts of Parliament.*

The . . . fees and percentages directed to be taken or paid by any Act of Parliament, and in respect of which no fee or percentage is . . . provided [by the Order are not affected]: (O., Oct. 28th, 1875, r. 4.)

(c) *Paupers.*

The former practice applies: (see PAUPERS.)

III. WHAT FEES TO BE PAID.

The fees and percentages contained in the schedule hereto are fixed and appointed to be, and shall be taken in the High Court of Justice, and in the Court of Appeal, and in any court to be created by any commission, and in any office which is connected with any of those courts, or in which any business connected with any of those courts is conducted, and by any officer paid wholly or partly out of public moneys who is attached to any of those courts or the Supreme Court, or any judge of those courts, or any of them: (O. 28th Oct., 1875, r. 1.)

The first two columns on the left hand of the schedule given *post*, VII. comprise the schedule above mentioned. The other columns comprise the schedule to the rules of April, 1876: (see *post*, IV.)

IV. HOW FEES PAID.

The . . . fees and percentages shall be taken by stamps: (O. 28th Oct., 1875, r. 1.)

[Except at Manchester and Liverpool] fees and percentages . . . taken in the district registries . . . shall, until further order, be taken in money: (*Id.*)

All the fees and percentages contained in the schedule . . . , which are taken in the district registries at Liverpool and Manchester respectively of the High Court of Justice, shall be taken in stamps: (O., 24th Oct., 1877, r. 2.)

Any document which ought to bear a stamp in pursuance of this Act, or any rule or order made thereunder, shall not be received, filed, used, or admitted in evidence unless and until it is properly stamped, within the time prescribed by the rules under this section regulating the use of stamps; but if any such document is through mistake or inadvertence received, filed, or used without being properly stamped, the Lord Chancellor or the court may, if he or it shall think fit, order that the same be stamped as in such order may be directed: (J. A., 1875, s. 26, sub-s. 4.)

The stamps used for denoting . . . fees and percentages shall be of the character, and be applied and dealt with, as prescribed by the schedule [to the order of the 22nd of April, 1876]: (O. XXII., April, 1876, r. 1.)

This schedule gives in the same order the proceedings detailed in the schedule to the order as to court fees of the 28th Oct., 1875.

In the schedule given (*post*, VII.) the two schedules are consolidated, the first two columns to the left hand being taken from the order of 1875, and the other columns from the order of 1876.

In any case in which the use of impressed stamps is prescribed, paper or parchment on which the document requiring a stamp is to be written, may be stamped at the Inland Revenue Office, notwithstanding that stamped forms are also supplied by the Commissioners of Inland Revenue.

The cancellation shall be effected in such manner as the Commissioners of Inland Revenue shall from time to time direct: (General Directions to O. XXII., April, 1876.)

V. SCALE OF FEES.

1. LOWER SCALE.

The fees and percentages set forth in the column headed Lower Scale in the Schedule hereto are to be taken and paid in all cases in which the lower scale of fees is to be charged and allowed to solicitors under the provisions of the Additional Rules of Court under the Supreme Court of Judicature Act, 1875, issued by Order in Council, dated the 12th Aug. 1875 : (O. 28th Oct. 1875, r. 2; see COSTS.)

In causes and matters by the 34th section of the Supreme Court of Judicature Act, 1873, assigned to the Chancery Division [as to which, see ACTION], the solicitor or party acting in person shall, on any proceeding in which he claims to pay fees according to the lower scale, file with the proper officer a certificate in the form hereunder set forth, of which certificate the officer is, at the request of any solicitor or any party acting in person in the cause or matter, to mark a copy without a fee : (O. 28th Oct. 1875, r. 3.)

The following is the form :—

(Title of Cause or Matter.)

I hereby certify that to the best of my judgment and belief the lower scale of fees of court is applicable to this case.

Dated, &c.

A. B.

Solicitor for plaintiff or defendant.

On production of such copy of the certificate all officers of the court are to receive and file all proceedings in the cause or matter bearing stamps according to the lower scale : (*Id.*)

2. HIGHER SCALE.

The fees and percentages set forth in the column headed Higher Scale in the schedule hereto are to be taken and paid in all other cases [than those in which the lower scale of fees is allowed to solicitors] : (O. 28th Oct. 1875, r. 2; see COSTS.)

3. PAYMENT ON IMPROPER SCALE.

In any case certified for the lower scale of court fees, in which it shall happen that the solicitor shall become entitled to charge and be allowed according to the higher scale of solicitors' fees, the deficiency in the fees of court is to be made good : (O. 28th Oct. 1875, r. 3.)

In any case in which the fees have been paid upon the higher scale, and in which it shall happen that the solicitor shall become entitled to charge and be allowed only according to the lower scale of solicitors' fees, the excess of fees so paid may be allowed upon the taxation of costs, if the circumstances of the case shall, in the judgment of the taxing officer, justify such allowance : (*Id.*)

VI. DEPOSIT FOR PROBABLE FEES.

In any case in which a deposit on account of probable fees and expenses is required, the following regulation shall be observed :

(a) The party, or his solicitor, from whom under any order as to court fees, a deposit may be required, shall, before the cause or matter be proceeded with, present for the signature of the officer of the court requiring the deposit, a certificate, duly stamped, for the amount of such deposit.

Forms of certificates provided by the Commissioners of Inland Revenue may be obtained at the Inland Revenue Office, Somerset House, or at such other places as the commissioners may appoint.

(b) When the fees and expenses are ascertained, the said officer of the court shall endorse upon the said certificate the amount thereof.

(c) If the amount is in excess of the deposit, the certificate, bearing an additional stamp equal to the excess, must be produced to the said officer before he delivers his judgment or award, or gives his decision in the matter or cause.

(d) If the amount of the fees and expenses is less than the deposit, the holder of the certificate may obtain repayment of the difference upon presenting the certificate so endorsed at the Inland Revenue Office, Somerset House: (O., 22nd April, 1876, r. 3.)

VII. SCHEDULE OF FEES AND STAMPS (Alphabetically arranged).

Accounts—

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
On taking an account of a receiver, guardian, consignee, bailee, manager, provisional, official, or voluntary liquidator, or sequestrator, or of an executor, administrator, trustee, agent, solicitor, mortgagee, co-tenant, co-partner, execution creditor, or other person liable to account, when the amount found to have been received without deducting any payment shall not exceed 200 <i>l.</i>	0	2	0	0	2	0
Where such amount shall exceed 200 <i>l.</i> for every 50 <i>l.</i> or fraction of 50 <i>l.</i>	0	0	6	0	0	6

Where the same persons are both trustees and executors, the percentage must be paid both on the gross receipts of the trustees and the gross receipts of the executors: (*Armitage v. Elworthy*, L. Rep. 13 Ch. Div. 91; 41 L. T. Rep. N. S. 608; 28 W. R. 283.)

In the case of any such receiver, guardian, consignee, bailee, manager, liquidator, sequestrator, or execution creditor, the fees shall, upon payment, be allowed in the account unless the court or judge shall otherwise direct, and in the case of taking the accounts of such other accounting parties the fees shall be paid by the party having the conduct of the order under which such account is taken as part of his costs of the cause or matter (unless the court or judge shall otherwise direct), and in such case shall be taken upon the certificate of the result of any such account; but the fees shall be due and payable, although no certificate is required, on the account taken, or on such part thereof as may be taken, and the solicitor or party suing in person shall in such case cause the proper stamps (the amount thereof to be fixed by the officer) to be impressed on or affixed to the account.

The officer taking the account may require a deposit of stamps on account of fees before taking the account, not exceeding the fees on the full amount appearing by the account to have been received, and the officer or his clerk taking such deposit shall make a memorandum thereof on the account.

The fees payable under this heading when taken on the accounts to be denoted by means of adhesive stamps affixed to the accounts or by impressed stamps on paper to be left at the office, but when taken on a certificate they may be denoted either by impressed or adhesive stamps: (Sched., O., 22nd April, 1876.)

Acknowledgment, see *post*, *Miscellaneous*.

Admission of solicitor, see *post*, *Miscellaneous*.

Advertisement, see *post*, *Miscellaneous*.

Affidavit, see *post*, *Oath*.

Appeal, see *post*, *Hearing*.

Appearance—

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
On entering an appearance, for each person ...	0	2	0	0	2	0

The fee payable on entering an appearance to be denoted by an impressed stamp on the form of memorandum as prescribed by the appendix to the Supreme Court of Judicature Act, 1875, and where the appearance of more than one person is entered by the same memorandum, the fees for all persons beyond the first to be denoted by means of impressed or adhesive stamps.

Forms of memorandum of appearance with the impressed stamp for one or more defendants will be sold at the Inland Revenue Office and by law stationers.

For certificate of appearance, see *post*, *Certificate*.

See also *post*, *Searches and Inspections*.

Attendances—

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
On an application, with or without a subpoena, for any officer to attend as a witness, or to produce any record or document to be given in evidence (in addition to the reasonable expenses of the officer) for each day or part of a day he shall necessarily be absent from his office ...	1	0	0	1	0	0

The officer may require a deposit of stamps, on account of any further fees, and a deposit of money on account of any further expenses which may probably become payable beyond the amount paid for fees and expenses on the application, and the officer or his clerk taking such deposit shall thereupon make a memorandum thereof on application.

The officer may also require an undertaking in writing to pay any further fees and expenses which may become payable beyond the amounts so paid and deposited.

The fees payable under this heading to be denoted either by an impressed or adhesive stamp on the subpoena, notice, or other document requiring the attendance of the officer,

If the officer's attendance be required beyond one day, the additional fee *per diem* after the first to be taken by means of a *præcipe* with the impressed stamp, filed in the department from which the officer is summoned.

Award, see *post*, *Filing*.

Bail, see *post*, *Filing*; *Miscellaneous*.

Bond, see *post*, *Miscellaneous*.

Bill of Sale, see *post*, *Filing*.

Caveat, see *post*, *Filing*.

Certificates—

	Fees payable.		Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
	Lower Scale. £ s. d.	Higher Scale. £ s. d.			
For a certificate of appearance, or of a pleading, affidavit, or proceeding having been entered, filed, or taken, or of the negative thereof	0 1 0	0 4 0	Certificate	Impressed or adhesive	Forms of certificate with the impressed stamp, will be sold at the Inland Revenue Office and by law stationers.

[And see *post*, *Hearing*, *Register of Judgment*, &c., *Taxation of Costs*.]

Commission—

	Fees payable.		Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
	Lower Scale. £ s. d.	Higher Scale. £ s. d.			
On sealing or issuing a commission to take oaths or affidavits in the Supreme Court	5 0 0	5 0 0	Commission	Impressed	Forms of commission with the impressed stamp will be sold at the Inland Revenue Office.
Every other commission	1 0 0	1 0 0	Commission	Impressed	The commission to be written on impressed paper, or the document to be produced at the Inland Revenue to be stamped.

Commitment, see *post*, *Miscellaneous*.

Copies—

	Fees payable.		Document to be Stamped.	Character of Stamp to be used.
	Lower Scale. £ s. d.	Higher Scale. £ s. d.		
For a copy of a written deposition of a witness to enable a party to print the same, for each folio	0 0 4	0 0 4	Copy	Impressed or adhesive.
For examining a written or printed copy, and marking same as an office copy, for each folio	0 0 2	0 0 2		
For making a copy and marking same as an office copy, for each folio	0 0 6	0 0 6		
For a copy in a foreign language, the actual cost				
For a copy of a plan, map, section, drawing, photograph, or diagram, the actual cost			<i>Præcipe</i> or copy	
For a printed copy of an order not being an office or certified copy, for each folio	0 0 1	0 0 1	Copy	

Decree, see *post*, *Judgments*, &c.

Decretal order, see *post*, *Judgments*, &c.

Demurrer, see *post*, *Hearing*.

Drawing up Judgment, &c., see *post*, *Judgments*, &c.

Entering for Hearing, see *post*, *Hearing*.

Entering judgment, &c., see *post*, *Judgments*, &c.

Evidence, see *sup.*, *Attendances*, *Copies*; *post*, *Examination of Witnesses*; *Oath*.

Examination of Witnesses—

	Lower Scale. £ s. d.	Higher Scale. £ s. d.
For every witness sworn and examined by an examiner or other officer in his office, including oath, for each hour ...	0 10 0	0 10 0
For an examination of witnesses by any such officer away from the office (in addition to reasonable travelling and other expenses), per day ...	3 0 0	3 0 0
The officer may require a deposit of stamps on account of fees and a deposit of money on account of expenses which may probably become payable beyond any amount paid for fees and expenses upon the examination, and the officer, or his clerk taking such deposit shall thereupon make a memorandum thereof and deliver the same to the party making the deposit.		
The officer may also require an undertaking in writing to pay any further fees and expenses which may become payable beyond the amount so paid and deposited.		
These fees are not to apply to the examination of witnesses for the purpose of any inquiry, taxation of costs, or other proceeding before the officer.		

The fees under this heading may still be denoted by means of adhesive stamps, which may be affixed either to the deposition or to the order or application paper for examination: (Sched. O., 22nd April, 1876.)

As to attendances on application when officer is to attend as a witness or to produce records, see *sup.*, *Attendances*.

Fiat, see *post*, *Miscellaneous*.

Filing—

	Fees payable.		Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
	Lower Scale. £ s. d.	Higher Scale. £ s. d.			
On filing a special case or petition of right	0 10 0	1 0 0	Special case, petition of right, or <i>præcipe</i>	Impressed	When practicable, stamp to be on special case or petition of right, and in other cases on <i>præcipe</i> filed.
On filing an affidavit with exhibits (if any) annexed, submission to arbitration, award, bill of sale, warrant of attorney, cognovit, bail, satisfaction piece, and writ of execution with return.	0 2 0	0 2 0	Document filed	Impressed or adhesive	
On filing a scheme pursuant to the statute of 30 & 31 Vict. c. 127, or the Liquidation Act, 1868	1 0 0	1 0 0	Scheme	Impressed	
On filing a caveat	0 5 0	0 5 0	Caveat	Impressed	

As to certificate of filing, see *sup.*, *Certificate*; see also *post*, *Register of Judgment*, &c.

Hearing—

	Fees payable.		Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
	Lower Scale. £ s. d.	Higher Scale. £ s. d.			
For entering or setting down, or re-entering or resetting down, an appeal to the Court of Appeal, or a cause for trial or hearing in any court in London or Middlesex, or at any assizes, including a demurrer, special case, and petition of right, but not any other petition, nor a summons adjourned from chambers.	1 0 0	2 0 0	In the Registry Office, Chancery Division, on forms provided for the purpose. At offices of Associates on copy of pleadings At all other offices of the High Court or Court of Appeal on <i>præcipe</i>	Impressed Impressed or adhesive Impressed	Forms with the impressed stamp, will be sold at the Inland Revenue, and at the Registrar's Office, Chancery Division.
For certificate of an associate of the result of trial.	1 0 0	1 0 0	Certificate	Impressed or adhesive	

Inspection, see post, Searches and Inspections.

Judge's Notes, see post, Miscellaneous.

Judgments, &c.—

	Fees payable.		Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
	Lower Scale. £ s. d.	Higher Scale. £ s. d.			
For drawing up and entering a judgment, or decree or decretal order, whether on the original hearing of a cause or on further consideration, including a cause commenced by summons at chambers, and an order on the hearing of a special case or petition, and any order by the Court of Appeal	0 10 0	1 0 0	Judgment or order	Stamp to be impressed or adhesive on the judgment or order, except at the Crown Office, where, as far as practicable a <i>præcipe</i> , with the impressed stamp, should be used	
For drawing up and entering any other order, whether made in court or at chambers	0 3 0	0 5 0	Order	Impressed or adhesive	
For copy of a plan, map, section, drawing, photograph, or diagram required to accompany any order, the actual cost			Copy	Impressed or adhesive	Where an adhesive stamp would damage the copy, a <i>præcipe</i> with the impressed stamp, should be used

[And see *post, Register of Judgments, &c.*]

Lis Pendens, see *post*, *Register of Judgments, &c.*

Mandamus—

	Fees payable.		Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
	Lower Scale. £ s. d.	Higher Scale. £ s. d.			
On sealing a writ of <i>mandamus</i>	0 10 0	1 0 0	<i>Præcipe</i> left at time of issuing writ.	Impressed	<i>Præcipes</i> with the impressed stamp will be sold at the Inland Revenue Office and by law stationers.

Miscellaneous—

	Fees payable.		Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations,
	Lower Scale. £ s. d.	Higher Scale. £ s. d.			
On a report of a private Bill in Parliament	5 0 0	5 0 0	Report	Impressed	Forms with the impressed stamp will be sold at the Inland Revenue Office.
On an allowance of bye-laws or table of fees	1 0 0	1 0 0	Allowance	Impressed	
On a fiat of a judge	0 5 0	0 5 0	Fiat	Impressed or adhesive	
On signing an advertisement	1 0 0	1 0 0	Advertisement	Impressed	
Upon a reference to a master of the Queen's Bench, Common Pleas, or Exchequer Divisions, or a district registrar, for the purpose of any investigation or inquiry, other than the taking of an account for which another fee is herein provided, for every hour or part of an hour the master or registrar is occupied	0 10 0	0 10 0	Certificate or other document used in giving the decision	Impressed or adhesive	
A deposit on account of fees before proceeding with such reference, or at any time during the course thereof, may be required, and a memorandum thereof shall be delivered to the party making the deposit					
On taking acknowledgment of a deed by a married woman	1 0 0	1 0 0	Acknowledgment	Impressed	
On taking a recognisance or bond	0 10 0	0 10 0	Recognisance	Impressed or adhesive	
On taking bail, and taking same off the file and delivering	0 2 0	0 2 0			
On a commitment	0 5 0	0 5 0	Commitment		
On an application to produce judges' notes	0 5 0	0 5 0	Application	Impressed	
On appointment of commissioners under glebe exchange	1 0 0	1 0 0	Appointment		

Miscellaneous—continued.

	Fees payable.		Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
	Lower Scale. £ s. d.	Higher Scale. £ s. d.			
On examining and signing enrolments of decrees and orders.	3 0 0	3 0 0	Inrolment	Impressed or adhesive	Forms of admission with the impressed stamp will be sold at the Inland Revenue Office.
On admission or re-admission of a solicitor	5 0 0	5 0 0	Admission	Impressed	
On a written request for information at the Chancery Pay Office	0 2 6	0 2 6	<i>Præcipe</i>	Impressed	
For preparing a power of attorney at the Chancery Pay Office	0 3 0	0 3 0	Power		
For transcript of an account in the books at the Chancery Pay Office, for each opening	0 2 0	0 2 0	Transcript	Impressed or adhesive	
Any other proceeding, pleading, or document not hereinbefore specified			Document or <i>præcipe</i>	Impressed or adhesive	These are to be impressed if practicable where not filed in the office.

Notices—

	Lower Scale. £ s. d.	Higher Scale. £ s. d.
For a notice as to stock under O. XLVI. r. 4 (Rule 23 of the Rules of the Supreme Court, April, 1880)	0 10 0	0 10 0

[See CHARGING STOCK.]

The last item is under the Order of 6th Aug., 1880.
See also *post*, *Third Party Notice*.

Oaths—

	Fees payable.		Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
	Lower Scale. £ s. d.	Higher Scale. £ s. d.			
For taking an affidavit or an affirmation or attestation upon honour in lieu of an affidavit or a declaration, except for the purpose of receipt of dividends from the Paymaster-General, for each person making the same	0 1 6	0 1 6	Affidavit or other document answering thereto	Impressed or adhesive	
And in addition thereto, for each exhibit therein referred to and required to be marked, whether annexed or not	0 1 0	0 1 0	Stamp to be impressed or adhesive on exhibit if practicable, but if not to be impressed on <i>præcipe</i> filed.		

Order, see *sup.*, *Judgment*, &c. ; *post*, *Petition*.
Payment in and out, see *sup.*, *Miscellaneous*.

Petition—

	Fees payable.		Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
	Lower Scale. £ s. d.	Higher Scale. £ s. d.			
For answering a petition for hearing in court, and setting down	0 5 0	1 0 0	Petition	Impressed or adhesive.	
For answering a non-attendable petition, not being a petition for an order of course	0 5 0	0 10 0	Petition	Impressed or adhesive	
On a matter of course order, on a petition of right	0 10 0	0 10 0	Order	Impressed or adhesive	
On an order for a commission on a petition of right	1 0 0	1 0 0	Order	Impressed	

Petition of Right—

	Fees payable.		Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
	Lower Scale. £ s. d.	Higher Scale. £ s. d.			
On marking a copy of a petition of right for service	0 1 0	0 5 0	Copy of petition	Impressed	The copy of petition to be written on impressed paper or the document to be produced at the Inland Revenue Office to be stamped.

And see *sup.*, *Filing, Hearing, Petition.*

Recognisance, see *sup.*, *Miscellaneous.*

Reference, see *sup.*, *Miscellaneous, and Referee.*

Register of Judgments, &c., and lis pendens—

	Fees payable.		Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
	Lower Scale. £ s. d.	Higher Scale. £ s. d.			
For registering a judgment or <i>lis pendens</i> , although more than one name may have to be registered	0 2 6	0 2 6	Memorandum of registry	Impressed	Forms with the impressed stamp will be sold at the office of the Registrar of Judgments, Common Pleas Division.
For re-registering same	0 1 0	0 1 0	Memorandum of registry	Impressed	
For a search for each name	0 1 0	0 1 0	General form of search <i>præcipe</i>	Impressed	
For a certificate of entry of satisfaction	0 1 0	0 1 0	Certificate	Impressed	
For certificate of judgment for registration in Ireland or Scotland under the Judgments Extension Act, 1868, including affidavit	0 2 0	0 2 0	Certificate	Impressed or adhesive	

Register of Judgments, &c., and lis pendens—continued.

	Fees payable.		Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
	Lower Scale. £ s. d.	Higher Scale. £ s. d.			
On filing for registration a certificate issued out of courts of Dublin or Court of Session in Scotland under the same Act, although more than one name may have to be registered under the same Act	0 7 0	0 7 0	Certificate	Impressed or adhesive	
On every certificate of the entry of a satisfaction under the same Act	0 1 0	0 1 0	Certificate	Impressed or adhesive	
For a search made in one or both of the registers of Irish and Scotch judgments for each name	0 1 0	0 1 0	<i>Præcipe</i>	Impressed	Forms of <i>præcipe</i> , with the impressed stamp, will be sold at the Inland Revenue Office, and by law stationers

See the Order of Aug. 6th, 1880, *post*, *Searches and Inspections*.

Report of Private Bill, see *sup.*, *Miscellaneous*.

Scheme, see *sup.*, *Filing*.

Searches and Inspections—

	Lower Scale. £ s. d.	Higher Scale. £ s. d.
On an application to search for an appearance or an affidavit, and inspecting the same	0 1 0	0 1 0
On an application to search an index, and inspect a pleading, decree, order, or other record, unless otherwise expressly provided for by any Act of Parliament or this order, and to inspect documents deposited for safe custody or production pursuant to an order, for each hour or part of an hour occupied	0 2 6	0 2 6
Not exceeding on one day	0 10 0	0 10 0

The Schedule to the Order as to Court Fees, made on the 28th Oct., 1875, shall have effect as if there were inserted therein the following fees, namely:

	Lower Scale. £ s. d.	Higher Scale. £ s. d.
For an official certificate of the result of a search in one name in any register or index under the custody of the Clerk of Enrolments, the Registrar of Bills of Sale, the Registrar of Certificates of Acknowledgments of Deeds by Married Women, or the Registrar of Judgments... ..	0 5 0	0 5 0
For every additional name, if included in same certificate	0 2 0	0 2 0
For a duplicate copy of certificate, if not more than three folios	0 1 0	0 1 0
For every additional folio	0 0 6	0 0 6
For a continuation search, if made within fourteen days of date of official certificate (the result to be indorsed on such certificate)	0 1 0	0 1 0

(O., 6th Aug., 1880.)

The fees on searches and inspections to be taken by means of impressed stamps on a form which will be issued at the Inland Revenue Office and sold there, and by law stationers : (Sched. Ord. 22nd April, 1876.)

See also *sup.* Register of Judgments, &c.

Special Case, see *sup.* Filing; Hearing.

Submission, see *sup.* Filing.

Subpœna—

	Fees payable.		Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
	Lower Scale. £ s. d.	Higher Scale. £ s. d.			
On sealing a writ of subpœna not exceeding three persons	0 2 6	0 5 0	Præcipe left at time of issuing writ	Impressed	Præcipe with the impressed stamp will be sold at the Inland Revenue Office and by law stationers.

Summons—

	Fees payable.		Document to be Stamped	Character of Stamp to be used.	Regulations and Observations.
	Lower Scale. £ s. d.	Higher Scale. £ s. d.			
On sealing a summons to originate proceedings in the Chancery Division	0 5 0	0 10 0	Summons	Impressed	A form of summons will be sold at the Inland Revenue Office and by law stationers
On sealing a duplicate thereof	0 1 0	0 5 0	Duplicate summons	Impressed	
On sealing a copy of same for service	0 1 0	0 5 0	Copy of summons	Impressed or adhesive	
On sealing or issuing any other summons or warrant	0 2 0	0 3 0	Summons	Impressed or adhesive	

Taxation of Costs—

	Fees payable.		Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
	Lower Scale. £ s. d.	Higher Scale. £ s. d.			
For taxing a bill of costs where the amount allowed does not exceed 8 <i>l.</i>	0 2 0	0 4 0		Stamp to be adhesive on bill of cost, but where a certificate, allocatur, or <i>præcipe</i> is used, the fee to be denoted by impressed stamps.	
Where the amount exceeds 8 <i>l.</i> , for every 2 <i>l.</i> allowed or a fraction thereof	0 0 6	0 1 0			
These fees, except where otherwise provided, shall be taken on signing the certificate or on the allowance of the					

Taxation of Costs—continued.

	Fees payable,		Documents to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
	Lower Scale. £ s. d.	Higher Scale. £ s. d.			
bill of costs, as taxed, but the fees shall be due and payable if no certificate or allocatur is required on the amount of the bill as taxed, or on the amount of such part thereof as may be taxed, and the solicitor or party suing in person shall in such case cause the proper stamps (the amount thereof to be fixed by the officer) to be impressed on or affixed to the bill of costs					
The taxing officer may require a deposit of stamps on account of fees before taxation not exceeding the fees on the full amount of the costs as submitted for taxation, and the officer or his clerk on taking such deposit shall make a memorandum thereof of the bill of costs					
For a certificate or allocatur of the result, not being a judgment	0 0 0	1 0 0	Certificate or allocatur	Impressed	
The 5th Rule of Order V. of the Chancery Consolidated Rules, 1874, shall continue in force and be acted upon in cases to which it is applicable*					

[* See COSTS, IV., 8 (f).]

Third Party Notice—

	Fees payable.		Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
	Lower Scale. £ s. d.	Higher Scale. £ s. d.			
On sealing a notice for service under O. XVI., r. 18	0 2 6	0 2 6	Notice	Impressed or adhesive.	Forms with the impressed stamp will be sold at the Inland Revenue Office and by law stationers.

*Warrant, see sup. Summons.**Warrant of Attorney, see sup. Filing.**Writ of Execution, see sup. Filing.*

Writ of Summons—

	Fees payable.		Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
	Lower Scale. £ s. d.	Higher Scale. £ s. d.			
On sealing a writ of summons for commencement of an action	0 5 0	0 10 0	Writ of summons	Impressed or adhesive.	Forms of writ with the impressed stamp will be sold at the Inland Revenue Office and by law stations.
On sealing a concurrent renewed, or amended writ of summons for commencement of an action	0 2 6	0 2 6	Writ of summons	Impressed or otherwise	

Writs—

	Fees payable.		Document to be Stamped.	Character of Stamp to be used.	Regulations and Observations.
	Lower Scale. £ s. d.	Higher Scale. £ s. d.			
On sealing every other writ [than a writ of summons, <i>mandamus</i> , or <i>subpoena</i>]	0 5 0	0 10 0	<i>Præcipe</i> left at time of issuing writ	Impressed or adhesive.	<i>Præcipes</i> with the impressed stamp will be sold at the Inland Revenue Office and by law stations,

FIERI FACIAS.

ORDINARY, and DE BONIS ECCLESIASTICIS.

[See EXECUTION.]

FIRM.

[See APPEARANCE; DISCOVERY; WRIT OF SUMMONS.]

FOLIO.

I. AS TO PLEADINGS.

[Folios are to contain] seventy-two words each (every figure being counted as one word): (O. XIX., r. 5.)

II. AS TO COSTS AND FEES.

A folio is to comprise seventy-two words, every figure comprised in a column being counted as one word: (Add. R., Aug. 1875, Sp. All., r. 12.)

This order is repeated in rule 7 of the order as to court fees of Oct. 28th, 1875.

FORECLOSURE.

- I. JURISDICTION.
- II. PARTIES.
 1. GENERAL RULE.
 2. MORTGAGEES AND THOSE CLAIMING UNDER THEM.
 - (a) *Mortgagees.*
 - (b) *Assignees.*
 - (c) *Cestuis que trustent.*
 - (d) *Devisees.*
 - (e) *Executors and Administrators.*
 - (f) *Heir.*
 - (g) *Sub-Mortgagees.*
 - (h) *Trustees.*
 3. PERSONS INTERESTED IN EQUITY OF REDEMPTION.
 - (a) *Mortgagors.*
 - (b) *Assignees.*
 - (c) *Bankruptcy Trustees.*
 - (d) *Devisees.*
 - (e) *Executors and Administrators.*
 - (f) *Heirs.*
 - (g) *Incumbrancers.*
 - (1) *Prior.*
 - (2) *Subsequent.*
 - (h) *Tenant in Tail, &c.*
 - (i) *Trustees.*
- III. INDORSEMENT OF WRIT.
- IV. ORDER FOR ACCOUNT WHEN CLAIMED [see ACCOUNT.]
- V. DEFAULT OF APPEARANCE.
- VI. PROCEEDINGS GENERALLY SUBSEQUENT TO WRIT.
- VII. PLEADING.
- VIII. DEFAULT OF PLEADING.
- IX. FORECLOSURE ORDER BEFORE HEARING.
- X. SALE INSTEAD OF FORECLOSURE.
 1. POWER TO ORDER.
 2. WHEN APPLICATION MADE.
 3. ORDER.
 4. DEPOSIT.
 5. SALE.
- XI. JUDGMENT FOR FORECLOSURE.
- XII. TAKING ACCOUNTS.
- XIII. CHIEF CLERK'S CERTIFICATE.
- XIV. PAYMENT.
 1. ATTENDING TO RECEIVE.
 2. ENLARGING TIME FOR.
 3. DEFAULT IN.
- XV. ORDER ABSOLUTE.
- XVI. SUCCESSIVE FORECLOSURES.
- XVII. INFANT SHOWING CAUSE.
- XVIII. OPENING FORECLOSURE.
- XIX. COSTS.

I. JURISDICTION.

Causes and matters for the foreclosure of mortgages are assigned to the Chancery Division: (J. A. 1873, s. 34.)

A mortgagee by deposit of deeds whether with or without an agreement to execute a legal mortgage, is entitled to foreclosure: (*Price v. Bury*, L. C. & L. J. J. 26th Jan. 1854; *James v. James*, L. Rep. 16 Eq. 153; *Backhouse v. Charlton*, L. Rep. 8 Ch. Div. 444; 26 W. R. 504; *Fisher*, 510.)

If the deposit of deeds be accompanied by an agreement to execute a legal mortgage, the mortgagee is entitled either to foreclosure or sale: (*York Union Banking Company v. Artley*, L. Rep. 11 Ch. Div. 205; 27 W. R. 704.)

A pledgee of personal chattels, as Canada railway bonds, is not entitled to foreclosure: (*Carter v. Wake*, L. Rep. 8 Ch. Div. 605.)

Foreclosure cannot be ordered against the Crown: (*Fisher*, 518.)

Orders for the sale both of freeholds and leaseholds have been made latterly, it being understood that the Crown was not pledged to make any grant to a purchaser; or liberty may be given to apply in chambers for an order for sale: (*Fisher*, 518; *Bartlett v. Rees*, L. Rep. 12 Eq. 395; 25 L. T. Rep. N. S. 373; 40 L. J. 599, Ch.)

II. PARTIES.

1. GENERAL RULE.

As a general rule all persons who have an interest either in the right of redemption or in the security must be joined as parties: (*Fisher on Mortgages*, 3rd edit., 883.)

2. MORTGAGEES AND THOSE CLAIMING UNDER THEM.

(a) *Mortgagees.*

A person interested in part only of a sum due on mortgage, cannot sue for foreclosure of a corresponding part of the estate: (*Fisher*, 505.)

One of several mortgagees may bring an action to foreclose, making the other co-defendants if they are unwilling to be plaintiffs, or have done some act precluding them from being plaintiffs: (*Luke v. South Kensington Hotel Company*, L. Rep. 11 Ch. Div. 121; 40 L. T. Rep. N. S. 638; 48 L. J. 361, Ch.; 27 W. R. 514.)

(b) *Assignees.*

An assignee of the mortgagee's whole interest, absolutely, if the legal estate has passed to him, may foreclose without bringing in the mortgagee or any prior assignee: (*Dan.* 175.)

The Master of the Rolls has held that if a party has assigned his interest after judgment, the assignee may be made a party even after the order for foreclosure absolute: (*Campbell v. Holyland*, L. Rep. 7 Ch. Div. 166; 38 L. T. Rep. N. S. 128; 47 L. J. 145, Ch.; 26 W. R. 109.)

(c) *Cestuis que trustent.*

Where the trustees under the mortgagee's will have disclaimed, the beneficiaries must be parties: (*Dan.* 227.)

(d) *Devisees.*

If the legal estate has been devised the devisee is a necessary party and the heir is not: (*Dan.* 175.)

(e) *Executors and Administrators.*

If the heir of the mortgagee commences the action he must make the personal representative a party: (*Dan.* 195.)

(f) *Heir.*

The heir is a necessary party where nothing has been done to affect the descent of the legal estate to him: (*Dan.* 175.)

(g) *Sub-Mortgagees.*

All the mortgagees must be made parties: (*Dan.* 175.)

(h) *Trustee.*

Where a mortgage has been made to a trustee, he is a necessary party : (Dan. 174.)

A trustee of the equity of redemption, who is also mortgagee of the property, will not be allowed to foreclose : (*Tenant v. Trenchard*, L. Rep. 4 Ch. App. 537.)

3. PERSONS INTERESTED IN EQUITY OF REDEMPTION.

(a) *Mortgagors.*

When a mortgagor has become bankrupt, he need not be made a party, although his trustee has disclaimed : (Dan. 191.)

It is stated in *Fisher on Mortgages* that the bankrupt may be properly joined because the right of redemption becomes re-vested in him upon the disclaimer of the trustee, and that if the disclaimer be after the commencement of the action, the mortgagee will be properly added as a party (*Fisher*, 886). But under sect. 23 of the Bankruptcy Act, 1869, on disclaimer, the property, if leasehold, is deemed to be surrendered; and if it consists of shares in a company, they are forfeited. If it consists of other property it reverts to the person entitled on the determination of the bankrupt's interest. If there is no such person in existence no estate or interest remains in the bankrupt, and *Jessel, M.R.*, has intimated that a fee-simple estate reverts to the Crown : (*Re Mercer and Moore*, L. Rep. 14 Ch. Div. 287; 42 L. T. Rep. N. S. 311; 49 L. J. 201, Ch.)

Where the mortgagors are a company, and afterwards go into liquidation, leave to continue the action will be given : (*Re David Lloyd and Co.*, L. Rep. 6 Ch. Div. 339; 37 L. T. Rep. N. S. 83.)

The mere fact of a winding-up order having been made, does not prevent a mortgagee from bringing an action to realise his security : (*Re Longden-dale Cotton Spinning Company*, L. Rep. 8 Ch. Div. 150; 38 L. T. Rep. N. S. 776.)

(b) *Assignees.*

Where the estate has been sold or charged subsequently to the date of the plaintiff's claim, whether by legal instrument or agreement, and whether as to the whole or only as to partial interests, the persons entitled to the benefit of the assignment or charge must be made parties : (Dan. 240.)

Incumbrancers and purchasers becoming such after the writ has been served, and the action registered as a *lis pendens*, will be bound by the judgment, and need not be made parties to the suit, whether the plaintiff have notice of them or not : (Dan. 242; *Fisher*, 917-919.)

But they have been made parties, even after judgment for foreclosure absolute : (*Campbell v. Holyland*, cited *sup.* 2 (b).)

(c) *Bankruptcy Trustees.*

The mortgagee may sue for foreclosure in the Chancery Division, notwithstanding the mortgagor's bankruptcy, making the trustee defendant (*White v. Simmons*, L. Rep. 6 Ch. App. 555; *Waddell v. Tollman*, L. Rep. 9 Ch. Div. 212; 38 L. T. Rep. N. S. 910; 26 W. R. 802); but the Court of Bankruptcy may restrain the action by injunction (*Ex parte Ditton*, *Re Woods*, L. Rep. 1 Ch. Div. 557; 34 L. T. Rep. N. S. 109; 45 L. J. 87, Bk.; 24 W. R. 289), though this will not be done except in a very strong case : (*Ex parte Pannell*, *Re England*, L. Rep. 6 Ch. Div. 335; 37 L. T. Rep. N. S. 450; 47 L. J. 21, Bk.; 26 W. R. 194; *Ex parte Hirst*, *Re Wherly*, L. Rep. 11 Ch. Div. 278; 27 W. R. 788; *Ex parte Bayly*, *Re Hart*, W. N. 1880, p. 144.)

(d) *Devisees.*

The devisee, whether in trust or beneficially, of the mortgagor is a

necessary party in respect of so much of the equity of redemption as has been devised to him : (Fisher, 894.)

(e) *Executors and Administrators.*

The mortgagor's executor or administrator is a necessary party to an action to foreclose a mortgage of a subsisting term or other chattel interest, but not of a mortgage by devise or grant of a freehold estate : (Dan. 245 ; Fisher, 896.)

The mere fact that an administration action is pending will not prevent the mortgagee from suing to foreclose : (*Crowle v. Russell*, L. Rep. 4 C. P. Div. 186 ; 39 L. T. Rep. N. S. 320 ; 48 L. J. 76, C. P. ; 27 W. R. 84.)

(f) *Heir.*

The mortgagor's heir is a necessary party in respect of what he takes by descent : (Fisher, 894 ; Dan. 245.)

He is the proper defendant when the land is freehold, whether the mortgage was by demise or grant : (Fisher, 896 ; Dan. 245.)

(g) *Incumbrancers.*

(1) *Prior.*

A prior incumbrancer is not a necessary party in an action by a second mortgagee to foreclose the mortgagor and a third mortgagee : (Dan. 190, 241.)

If the first mortgagee is made a party, the plaintiff must offer to redeem him : (Dan. 191, citing *Gordon v. Horsfall*, 5 Moore 393.)

A third mortgagee buying in the first, need not make the second mortgagee a party to an action to foreclose the mortgagor : (Dan. 191.)

When the land is in a registered county, and the judgment has not been registered, the judgment creditor need not be made a party : (Fisher 892-3.)

(2) *Subsequent.*

All persons who have incumbrances upon the estates, posterior in point of time to the plaintiff's mortgage, must be made defendants : (Dan. 239.)

And all subsequent judgment creditors must be made parties, where under the statutes their judgments give them a lien on the land : (See Fisher, 892 ; 1 & 2 Vict. c. 110 ; 23 & 24 Vict. c. 38 ; 27 & 28 Vict. c. 112.)

If some only of the subsequent incumbrancers are brought before the court, those made parties may be foreclosed, but the other incumbrancers will not be foreclosed, although the mortgagees at the date of the judgment had no notice of their existence : (Dan. 240 ; Fisher, 893.)

If, pending the action, the plaintiff received notice of a subsequent incumbrance, he must make the owner thereof a party to bind his rights : (Fisher, 893.)

But where the general rule cannot be acted upon for want of notice to the plaintiff of the subsequent incumbrances, if the plaintiff obtain his judgment without having received notice, the judgment will bind the subsequent incumbrancer as to the accounts, if taken *bonâ fide*, but not his right of redemption. Collusion or other fraud will give the subsequent incumbrancer a right to open the accounts, upon his stating particular errors, but not to unravel them upon general charges of fraud and collusion, if denied. And the fraudulent or vexatious conduct of the mortgagor, if he should create subsequent incumbrances with the view of shielding himself from foreclosure, will excuse the mortgagee from making the owners of such securities parties : (Fisher, 893-4.)

(h) *Tenant in tail, &c.*

Where the equity of redemption is the subject of an entail, the first tenant in tail must be made a party, but no subsequent remaindermen are necessary parties : (Dan. 230, 231.)

The presence of an infant tenant in tail will bind the inheritance as if he were an adult.

If it is doubtful whether a particular person has an estate tail or not, the person who has the first undoubted vested estate of inheritance ought to be a party, and where the first tenant in tail is a lunatic, the remainderman is a proper party : (Dan. 231.)

The intermediate remaindermen for life must be parties, and the same rule applies where the intermediate estate is contingent or executory, if the person to take is ascertained. If he is not ascertained, it is sufficient if the trustees (if any) to support contingent remainders, and the person *in esse* entitled to the first vested estate of inheritance are parties : (Dan. 231.)

Executory devises to persons not in being are bound by judgment against a vested estate of inheritance, but a person claiming under limitations by way of executory devise, not subject to any preceding vested estate of inheritance by which it may be defeated, must be a party : (Dan. 231.)

If by the death, pending the action of the owner of the first estate of inheritance, that interest be determined, the owner of the next estate of inheritance; and of the interests prior to his, must be joined : (Fisher, 889.)

Owners of new interests, acquired by the determination of a contingency, and not subject to destruction by a prior vested estate of inheritance, must be added as parties : (*Id.*)

(i) *Trustees.*

Trustees in whom the mortgaged estate is vested, who as executors or otherwise are in possession of funds to redeem, may sufficiently represent their *cestuis que trustent*; but if this is not the case the *cestuis que trustent* or some of them ought to be made parties : (Dan. 226.)

III. INDORSEMENT OF WRIT.

In all cases of ordinary account . . . where the plaintiff, in the first instance, desires to have an account taken, the writ of summons shall be indorsed with a claim that such account be taken : (O. III., r. 8.)

The following form may be used :

The plaintiff's claim is to have an account taken of what is due to him for principal, interest, and costs on a mortgage dated the day of made between [*or by deposit of title deeds*], and that the mortgage may be enforced by foreclosure or sale.

(Rules 1875, App. A. p. 2, s. 1.)

IV. ORDER FOR ACCOUNT WHEN CLAIMED.

[See ACCOUNT.]

V. DEFAULT OF APPEARANCE.

Where a defendant did not enter an appearance, and the statement of claim was filed against him, an order for immediate foreclosure absolute was directed, but before it was drawn up, an order *nisi* in the usual form was substituted : (*Patey v. Flint*, W. N. 1879, pp. 86, 100; 40 L. T. Rep. N. S. 651; 48 L. J. 691 Ch.; 27 W. R. 529, 595; and comp. Fisher, 1103.)

VI. PROCEEDINGS GENERALLY SUBSEQUENT TO WRIT.

The proceedings are conducted in the usual way down to the hearing : (Ayck. 263.)

VII. PLEADING.

Forms of pleading are given in Appendix C. 14 to the Rules of 1875.

An application to amend so as to give the plaintiff the benefit of consolidation under a transfer executed after writ issued, was refused: (*Matthews v. Antrobus*, W. N. 1879, p. 207; 49 L. J. 80, Ch.)

VIII. DEFAULT OF PLEADING.

Several cases are reported in which judgment for foreclosure has been given on motion for judgment in default of delivery of a defence. The point as to whether absolute judgment might be given at once was apparently raised in none of them: (*Hate v. Snelling*, W. N. 1876, p. 77; *Pearce v. Spickett*, *Id.* 109; *Dymond v. Croft*, L. Rep. 3 Ch. Div. 512.)

In *Dymond v. Croft*, *sup.*, the usual order for payment within six months was made: (see also *sup.* JUDGMENT.)

IX. FORECLOSURE ORDER BEFORE HEARING.

Where any suit [is] brought to compel the defendant or defendants (having or claiming a right to redeem) to pay the principal money and interest due or the principal money and interest together with any sum or sums of money due on any incumbrance, or specially charged or chargeable on the equity of redemption and in default of payment thereof to foreclosure [the court] upon application by the defendant or defendants having a right to redeem and upon his or their admitting the right and title of the plaintiff may and shall at any time or times before such suit or cause [is] brought to a hearing, make such order or decree as [it] might or could have made in case such suit or cause had then been regularly brought to a hearing: (7 Geo. 2, c. 20, s. 2.)

[The Act does] not extend to any case where the right of redemption [is] controverted or questioned by or between different defendants in the same cause or suit, [or] prejudice any subsequent mortgagee or mortgagees, or subsequent incumbrancers: (*Id.*, s. 3.)

The right to redeem must be clear beyond doubt: (Fisher, 341.)

Where the foreclosure action was commenced in respect of sixteen mortgages, and afterwards the plaintiff transferred the mortgages to persons who were plaintiffs in other actions for foreclosure of other mortgages given by defendants, to enable such plaintiffs to consolidate, and an application by them to amend the action by stating the transfer was dismissed, an order was made under the statute: (*Matthews v. Antrobus*, W. N. 1879, p. 207; 49 L. J. 80, Ch.)

The statute does not apply where another demand is set up which is independent of the foreclosure, or where a sale is claimed: (Fisher, 341.)

But where a sale is prayed, the court will direct an account to be taken under its general powers: (*Id.*, and see ACCOUNT.)

All the defendants who have a right to redeem must join in the application and admit the plaintiff's title: (Fisher, 339.)

When one of the defendants is an infant, the order cannot be made: (Fisher, 340.)

The application is by petition or motion on notice: (Fisher, 339.)

The amount of principal stated in the writ cannot be disputed, nor can evidence be admitted that payments have been made in reduction of principal, notwithstanding it is so stated in the petition: (*Id.*)

The order directs an account of the principal and interest due, and taxation of the plaintiff's costs, and that, on payment within six months of the amount found due, the plaintiff do reconvey; but in default of payment, that the defendant be foreclosed, with the usual directions: (*Id.*)

Although the statute has not been strictly complied with, if the money has been paid into court, or to the plaintiff, the action will not be allowed to proceed: (*Bourton v. Williams*, L. Rep. 5 Ch. App. 655.)

X. SALE INSTEAD OF FORECLOSURE.

1. POWER TO ORDER.

It shall be lawful for the court in any suit for the foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee, or of any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, to direct a sale of such property, instead of a foreclosure of such equity of redemption, on such terms as the court may think fit to direct, and if the court shall so think fit, without previously determining the priorities of incumbrances, or giving the usual or any time to redeem; provided that if such request shall be made by any such subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the court shall not direct any such sale, without the consent of the mortgagee or the persons claiming under him, unless the party making such request shall deposit in court a reasonable sum of money, to be fixed by the court, for the purpose of securing the performance of such terms as the court may think fit to impose on the party making such request: (15 & 16 Vict. c. 86, s. 48.)

A sale will not be ordered, unless there is such complication that the common decree cannot be conveniently worked (*Hiorns v. Holtom*, 16 Jur. 1077); or unless it is manifestly for the benefit of all parties (*Hurst v. Hurst*, 16 Beav. 372; 22 L. J. 538, Ch.); or for other special reasons, but not as of course: (Fisher, 1078.)

A sale may be ordered though the mortgagor or some of the incumbrancers do not consent: (Dan. 1151.)

It was refused where the plaintiff, a judgment creditor, insisted on a foreclosure: (*Id.*)

The court refuses to make the order where it cannot go on and complete the sale in every necessary way, giving possession and insuring that the title deeds shall be handed over: (per Cairns, L.C. *Heath v. Crealock*, L. Rep. 10 Ch. App. 22; 31 L. T. Rep. N. S. 650; 44 L. J. 157, Ch.)

No sale can be made of a mortgaged estate as against a mortgagee with a paramount title without his express consent, except in foreclosure suits, as provided by the statute; the sale can only be subject to his mortgage. The course is to order a sale, free from the mortgagee's security if he concurs, but subject to it if he does not; and if he be a party, he will be required at once to consent or refuse: (Fisher, 519.)

Sale may be ordered where it is the proper remedy, though foreclosure only be claimed, and though there be no right to foreclosure: (Fisher, 519.)

Under the Confirmation of Sales Act a sale may be ordered, notwithstanding an action for foreclosure has been commenced: (see CONFIRMATION OF SALES, &c.)

2. WHEN APPLICATION MADE.

The Master of the Rolls refused in an ordinary foreclosure action to direct a sale on an interlocutory application: (*Wayn v. Lewis*, 1 Drew. 487; *London and County Banking Company v. Dover*, L. Rep. 11 Ch. Div. 204; 48 L. J. 336, Ch.; 27 W. R. 749; but see *Davis v. Ashwin*, 47 L. J. 70, Ch.; 26 W. R. 139.)

Where all the parties wished to sell, an order was granted on an interlocutory application, that the sale should be conducted by the parties

independently of the control of the court, and the money paid into court : (*Relph v. Horton*, 19 W. R. 267.)

The sale should be asked for at the hearing; if judgment has been given for foreclosure, it cannot afterwards be ordered unless by consent : (Ayck. 263; Dan. 1151.)

3. ORDER.

The usual course is for the order to direct a sale, in the event of default being made in payment of what is found due by the chief clerk's certificate, within a limited time (usually six months) from the date of the certificate : (Dan. 1152.)

By consent, or where it is for the benefit of all parties, the sale will be directed to take place within a shorter period, or even immediately : (*Id.*, Fisher, 1079.)

4. DEPOSIT.

If the sale is directed at the request of a subsequent mortgagee, or of the mortgagor, the court cannot, except by consent, dispense with a deposit : (Dan. 1152.)

The amount of the deposit (which is fixed in chambers if the parties do not agree) is in the discretion of the court, and is generally fixed with reference to the probable expenses of the sale : (*Id.*, Fisher, 1079.)

In one case it was made sufficient to indemnify a puisne mortgagee, who had bought in several incumbrances : (*Laslett v. Cliffe*, 2 Sim. & G. 278.)

Where the sale is at the request of the mortgagor or subsequent incumbrancer, a reserved price is fixed to protect the interest of the first mortgagee : (Dan. 1152; Fisher, 1079.)

5. SALE.

The sale is made with the approbation of the judge at chambers [see PROPERTY], and the judgment may direct the distribution of the purchase money on application at chambers, without further consideration : (Ayck. 263.)

The conduct of the sale will be given to the person by whom it may be most conveniently effected, as in one case to the first mortgagee, though not plaintiff, because he had the deeds : (*Hewitt v. Nanson*, 28 L. J. 49, Ch.; 7 W. R. 5.)

The sale is effected in the same manner as other sales by the court : (Dan. 1139.)

XI. JUDGMENT FOR FORECLOSURE.

The ordinary form of judgment directs an account to be taken of principal, interest, and costs to be taxed, that upon payment of the amount certified within six calendar months from the date of the chief clerk's certificate at the time and place thereby appointed, the plaintiff shall recover and deliver up, on oath, the deeds, &c., and that in default of payment the defendant shall be absolutely debarred and foreclosed from all right and equity of redemption to the mortgaged premises : (Seton, 1035.)

In a foreclosure action, where both forms of relief are expressly claimed, an order for personal payment may be combined with an order for foreclosure : (*Dymond v. Croft*, L. Rep. 3 Ch. Div. 512; *Gibbon v. Walker*, 38 L. T. Rep. N. S. 217; *Greenough v. Littler*, W. N. 1880, p. 16; 42 L. T. Rep. N. S. 144; 28 W. R. 318.)

For another variation in the order, see *Lees v. Fisher* (W. N. 1880, p. 12.)

As to the order where the mortgagee has contracted to sell his interest, see *Greenough v. Littler*, *sup.*

In some cases an inquiry is given as to the costs, charges, and expenses properly or "justly" incurred by the mortgagee in respect of his mortgage security, not being costs of suit: (Seton, 1072; *Rees v. Metropolitan Board*, L. Rep. 4 Ch. Div. 372; 42 L. T. Rep. N. S. 685; 49 L. J. 620, Ch.; 28 W. R. 614.)

XII. TAKING ACCOUNTS.

On the return of the summons to proceed on the judgment [see ACCOUNT] the mortgagee is directed to bring in evidence of the amounts due to him; and where he has been in possession, and the judgment so directs, an account of rents, and for expenditure in repairs and lasting improvements: (Dan. 1138-9.)

The inquiries and account are presented in chambers in the usual way: (See ACCOUNTS, CHAMBERS.)

The plaintiff's costs of suit are taxed, and any other costs claimed by him may be sent by the chief clerk to be moderated by the taxing officer: (Dan. 1139.)

XIII. CHIEF CLERK'S CERTIFICATE.

The chief clerk makes his certificate of the amount due, and thereby appoints a time and place for payment of the amount due to the mortgagee: (Dan. 1139, Ayck. 263.)

XIV. PAYMENT.

1. ATTENDING TO RECEIVE.

At the time appointed the mortgagee, or some person duly appointed by power of attorney, must attend to receive the money, and the mortgagor to redeem the property: (Dan. 858.)

2. ENLARGING TIME.

On a proper case being made out, the security being sufficient, the court may from time to time enlarge the time for payment: (*Edwards v. Cunliffe*, 1 Madd. 287.) The order is made on summons or on motion with notice; and is usually on condition that the interest and costs already reported due [and the costs of the motion] be paid, and of a further account being directed of subsequent interest and costs.

Where [the mortgagee, by mistake, omitted to attend at the time and place appointed for payment, a new time and place were appointed. In such case the mortgagee is not entitled to subsequent interest: (*Hughes v. Williams*, 1 Kay, App. 4.)

The time is also enlarged by the death of one of several mortgagees entitled as on a joint account where payment was directed to be made to them all: (Fisher, 1056.)

If a mortgagee receive rents after the certificate and before the day appointed for payment, the judgment for foreclosure will not be made absolute without a further account being taken, and a new day will be fixed, at chambers, for payment: (Ayck. 264.)

If the rents are received after the day appointed, the judgment is made absolute without a further account: (*Id.*)

A foreclosure is opened where the plaintiff realises collateral securities: (Seton, 1088.)

[And see *post*, XVIII.]

3. DEFAULT IN.

If the money is not paid at the time appointed, the plaintiff is entitled to an order confirming the foreclosure: (Dan. 858, Ayck. 264.)

XV. ORDER ABSOLUTE.

The order is obtained on motion of course, supported by an affidavit of due attendance and of nonpayment. The plaintiff must make an affidavit as to nonpayment, whether he attend personally or not : (Dan. 858-9.)

If the mortgagor does not attend, it is unnecessary to prove that the mortgagee's agent had a power of attorney with him (*Cox v. Watson*, L. Rep. 7 Ch. Div. 196), but a power of attorney must have been in existence, and an affidavit of such existence must be produced : (*Hart v. Hawthorne*, 42 L. T. Rep. N. S. 79.)

XVI. SUCCESSIVE FORECLOSURES.

If the judgment provides for successive foreclosures, after the first foreclosure a summons to proceed further is taken out and served, and an account is then taken of what is due for principal, interest, and costs to the next person, and so on until all directions are exhausted : (Dan. 1139.)

XVII. INFANT SHOWING CAUSE.

The judgment formerly reserved to an infant a day to show cause against the decree after coming of age, not by unravelling accounts or redeeming, but only by showing error in the decree : (*Mallack v. Galton*, 3 P. W. 352; *Fisher*, 1084.)

As to whether the right still exists, see *Fisher*, 1084-7; *Newbury v. Martin*, 15 Jur. 166.

Where the estate of the mortgagor had been devised in trust for sale, and, through the trustees having disclaimed, had become vested in an infant, who was also one of the parties beneficially entitled, the decree *nisi* directed that in case the mortgagees were not redeemed within six months the infant should be a trustee, and that the executrix should convey the estate to the mortgagees on his behalf : (*Foster v. Parker*, L. Rep. 8 Ch. Div. 147.)

XVIII. OPENING FORECLOSURE.

Where an order for final foreclosure has been made it can only be set aside either upon the ground of error apparent upon the face of it, upon the ground of new matter subsequently discovered, as accident having prevented payment, or upon the ground of actual fraud, that is such that there is on the part of the person chargeable with it the *malus animus* putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him : (*Patch v. Ward*, L. Rep. 3 Ch. App. 203; 18 L. T. Rep. N. S. 134.)

According to Jessel, M.R., an order for foreclosure according to the practice of the Court of Chancery, was never really absolute, and cannot be so now; and the Court has at any time a discretion to allow the mortgagor to redeem, without requiring special circumstances to be shown : (*Campbell v. Holyland*, cited *sup.* II. 1 (b).)

XIX. COSTS.

The mortgagee is generally entitled to be repaid such of the costs as originally fall upon himself, and they are added to the amount due upon his security and, with the principal and interest, form part of a single debt, and are all payable in the same priority : (*Fisher*, 1000); and see Costs III. 1 (b). Even before the Judicature Acts the Court could deprive him of his costs, and also make him pay costs, but did so with reluctance : (*Fisher*, 1002.)

The mortgagee is made to pay the costs when he has been guilty of gross misconduct or oppression, or where, even without improper motives he has caused expenses to be incurred which cannot be justly thrown on the mortgagor, as where the mortgagee resists any just claim to redeem: (Fisher, 1003 *et seq.*; and see Seton, 1060 *et seq.*)

But he may be allowed the ordinary costs of redemption: (*Id.*)

FOREIGN LAW.

I. ASCERTAINING BY OR IN AID OF COURTS WITHIN QUEEN'S DOMINIONS.

1. INTERPRETATION.
2. DIRECTING CASE TO BE PREPARED.
3. REMITTING CASE AND QUESTIONS TO OTHER COURT.
4. PETITION FOR OPINION.
5. HOW OPINION GIVEN.
6. CERTIFIED COPY OF OPINION.
7. HOW OPINION APPLIED.
8. REVIEWING OPINION IN HOUSE OF LORDS.

II. ASCERTAINING BY OR IN AID OF FOREIGN COURTS.

1. INTERPRETATION.
2. DIRECTING CASE TO BE PREPARED.
3. REMITTING CASE AND QUESTIONS TO FOREIGN COURTS.
4. CERTIFIED COPY TO BE RECORD.
5. LODGING COPY, OPINION, AND NOTICE OF MOTION.
6. APPLYING OPINION.
7. SENDING CASE BACK.

III. STATING LAW IN AID OF FOREIGN COURTS.

1. INTERPRETATION [see *sup.* II., 1.]
2. PETITION.
3. OPINION.
4. COPY OF OPINION.

I. ASCERTAINING BY OR IN AID OF COURTS WITHIN QUEEN'S DOMINIONS.

1. INTERPRETATION.

In the construction of [the] Act, the word "action" shall include every judicial proceeding instituted in any court, civil, criminal, or ecclesiastical; and the words "Superior Courts" shall include, in England [the Supreme Court of Judicature], in Scotland, the High Court of Justiciary, and the Court of Session acting by either of its divisions; in Ireland [the Supreme Court of Judicature]; and in any other part of Her Majesty's dominions, the Superior Courts of Law or Equity therein: (22 & 23 Vict. c. 63, s. 5.)

2. DIRECTING CASE TO BE PREPARED.

If in any action depending in any court within Her Majesty's dominions, it shall be the opinion of such court that it is necessary or expedient for the proper disposal of such action to ascertain the law applicable to the facts of the case, as administered in any other part of Her Majesty's dominions, on any point on which the law of such other part of Her Majesty's dominions is different from that in which the court is situate, it shall be competent to the court in which such action may depend to direct a case to be prepared, setting forth the facts, as these may be ascertained by verdict of a jury or other mode competent, or may be agreed upon by the parties, or settled by such person or persons as may

have been appointed by the court for that purpose in the event of the parties not agreeing: (*Id.*, s. 1).

Cases have been directed for the opinion of the Court of Session in Scotland, and of the High Court at Fort William, Bengal: (Dan. 1012.)

3. REMITTING CASE AND QUESTIONS TO OTHER COURTS.

Upon such case being approved of by such court or a judge thereof, they shall settle the questions of law arising out of the same on which they desire to have the opinion of another court, and shall pronounce an order remitting the same, together with the case, to the court in such other part of Her Majesty's dominions, being one of the Superior Courts thereof, whose opinion is desired upon the law administered by them as applicable to the facts set forth in such case, and desiring them to pronounce their opinion on the questions submitted to them in the terms of the Act: (22 & 23 Vict. c. 63, s. 1.)

A certified copy of the order is left at chambers, and a summons to proceed thereon served: (Dan. 1013.)

Upon the return of the summons, the draft case is directed to be prepared and left, and the summons is adjourned for the purpose: (*Id.*)

The case and questions are settled at chambers with or without the attendance of the judge: (*Id.*)

A fair copy of the case is made, and identified by the signature of the chief clerk to a memorandum at the foot: (*Id.*)

The case, with the original or an office copy order, is usually sent by the person having the conduct of the inquiry to a practitioner of the court whose opinion is asked: (*Id.*)

4. PETITION FOR OPINION.

It shall be competent to any of the parties to the action to present a petition to the court whose opinion is to be obtained, praying such last-mentioned court to hear parties or their counsel, and to pronounce their opinion thereon in terms of [the] Act, or to pronounce their opinion without hearing parties or counsel: (22 & 23 Vict. c. 63, s. 1.)

5. HOW OPINION GIVEN.

The court to which such petition shall be presented shall, if they think fit, appoint an early day for hearing parties or their counsel on such case, and shall thereafter pronounce their opinion upon the questions of law, as administered by them, which are submitted to them by the court, and in order to their pronouncing such opinion they shall be entitled to take such further procedure thereupon as to them shall seem proper: (*Id.*)

6. CERTIFIED COPY OF OPINION.

Upon such opinion being pronounced, a copy thereof, certified by an officer of such court, shall be given to each of the parties to the action by whom the same shall be required, and shall be deemed and held to contain a correct record of such opinion: (*Id.*, s. 2.)

7. HOW OPINION APPLIED.

It shall be competent to any of the parties to the action, after having obtained such certified copy of such opinion, to lodge the same with an officer of the court in which the action may be depending, who may have the official charge thereof, together with a notice of motion, setting forth that the party will, on a certain day named in such notice, move the court to apply the opinion contained in such certified copy thereof to the facts set forth in the case: (*Id.*, s. 3.)

The certified copy is filed in the Central Office: (Dan. 1013; J. A. 1879.)

An office copy of the opinion is taken before moving: (Dan. 1013.)

The said court shall thereupon apply such opinion to such facts, in the same manner as if the same had been pronounced by such court itself upon a case reserved for opinion of the court, or upon special verdict of a jury; or the said last-mentioned court shall, if it think fit, when the said opinion has been obtained before trial, order such opinion to be submitted to the jury with the other facts of the case as evidence, or conclusive evidence as the court may think fit, of the foreign law therein stated, and the said opinion shall be submitted to the jury: (22 & 23 Vict. c. 63, s. 3.)

8. REVIEWING OPINION IN HOUSE OF LORDS.

In the event of an appeal . . . to the House of Lords in any such action, it shall be competent to bring under the review of . . . the House of Lords the opinion pronounced as aforesaid by any court whose judgments are reviewable . . . by the House of Lords, and . . . that House may . . . adopt or reject such opinion of any court whose judgments are . . . reviewable by [it] as the same shall appear to [it] to be well founded or not in law: (*Id.*, s. 4.)

II. ASCERTAINING BY OR IN AID OF FOREIGN COURTS.

1. INTERPRETATION.

In the construction of [the] Act, the word "action" shall include every judicial proceeding in any court, civil, criminal, or ecclesiastical; and the words "Superior Courts" shall include in England [the Supreme Court of Judicature]; in Scotland, the High Court of Justiciary, and the Court of Sessions, acting by either of its divisions; in Ireland [the Supreme Court of Judicature]; and in a foreign country or state any superior court or courts which shall be set forth in any such convention between Her Majesty and the Government of such foreign state or country: (24 Vict. c. 11, s. 4.)

2. DIRECTING CASE TO BE PREPARED.

If, in any action depending in any of the Superior Courts within Her Majesty's dominions, it shall be the opinion of such court that it is necessary or expedient, for the disposal of such action to ascertain the law applicable to the facts of the case as administered in any foreign state or country with the Government of which Her Majesty shall have entered into [a convention for the purpose of mutually ascertaining the law of such foreign country or state when pleaded in actions depending in any courts within Her Majesty's dominions and the law as administered in any part of Her Majesty's dominions when pleaded in actions depending in the courts of such foreign country or state], it shall be competent to the court in which such action may depend to direct a case to be prepared setting forth the facts as these may be ascertained by verdict of jury or other mode competent, or as may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the court for that purpose in the event of the parties not agreeing: (24 Vict. c. 11, s. 1.)

3. REMITTING CASE AND QUESTIONS TO FOREIGN COURT.

Upon such case being approved of by such court or a judge thereof, such court or judge shall settle the questions of law arising out of the same on which they desire to have the opinion of another court, and shall pronounce an order remitting the same, together with the case, to such superior court in such foreign state or country as shall be agreed upon in said convention, whose opinion is desired upon the law administered by such foreign court as applicable to the facts set forth in such case, and requesting them to pronounce their opinion on the questions submitted to them: (*Id.*, s. 1.)

4. CERTIFIED COPY TO BE RECORD.

Upon such opinion being pronounced, a copy thereof, certified by an officer of such court, shall be deemed and held to contain a correct record of such opinion : (*Id.*, s. 1.)

5. LODGING COPY OPINION AND NOTICE OF MOTION.

It shall be competent to any of the parties to the action, after having obtained such certified copy of such opinion, to lodge the same with the officer of the court within Her Majesty's dominions in which the action may be depending who may have the official charge thereof, together with a notice of motion setting forth that the party will, on a certain day named in such notice, move the court to apply the opinion contained in such certified copy thereof to the facts set forth in the case hereinbefore specified : (*Id.*, s. 2.)

6. APPLYING OPINION.

The said court shall thereupon, if it shall see fit, apply such opinion to such facts, in the same manner as if the same had been pronounced by such court itself upon a case reserved for opinion of the court, or upon special verdict of a jury; or the said last-mentioned court shall, if it think fit, when the said opinion has been obtained before trial, order such opinion to be submitted to the jury with the other facts of the case as conclusive evidence of the foreign law therein stated, and the said opinion shall be so submitted to the jury : (*Id.*, s. 2.)

7. SENDING CASE BACK.

If, after having obtained such certified copy, the court shall not be satisfied that the facts had been properly understood by the foreign court to which the case was remitted, or shall on any ground whatsoever be doubtful whether the opinion so certified does correctly represent the foreign law as regards the facts to which it is to be applied, it shall be lawful for such court to remit the said case, either with or without alterations or amendments, to the same or to any other such superior court in such foreign state as aforesaid, and so from time to time as may be necessary or expedient : (*Id.*, s. 2.)

III. STATING LAW IN AID OF FOREIGN COURTS.

1. INTERPRETATION. [See *sup.* II., 1.]

2. PETITION.

If, in any action depending in any court of a foreign country or state with whose Government Her Majesty shall have entered into a convention as above set forth, such court shall deem it expedient to ascertain the law applicable to the facts of the case as administered in any part of Her Majesty's dominions, and if the foreign court in which such action may depend shall remit to the court in Her Majesty's dominions whose opinion is desired a case setting forth the facts and the questions of law arising out of the same on which they desire to have the opinion of a court within Her Majesty's dominions, it shall be competent to any of the parties to the action to present a petition to such last-mentioned court whose opinion is to be obtained, praying such court to hear parties or their counsel, and to pronounce their opinion thereon in terms of this Act, or to pronounce their opinion without hearing parties or counsel : (*Id.*, s. 3.)

3. OPINION.

The court to which such petition shall be presented shall consider the same, and, if they think fit, shall appoint an early day for hearing parties or their counsel on such case, and shall pronounce their opinion upon the questions of law as administered by them which are submitted to them by the foreign court : (*Id.*, s. 3.)

In order to their pronouncing such opinion they shall be entitled to take such further procedure thereupon as to them shall seem proper: (*Id.*, s. 3.)

4. COPY OF OPINION.

Upon such opinion being pronounced a copy thereof, certified by an officer of such court, shall be given to each of the parties to the action by whom the same shall be required: (*Id.*, s. 3.)

FOREIGN SOVEREIGN.

[See PARTIES.]

FORMER PRACTICE.

- I. PROVISIONS OF JUDICATURE ACT, 1873.
- II. PROVISIONS OF JUDICATURE ACT, 1875.
- III. PROVISIONS OF RULES OF COURT.
- IV. RULE WHERE PRACTICE OF ABOLISHED COURTS VARIED.

[See EQUITABLE RULES, I.]

I. PROVISIONS OF JUDICATURE ACT, 1873.

The jurisdiction by this Act transferred to the said High Court of Justice and the said Court of Appeal respectively shall be exercised (so far as regards procedure and practice) in the manner provided by this Act, or by such Rules and Orders of Court as may be made pursuant to this Act; and where no special provision is contained in this Act or in any such Rules or Orders of Court with reference thereto, it shall be exercised as nearly as may be in the same manner as the same might have been exercised by the respective courts from which such jurisdiction shall have been transferred, or by any of such courts: (J. A., 1873, s. 32.)

All Acts of Parliament relating to the several courts and judges, whose jurisdiction is hereby transferred to the said High Court of Justice and the said Court of Appeal respectively, or wherein any of such courts or judges are mentioned or referred to, shall be construed and take effect, so far as relates to anything done or to be done after the commencement of this Act, as if the said High Court of Justice or the said Court of Appeal, and the judges thereof respectively, as the case may be, had been named therein instead of such courts or judges whose jurisdiction is so transferred respectively; and in all cases not hereby expressly provided for in which, under any such Act, the concurrence or the advice or consent of the judge or any judges, or of any number of the judges, of any one or more of the courts whose jurisdiction is hereby transferred to the High Court of Justice is made necessary to the exercise of any power or authority capable of being exercised after the commencement of this Act, such power or authority may be exercised by and with the concurrence, advice, or consent of the same or a like number of judges of the said High Court of Justice; and all general and other commissions, issued under the Acts relating to the Central Criminal Court or otherwise, by virtue whereof any judges of any of the courts whose jurisdiction is so transferred may, at the commencement of this Act, be empowered to try, hear, or determine any causes or matters, criminal or civil, shall remain and be in full force and effect, unless and until they shall respectively be in due course of law revoked or altered: (J. A., 1873, s. 76.)

II. PROVISIONS OF JUDICATURE ACT, 1875.

Save as by the principal Act or this Act, or by any Rules of Court, may be otherwise provided, all forms and methods of procedure which at the commencement of this Act were in force in any of the courts whose jurisdiction is by the principal Act or this Act transferred to the said High Court and to the said Court of Appeal respectively, under or by virtue of any law, custom, general order, or rules whatsoever, and which are not inconsistent with the principal Act or this Act or with any Rules of Court, may continue to be used and practised, in the said High Court of Justice and the said Court of Appeal respectively, in such and the like cases, and for such and the like purposes, as those to which they would have been applicable in the respective courts of which the jurisdiction is so transferred if the principal Act and this Act had not passed: (J. A., 1875, s. 21.)

III. PROVISIONS OF RULES OF COURT.

NOTE.—Where no other provision is made by the Act or these Rules the present procedure and practice remain in force: (Preliminary Note to Rules of 1875.)

All actions which have hitherto been commenced by writ in the Superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits which have hitherto been commenced by bill or information in the High Court of Chancery, or by a cause *in rem* or *in personam* in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action: (O. I., r. 1.)

With respect to interpleader, the procedure and practice now used by Courts of Common Law under the Interpleader Acts (1 & 2 Will. 4, c. 58, and 23 & 24 Vict. c. 126), shall apply to all actions and to all the divisions of the High Court of Justice, and the application by a defendant shall be made at any time after being served with a writ of summons and before delivering a defence: (*Id.*, r. 2.)

All other proceedings in and applications to the High Court may, subject to these Rules, be taken and made in the same manner as they would have been taken and made in any court in which any proceeding or application of the like kind could have been taken or made if the Act had not been passed: (*Id.*, r. 3.)

There are also many rules expressly continuing, in particular cases, the former practice. These will be found under the various headings to the subjects to which they relate.

IV. RULE WHERE PRACTICE OF ABOLISHED COURTS VARIED.

[See EQUITABLE RULES, I.]

FORMS.

Any costs occasioned by the use of any more prolix or other forms of writs, and of indorsements thereon, than the forms hereinafter prescribed, shall be borne by the party using the same, unless the court shall otherwise direct: (O. II., r. 2.)

The forms of writs given in the Appendix A. to the Rules of 1875 have

in some instances been amended, and in others abolished. Other forms were added by the Rules of April, 1880. [See WRIT OF SUMMONS.]

[In pleading] forms similar to those in Appendix C. [to the Rules of 1875] may be used : (O. XIX., r. 4.)

As to prolixity in pleading, see O. XIX., r. 2 ; PLEADING.

Such variations shall be made in the forms prescribed by or under the Supreme Court of Judicature Acts, 1873, 1875, and 1877, as are requisite for giving effect to these rules.

The additional forms contained in the schedule hereto shall be used in or for the purposes of the Central Office, with such variations as circumstances require.

The masters may from time to time prescribe the use in or for the purpose of the Central Office of such modified or additional forms as may be deemed expedient : (O. LXA., r. 12, April, 1880.)

FURTHER CONSIDERATION.

I. GENERAL POWER TO ORDER.

1. GENERALLY.
2. ON MOTION FOR JUDGMENT.
3. AT TRIAL.
4. ON MOTION FOR NEW TRIAL [see *sup.* 2.]
5. ON REFERENCE TO REFEREE.

II. IN WHAT CASE RESERVED.

III. SETTING DOWN.

1. ACTION.
2. CAUSE ORIGINATING IN CHAMBERS.

IV. NOTICE OF SETTING DOWN.

V. MARKING "SHORT."

1. ACTION.
2. CAUSE ORIGINATING IN CHAMBERS.

VI. PLACING IN PAPER.

1. ACTION.
2. CAUSE ORIGINATING IN CHAMBERS.

VII. LEAVING PAPERS.

VIII. HEARING.

IX. ORDER.

I. POWER TO ORDER.

1. GENERALLY.

Subject to any rules of court, any judge of the said High Court, sitting in the exercise of its jurisdiction elsewhere than in a Divisional Court, may reserve any case, or any point in a case, for the consideration of a Divisional Court, or may direct any case, or point in a case, to be argued before a Divisional Court ; and any Divisional Court of the said High Court shall have power to hear and determine any such case or point so reserved or so directed to be argued : (J. A., 1873, s. 46.)

[But nothing in the Act of 1873, or] in any rule or order made under the powers thereof or of this Act, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the judge to the jury before whom the same shall come for trial, with a proper and complete direction to the jury upon the law, and as to the evidence applicable to such issues :

Provided also, that the said right may be enforced either by motion in

the High Court of Justice, or by motion in the Court of Appeal founded upon an exception entered upon or annexed to the record: (J. A., 1875, r. 22.)

There shall be repealed . . . so much of section forty-six of the Supreme Court of Judicature Act, 1873, as is inconsistent with the provisions of [the 17th section of the Appellate Jurisdiction Act, 1876, by which] every action and proceeding in the High Court of Justice, and all business arising out of the same, except as [thereinafter] provided, shall, so far as is practicable and convenient, be heard, determined, and disposed of before a single judge, and all proceedings in an action subsequent to the hearing or trial, and down to and including the final judgment or order, except as aforesaid, and always excepting any proceedings on appeal in the Court of Appeal, shall, so far as is practicable and convenient, be had and taken before the judge before whom the trial or hearing of the cause takes place: (A. J. A., 1876, s. 17.)

The remainder of the rule provides that Divisional Courts may be held, and that Rules of Court may be made to carry the enactment into effect. Rules of Court have been made as to the business to be conducted in Divisional Courts, but it is not the practice to hold Divisional Courts of the Chancery Division: (see A. J. A., 1876, s. 17; O. LVII., r. 1, Dec., 1876.)

2. ON MOTION FOR JUDGMENT.

Upon a motion for judgment, or for a new trial, the court may . . . if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made, as it may think fit: (O. XL., r. 10.)

3. AT TRIAL.

Upon the trial of an action the judge may, at or after the trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration: (O. XXXVI., r. 22a, Dec., 1876; and see CHAMBERS.)

4. ON MOTION FOR NEW TRIAL.

[See *sup.*, 2.]

5. ON REFERENCE TO REFEREE.

[After a trial by or reference to a referee] . . . the court shall have power to require any explanation or reasons from the referee, and to remit the cause or matter, or any part thereof, for re-trial or further consideration to the same or any other referee: (O. XXXVI., r. 34.)

II. IN WHAT CASE RESERVED.

Where accounts or inquiries have been directed, the judgment, or order, if made at the original hearing, adjourns the further consideration of the cause, and final judgment is obtained at the hearing on further consideration: (Dan. 1228.)

Where an order for an account is made on default of appearance to a writ specially indorsed for an account [see ACCOUNT II., 3], or after appearance, where the defendant fails to satisfy the court or judge that there is some preliminary question to be tried [see ACCOUNT, II., 3], it seems unnecessary to reserve further consideration, for, in the case of default of appearance to an action for an account, the action may proceed as if the party had appeared [O. XIII., r. 9; APPEARANCE, XVI.], and where the defendant has appeared it is necessary to bring on the action by notice of trial or otherwise: [see JUDGMENT, TRIAL.] But if the judge, after default in appearance, requires no further trial, further con-

sideration should be reserved : (see form, Seton, 8-9.) If the party has appeared, the order in Seton is improper, as the preliminary account will not be allowed to prejudice the defendant in having the issues raised by the subsequent pleadings properly heard and determined : (per Bacon, V.C., *Gatti v. Webster*, L. Rep. 12 Ch. Div. 774; 41 L. T. Rep. N. S. 18; 48 L. J. 763, Ch.)

If an order for an account is made, previous to the hearing, under O. XXXIII. [see ACCOUNT, IV., 1], it is improper to reserve further consideration, for the hearing as to the account is not the hearing of the action, which will be brought on by notice of trial or motion for judgment, whether further consideration has been reserved or not.

A cause cannot be set down, on further consideration, on a separate certificate; an order on such a certificate must be obtained on petition or summons : (Dan. 1228.)

III. SETTING DOWN.

1. ACTION.

If the accounts and inquiries have been directed by judgment in an action, the action cannot be set down on further consideration until the accounts or inquiries directed have been taken or made, and the chief clerk's certificate of their result filed; or a special certificate obtained, showing why the accounts and inquiries, or any of them, have not been proceeded with : (Dan. 1228.)

If a preliminary order for accounts has been made, and the action is allowed to come on for hearing before the chief clerk's certificate has been made, the hearing will be postponed, and the costs will be ordered to be paid by the party so bringing the action on : (*Re Bell*, 39 L. T. Rep. N. S. 422.)

When any cause shall, at the original or any subsequent hearing thereof, have been adjourned for further consideration, such cause may, after the expiration of eight days and within fourteen days from the filing of the certificate of the chief clerk of the judge to whose court the cause is attached, be set down by the registrar in the cause book for further consideration, on the written request of the solicitor for the plaintiff or party having the conduct of the cause; and after the expiration of such fourteen days the cause may be set down by the registrar, on the written request of the solicitor for the plaintiff or for any other party : (C. O. 21, r. 10.)

The request to set down the cause may be in the form or to the effect first set forth at the end of [the rule] : (*Id.*)

[On setting down there must be produced], the [judgment] or order adjourning further consideration, or an office copy thereof, and an office copy of the chief clerk's certificate or a memorandum of the date when such certificate was filed, indorsed on the request by the clerk of reports : (Ch. Reg. 15th March, 1860, r. 9.)

The registrar's clerk retains the request for filing, and sets down the cause on the same day the request is left with him : (Dan. 1234.)

2. CAUSE ORIGINATING AT CHAMBERS.

Where any cause originating in chambers [has] at the original or any subsequent hearing thereof . . . been adjourned for further consideration, such cause may, after the expiration of eight days, and within fourteen days from the filing of the certificate of the chief clerk . . . be brought on for further consideration by a summons to be taken out by the plaintiff or party having the conduct of the cause; and, after the expiration of such fourteen days, by a summons to be taken out by any

other party This summons is to be served six clear days before the return : (Ch. Reg., Aug. 1857, r. 18.)

Where the hearing on further consideration is adjourned into court, a note signed by the chief clerk to that effect is left with the clerk at the order of course seat at the registrar's office ; and, when the cause has been set down by him, notice thereof should be given to the other parties by the solicitor at whose instance it is set down : (Dan. 1235.)

Upon the return of the summons the cause will be heard on further consideration in chambers, or, if there is a question which the judge thinks ought, or the parties desire, to be argued by counsel, it will be adjourned into court : (Dan. 1234-5.)

IV. NOTICE OF SETTING DOWN.

Notice [of the setting down] shall be given to the other parties in the cause at least six days before the day for which the [cause] may be so marked for further consideration : (C. O. 21, r. 10.) A form is given in the same rule.

If any person has been served with notice of judgment, and has had leave by order to attend the proceedings, he must be served : (Seton, 42.)

If it is intended to deal with the proceeds of any estate sold under the decree, the purchaser must be served, unless it appears on the proceedings that he has obtained his conveyance : (Seton, 42.)

If any stop order affects the funds to be dealt with, the person who obtained it must be served with notice : (Seton, 42.)

V. MARKING "SHORT."

1. ACTION.

A cause for further consideration may be marked "short" on production of the certificate of the plaintiff's counsel that the cause is fit to be so heard, without the consent of the solicitors for any of the defendants ; but [it] will not be so marked until after the expiration of ten days unless by consent of all parties : (Ch. Reg., 15th March, 1860, r. 10.)

Notice that the cause has been marked for hearing as a short cause should, where not so marked by consent, be given to the other solicitors in the cause, by the solicitor of the plaintiff : (Dan. 1234.)

2. CAUSE ORIGINATING IN CHAMBERS.

If the parties desire that the cause should be heard as a "short cause" the note mentions the short cause day on which it is to be heard : (Dan. 1235.)

VI. PLACING IN PAPER.

1. ACTIONS.

The cause when so set down shall not be put into the paper for further consideration until after the expiration of ten days from the day on which the same was so set down, and shall be marked in the cause book accordingly : (C. O. 21, r. 10.)

2. CAUSE ORIGINATING IN CHAMBERS.

In cases other than short causes, the cause will not, except by consent, be put into the paper before the expiration of ten days from the time when it was set down : (Dan. 1235.)

VII. LEAVING PAPERS.

Before the cause comes on, copies of the judgment or order adjourning the further consideration, the chief clerk's certificate, and any other orders

or certificates which shall be referred to at the hearing, should be left with the usher for the use of the court, by the solicitor for the party who has set the cause down: (Dan. 1235.)

VIII. HEARING.

No . . . further consideration shall be allowed to stand over to an indefinite period: (C. O. 21, r. 13.)

The further consideration comes on before the judge before whom the trial took place: (see *sup.*, I., 7; and C. O. 6, r. 5.)

When, by sect. 17 of the Appellate Jurisdiction Act, 1876, or by these rules, any application ought to be made to, or any jurisdiction exercised by the judge before whom an action has been tried, if such judge shall die or cease to be a judge of the High Court, or if such judge shall be a judge of the Court of Appeal, or if for any other reason it shall be impossible or inconvenient that such judge should act in the matter, the president of the division to which the action belongs may, either by a special order in any action or matter, or by a general order applicable to any class of actions or matters, nominate some other judge to whom such application may be made, and by whom such jurisdiction may be exercised: (O. LVIIA., r. 2, Dec., 1876.)

If any party served does not appear, an office copy of the affidavit of service of the notice must be produced to the registrar before the rising of the court: (Seton, 42.)

When a purchaser has been served, the affidavit must show that his conveyance has been delivered to him: (*Id.*)

If the purchaser has obtained his conveyance he should not appear. If he appears, he is generally refused his costs: (*Id.*)

Any person who has been found by the certificate to be interested in the subject-matter of the suit, such as a creditor whose claim has been allowed, has a right to appear upon the hearing of the cause for further consideration, to protect his own interest; and he may do so, without previously obtaining leave to appear, provided he desires to take advantage of nothing but what appears in the certificate: (Dan. 1236.)

Upon a hearing on further consideration the court will not permit facts to be brought before it, in order to ground upon them a direction not warranted by the original judgment: (Dan. 1236.)

The certificate cannot be challenged at the hearing on further consideration, by any person who has not applied to discharge or vary it, and whose application does not then come on for hearing: (Dan. 1228.)

No further evidence than the certificate, as to matters directly in issue in the cause, will be received on the hearing on further consideration; but, if necessary, the court will, at the suggestion of counsel, direct further inquiries as to such matters: (Dan. 1228.)

Matters not directly in issue may, if the court thinks proper, be proved by affidavit: (*Id.*; and see EVIDENCE, II., 3.)

Under O. XV., r. 1 (see ACCOUNT, II., 3) any matter required on further consideration may be proved by affidavit: (*Beaney v. Elliott*, W. N., 1880, p. 99.)

IX. ORDER.

Upon the hearing on further consideration the court will make such further order in the cause as, upon reading the chief clerk's certificate, appears to be consistent with the justice of the case as it stands upon the judgment and certificate: (Dan. 1229; and see *Re St. Nazaire Land Company*, L. Rep. 12 Ch. Div. 88; 41 L. T. Rep. N. S. 110.)

The court will direct any further inquiries or accounts, where circum-

stances have arisen which render it necessary to give such directions, in order to fulfil the objects of the decree: (Dan. 1237.)

Further consideration may be reserved more than once: (Dan. 1230.)

Where, on the hearing of an administration suit on further consideration, the order directed further accounts and inquiries to be taken, and, there being no further questions of law to decide, it was proposed again to reserve further consideration, Jessel, M.R. refused to do so in court, but gave general liberty to apply in chambers when the certificate was made: (*Gilbert v. Russell*, W.N., 1875, p. 225.)

On bespeaking orders on further consideration [the following documents must be left with the registrar]: counsel's brief, the original [judgment], or the last order on further consideration, and any subsequent orders to revive or carry on the proceedings, the office copy of the chief clerk's certificate, and office copies of any affidavits, and any exhibits or other evidence used at the hearing: (Ch. Reg., March, 1860, r. 29.)

If the order deals with any purchase money [there must be left] a consent brief for the purchaser, or an affidavit of notice to him of the intended application of the purchase money, and that the conveyance has been executed and delivered to him: (*Id.*, r. 30.)

Whenever any fund in court is to be dealt with [there must be left the Paymaster-General's] certificate, and, if the funds are restrained by any order, the restraining order or an office copy thereof: (Ch. Reg., March, 1860, r. 16.)

Where payment out of court is ordered to legal personal representatives [there must be left] the probate or letters of administration, stamped for a sufficient amount: (*Id.*, r. 17.)

GARNISHEE.

[See EXECUTION.]

GOODS.

I. ACTION IN RESPECT OF.

1. WRIT OF SUMMONS.
2. PROCEEDINGS IN DEFAULT.
 - (a) *Of Appearance.*
 - (b) *Of Pleading.*
3. INTERLOCUTORY ORDER FOR DELIVERY.
4. EXECUTION [see EXECUTION, XII., 4, 5.]

II. ORDER FOR SALE OF [see PROPERTY.]

I. ACTION IN RESPECT OF.

1. WRIT OF SUMMONS.

Forms of indorsement are given in App. A., p. II., s. 4, to the Rules of 1875.

2. PROCEEDINGS IN DEFAULT.

(a) *Of Appearance.*

Where the defendant fails to appear to the writ of summons and the plaintiff's claim is not for a debt or liquidated demand only, but for detention of goods and pecuniary damages, or either of them, no statement of

claim need be delivered, but interlocutory judgment may be entered: (O. XIII., r. 6; and see JUDGMENT.)

The rule does not provide for judgment being entered in default of appearance of one of several defendants.

A form of judgment has been issued by the registrar.

A writ of inquiry shall issue to assess the value of the goods and the damages, or the damages only, as the case may be, in respect of the causes of action disclosed by the indorsement on the writ of summons. But the court or a judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way in which any question arising in an action may be tried: (O. XIII., r. 6; and see INQUIRIES; TRIAL.)

A form of judgment, after the writ of inquiry, has been issued by the registrars: (see JUDGMENT.)

If the action be for the return of a specific chattel, final judgment may be entered, and without leave: (*Ivory v. Cruickshank*, W. N., 1875, p. 249.)

(b) Pleading.

If the plaintiff's claim be for detention of goods and pecuniary damages, or either of them, and the defendant makes default as mentioned in rule 2 [that is, by not delivering a defence or demurrer within the time allowed] plaintiff may enter an interlocutory judgment against the defendant: (O. XXIX., r. 4.)

A writ of inquiry shall issue to assess the value of the goods, and the damages, or the damages only, as the case may be. But the court or a judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way in which any question arising in an action may be tried: (O. XXIX., r. 4; and see INQUIRIES, TRIAL.)

When in any such action, as in Rule 4 mentioned, there are several defendants, if one of them make default as mentioned in Rule 2, the plaintiff may enter an interlocutory judgment against the defendant so making default, and proceed with his action against the others. And in such case, damages against the defendant shall be assessed at the same time with the trial of the action or issues therein against the other defendants, unless the court or a judge shall otherwise direct: (O. XXIX., r. 5; and see TRIAL.)

The solicitor, on entering judgment, must produce the master's certificate of appearance and the statement of claim, unless it appears by such certificate that the defendant did not require a statement of claim to be delivered. If the statement of claim does not show the date of delivery the solicitor must indorse such date: (Directions to Registrars, July, 1876.)

A form of judgment has been issued by the registrars: (see JUDGMENT; and Sched. D. 8 to Rules of April, 1880.)

If the action be for the return of a specific chattel, final judgment may be entered, and without leave: (*Ivory v. Cruickshank*, *sup.*)

If the plaintiff's claim be for a debt or liquidated demand, and also for detention of goods and pecuniary damages, or pecuniary damages only, and the defendant makes default as mentioned in Rule 2, the plaintiff may enter final judgment for the debt or liquidated demand, and also enter interlocutory judgment for the value of the goods and the damages, or the damages only, as the case may be, and proceed as mentioned in Rule 4: (O. XXIX., r. 6.)

3. INTERLOCUTORY ORDER FOR DELIVERY.

Where an action is brought to recover, or a defendant in his statement

of defence seeks by way of counter-claim to recover specific property other than land, and the party from whom such recovery is sought does not dispute the title of the party seeking to recover the same, but claims to retain the property by virtue of a lien or otherwise as security for any sum of money, the court or a judge may, at any time after such last-mentioned claim appears from the pleadings, or, if there be no pleadings, by affidavit or otherwise to the satisfaction of such court or judge, order that the party claiming to recover the property be at liberty to pay into court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs as such court or judge may direct, and that upon such payment into court being made, the property claimed be given up to the party claiming it: (O. LII., r. 6.)

A motion, by a plaintiff before judgment, for delivery of a vessel subject to a lien for a final instalment of purchase money, which was payable under contract on delivery of the vessel abroad, was refused: (*Sultan of Turkey v. Union Bank of London*, W. N., 1877, p. 79.)

4. EXECUTION.

[See EXECUTION, XII., 4, 5.]

II. ORDER FOR SALE OF.

[See PROPERTY.]

GRAMMAR SCHOOL.

[See CHARITIES.]

GUARDIAN.

[See INFANTS; LUNATICS; PARTIES; SETTLED ESTATES;
TRUSTEES.]

HOUSE OF LORDS.

[See APPEAL.]

IMPRISONMENT.

[See ARREST; EXECUTION.]

IMPROVEMENT OF LAND.

- I. WHAT IMPROVEMENTS MAY BE AUTHORISED.
- II. WHERE ORDER OF JUDGE NECESSARY.

1. ON DISSSENT OF ANY INTERESTED PERSON.
2. WHERE LANDOWNER OR HER HUSBAND IS FATHER OF INTERESTED INFANT.
3. ON DISSSENT OF NAVIGATION TRUSTEES.

III. APPLICATION.

1. UNNECESSARY WHERE DISSENT WITHDRAWN.
2. LANDOWNER TO APPLY.
3. SUMMONS.
4. SERVICE OUT OF JURISDICTION.

IV. HEARING AND EVIDENCE.

V. ORDER.

VI. COSTS.

I. WHAT IMPROVEMENTS MAY BE AUTHORISED.

By improvement of land shall be meant all or any of the following matters:—

- (1) Drainage of land, and straitening, widening, deepening, or otherwise improving the drains, streams, and watercourses of any land.
- (2) Irrigation and warping.
- (3) Embanking and weiring of land from the sea or tidal waters, or from lakes, rivers, or streams, in a permanent manner.
- (4) Inclosing of lands and the straitening of fences and re-division of fields.
- (5) Reclamation of land, including all operations necessary thereto.
- (6) Making of permanent farm roads and permanent tramways and railways and navigable canals for all purposes connected with the improvement of the estate.
- (7) Clearing of land.
- (8) Erection of labourers' cottages, farmhouses, and other buildings required for farm purposes, and the improvement of and addition to labourers' cottages, farmhouses, and other buildings for farm purposes already erected, so as such improvements or additions be of a permanent nature.
- (9) Planting for shelter.
- (10) Constructing or erecting of any engine houses, waterwheels, saw and other mills, kilns, shafts, wells, ponds, tanks, reservoirs, dams, leads, pipes, conduits, watercourses, bridges, weirs, sluices, floodgates, or hatches which will increase the value of any lands for agricultural purposes.
- (11) Construction or improvement of jetties or landing places on the sea coast, or on the banks of navigable rivers or lakes, for the transport of cattle, sheep, and other agricultural stock and produce, and of lime, manure, and other articles and things for agricultural purposes, provided the Inclosure Commissioners shall be satisfied that such works will add to the permanent value of the lands to be charged to an extent equal to the expense thereof.
- (12) The execution of all such works as in the judgment of the commissioners may be necessary for carrying into effect any matter hereinbefore mentioned, or for deriving the full benefit thereof: (27 & 28 Vict. c. 114, s. 9.)
- (13) Erection of a mansion house and such other usual and necessary buildings, outhouses, and offices as are commonly appurtenant thereto, and held and enjoyed therewith.
- (14) Completion of any mansion house and such appurtenances as aforesaid.
- (15) Improvement of and addition to any mansion house and such appurtenances as aforesaid already erected.
- (16) Improvement of and addition to any house which is capable of being converted into a mansion house suitable to the estate on

which the same stands, so as such improvement and addition be of a suitable nature : (34 & 35 Vict. c. 85, s. 3.)

Every such mansion house so erected or enlarged or converted must, to be an improvement, be suitable to the estate on which it stands as a residence for such estate, "estate" including lands on which any improvement is to be made, and any other lands in the neighbourhood settled to the same uses : (*Id.*)

As to the sum to be charged in respect of mansions and other buildings see 33 & 34 Vict. c. 56, s. 4.

II. WHERE ORDER OF JUDGE NECESSARY.

1. ON DISSENT OF ANY INTERESTED PERSON.

[When] any person having any estate in, or charge or security on, the land to be improved [has] within the month named in the [previous] section [signified] in writing to the [Inclosure] Commissioners his dissent from such application, stating therein the nature of his estate in, or charge or security on, such land unless or until such dissent be withdrawn : (27 & 28 Vict. c. 114, s. 18.)

2. WHERE LANDOWNER OR HER HUSBAND IS FATHER OF INTERESTED INFANT.

[Where] the landowner, or the husband of the landowner, [is] the father of the person or persons entitled, either at law or in equity, to any estate in such land, or any part thereof, in reversion or remainder, up to and inclusive of the person entitled to the first vested estate of inheritance, and such person or persons, or any of them [is or are] infant or infants, or a minor or minors : (*Id.*)

3. ON DISSENT OF NAVIGATION TRUSTEES.

If the commissioners shall consider that any proposed improvement would interfere with any navigable river or canal respectively vested in or under the management or control of any commissioners, trustees, conservators, undertakers, company, or other body or individuals, or the banks or other works or conveniences thereof, or would occasion the flow or discharge into such river or canal of any drainage or other matter, in case they shall within one month after the receipt of [the commissioners'] notice [of the intended application] signify in writing to the commissioners their dissent from such application, and state the nature of their interest in or authority over such river or canal unless or until such dissent be withdrawn : (27 & 28 Vict. c. 114, s. 19.)

III. APPLICATION.

1. UNNECESSARY WHERE DISSENT WITHDRAWN.

If, at any time after notification of such dissent, and before any order [of a judge] shall have been applied for and made as aforesaid, such dissent shall be withdrawn by a like notification in writing, it shall not be necessary to make or proceed with such application, or to obtain such order : (27 & 28 Vict. c. 114, s. 21.)

2. LANDOWNER TO APPLY.

If and when any dissent from any application to the commissioners for their sanction of proposed improvements shall have been notified in writing to the commissioners [as mentioned, *sup.* II.], or if the landowner, or the husband of the landowner, shall be the father of an infant or minor [entitled as mentioned, *sup.* II.], the landowner desiring such improvements may apply to the [Chancery Division] for an order authorising the commissioners to entertain and proceed

upon the application for such proposed improvements notwithstanding such dissent or circumstance : (27 & 28 Vict. c. 114, s. 21.)

3. SUMMONS.

Such application shall be made to a judge sitting at chambers, by summons, calling on the party dissenting to show cause why such order should not be made : (27 & 28 Vict. c. 114, s. 21 ; see CHAMBERS, XIII.)

4. SERVICE OUT OF JURISDICTION.

Where any party dissenting shall be out of the jurisdiction of the court, it shall be lawful for the court or judge to order service to be made in such manner as such court or judge may think fit, and upon proof to the satisfaction of such court or judge that such party has had actual notice, within a reasonable time, of such intended application, it shall be lawful for such court or judge thereupon to hear and determine such application : (27 & 28 Vict. c. 114, s. 22.)

IV. HEARING AND EVIDENCE.

The . . . judge to whom such application shall be made, shall hear and determine such application, and for that purpose shall have power to make or direct to be made all such inquiries, and receive and entertain all such statements and evidence, on oath or by affidavit, as such . . . judge may consider necessary or desirable, or as may be produced before them or him : (27 & 28 Vict. c. 114, s. 24.)

V. ORDER.

If, upon a consideration of all the circumstances, such . . . judge shall be of opinion that the commissioners should entertain and proceed upon such application, an order shall be made authorising and requiring them to proceed thereon, and to deal with the same according to the provisions of this Act authorising them in that behalf, notwithstanding such dissent or circumstance as aforesaid : (27 & 28 Vict. c. 114, s. 21.)

VI. COSTS.

The costs of and incidental to every application under the 21st and 22nd sections, and the mode in which such costs shall be settled or taxed, shall be in the discretion of the . . . judge who shall hear such application, and if such . . . judge shall so direct the said costs shall be deemed to be part of the expenses of and incidental to the application for the proposed improvements : (27 & 28 Vict. c. 114, s. 23.)

INCLOSURE ACT.

Moneys payable under the Inclosure Act (where not payable to proprietors), if less than . . . 200*l.* and [exceeding or amounting] to . . . 20*l.* . . . shall, at the option of the parties who for the time being would have been entitled to the rents and profits of the . . . land, or their guardians or committees, in case of infancy, idiotcy, lunacy, or other incapacity, with the approbation of the commissioners, to be signified in writing under their seal, be

(1) Paid into court ; or

(2) To trustees nominated by the parties : (8 & 9 Vict. c. 118, s. 140.)

[If the money] shall amount to or exceed the sum of 200*l.*, the same shall, with all convenient speed, unless the commissioners shall otherwise direct, under the provisions . . . contained [in the Act], be paid into

[court, to an account—“*Ex parte* The Inclosure Commissioners”]: (8 & 9 Vict. c. 118, s. 138; 38 & 39 Vict. c. 66.)

The money shall, when so paid in, then remain until the same shall, by order of the said court, made upon a petition in a summary way by the parties who would have been entitled to the rents and profits of the . . . land, be applied to the following purposes or any of them; (that is to say,)

The redemption or discharge of the land tax, or of any debt or other incumbrance affecting the same land, or affecting other lands standing settled therewith to the same or the like uses or trusts;

The purchase of other land, to be conveyed or settled upon the like uses or trusts, or such of them as shall be then existing undetermined, or capable of taking effect: (8 & 9 Vict. c. 118, s. 138.)

In the meantime, and until such application shall be made, the said money may, by order of the said court, to be made upon the like petition, be invested by the [Paymaster-General] in the purchase of 3l. per cent. Consolidated, or 3l. per cent. Reduced, Bank Annuities, or of Government securities: (s. 139.)

The dividends or interest of such annuities or securities shall, from time to time be paid, by order of the said court, to the parties who, for the time being, would have been entitled to the rents and profits of the lands so to be purchased, conveyed, and settled: (s. 139.)

[And see PAYMENT INTO AND OUT OF COURT.]

The practice under ss. 69 and 70 of the Lands Clauses Consolidation Act, 1845, is generally applicable to proceedings under the Inclosure Act: (See LANDS CLAUSES ACT.)

INFANTS.

I. THEIR POSITION IN AN ACTION.

1. AS PARTIES [see PARTIES].
2. SERVICE OF WRIT [see WRIT OF SUMMONS].
3. APPEARANCE [see APPEARANCE, II.]
4. ADMISSIONS IN PLEADINGS.
5. INQUIRY AS TO PROPRIETY OF ACTION.
6. SHOWING CAUSE AGAINST JUDGMENT [see JUDGMENT].

II. WARDSHIP.

1. JURISDICTION.
2. WHO MAY TAKE PROCEEDINGS.
3. WHAT PERSONS ARE WARDS.
4. PROTECTION TO WARDS.
5. GUARDIANS.
 - (a) *When Appointed.*
 - (b) *Guardians of the Person.*
 - (1) Application.
 - (2) Evidence.
 - (3) Who Appointed.
 - (c) *Guardians of the Estate.*
 - (1) When Appointed.
 - (2) Application.
 - (3) Who Appointed.
 - (4) Evidence.
 - (5) Security.
 - (d) *Interference with Testamentary Guardians.*
 - (e) *Removing Guardians.*
6. TAKING WARDS OUT OF JURISDICTION.

7. SANCTIONING MARRIAGE OF WARD.

- (a) *Court's Leave necessary.*
- (b) *Who Applies.*
- (c) *How Application made.*
- (d) *Evidence.*
- (e) *Adjournment to Chambers.*
- (f) *Summons to Proceed.*
- (g) *Proceedings in Chambers.*
- (h) *Settlement.*
- (i) *Trustees.*
- (k) *Order.*

8. RESTRAINING MARRIAGE OF WARD.

- (a) *When Order made.*
- (b) *Application.*

9. PROCEEDINGS ON MARRIAGE WITHOUT SANCTION.

- (a) *Committal.*
- (b) *Application for Inquiry.*
- (c) *Attendance of Parties.*
- (d) *Settlement.*
- (e) *Ordering Marriage Ceremony.*

III. PRODUCTION OF INFANTS.

- 1. HABEAS CORPUS.
- 2. ORDER.

IV. CUSTODY OF INFANTS.

- 1. UNDER ACT OF 1873.
 - (a) *Where given to Mother.*
 - (b) *Enforcing Covenants in Separation Deeds.*
- 2. WHERE CONVICTED OF FELONY.
 - (a) *Power to make Orders.*
 - (b) *No Fees to be taken.*
 - (c) *Order to Provide for keeping within Jurisdiction.*
 - (d) *Conviction not Affected.*
 - (e) *Costs.*
 - (f) *Rescinding Order.*

V. APPROVAL OF MARRIAGES UNDER 4 GEO. 4, c. 76.

VI. CARE OF INFANTS' ESTATES.

- 1. JURISDICTION.
- 2. MAINTENANCE.
 - (a) *Dividends from Stock.*
 - (b) *Other Cases.*
 - (c) *Application.*
 - (d) *Service.*
 - (e) *Evidence.*
 - (f) *Order.*
 - (g) *Where Capital applied.*
 - (h) *Increasing Allowance.*
- 3. ADVANCEMENT.
 - (a) *Where ordered.*
 - (b) *Application.*
 - (c) *Evidence.*
- 4. SURRENDER BY AND RENEWAL TO INFANT LESSEES.
 - (a) *Power to Order.*
 - (b) *Application.*
 - (c) *Expenses of Renewal.*
- 5. RENEWAL BY INFANT LESSORS.
 - (a) *Where ordered.*
 - (b) *Application.*
 - (c) *Premiums.*

6. LEASES BY INFANTS.

- (a) *Where ordered.*
- (b) *Application.*
- (c) *Conditional Contract.*
- (d) *Order.*
- (e) *Settling Lease.*
- (f) *Counterpart.*

7. SANCTIONING SETTLEMENTS.

- (a) *Power to Sanction.*
- (b) *Application.*
- (c) *Ordering Service of Petition.*
- (d) *Adjournment to Chambers.*
- (e) *Summons to Proceed.*
- (f) *Evidence.*
- (g) *Settlement.*
- (h) *Order.*

I. THEIR POSITION IN AN ACTION.

1. AS PARTIES.

[See PARTIES.]

2. SERVICE OF WRIT.

[See WRIT OF SUMMONS.]

3. APPEARANCE.

[See APPEARANCE, II.]

4. ADMISSIONS IN PLEADINGS.

Allegations of fact in pleadings in an action, though not denied specifically, or by necessary implication; or stated to be not admitted by an infant's pleading, are not thereby admitted, as in ordinary cases: (see O. XIX., r. 17; PLEADING.)

5. INQUIRY AS TO PROPRIETY OF ACTION.

Where, on behalf of an infant, two or more suits are instituted in his name, by different persons, each acting as his next friend, the court will, where no decree has been made in any of the actions, direct an inquiry to be made at chambers as to which suit is most for his benefit; and when that is ascertained, will stay the other actions.

When the suits are attached to the same branch of the Chancery Division, and none of them is in the paper for hearing, such inquiry will be directed on an *ex parte* motion, the court being satisfied, in the first instance, with the allegation that the actions are for the same purpose; when they are attached to different branches, an order of transfer of one suit must be obtained to the judge in whose court the other is; and the order for inquiry is then obtained from him on motion, after notice to the other parties. The order for inquiry must be made in both suits, and is no stay of proceedings.

If upon the inquiry the second suit is deemed more beneficial to be prosecuted, the court will stay the first suit, and give costs to the next friend.

Under special circumstances the court may order the suits to be stayed without inquiry. Where a decree has been made in any of the suits, no inquiry is usually directed; but the other suits will be stayed; liberty being given to each next friend in the stayed suits to apply for the conduct of the suit in which the decree was made. Where another next friend commences a second action, he must show some defect in the first; or a decided preference in the second; if the merits are only equal, priority prevails: (Dan. 68-9.)

The court will, on the application of the defendant, or of any person acting as next friend in the application (but not on the application of the next friend in the action, unless another action is pending, and not on the hearing), where a strong case is shown that an action preferred in the name of an infant is not for his benefit, or is begun from improper motives, order an inquiry concerning the propriety of the suit.

If upon such inquiry it appears that the suit is not for the benefit of the infant, either the proceedings will be stayed, or if there is no excuse for the fact of the suit having been instituted, the action will be dismissed with costs, to be paid by the next friend: (*Fox v. Suverkrop*, 1 Beav. 583; *Thomas v. Elson*, W. N. 1877, p. 177.)

Where it appeared clearly upon affidavits that the suit was commenced by the next friend to promote his own views, and not for the benefit of the infant, the court will make such order without an inquiry: (Dan. 69-70.)

6. SHOWING CAUSE AGAINST JUDGMENT.

[See JUDGMENT.]

II. WARDSHIP.

1. JURISDICTION.

Causes and matters relating to the wardship of infants are assigned to the Chancery Division: (J. A. 1873, s. 34.)

The jurisdiction of the court over its wards remains notwithstanding they become lunatic during their infancy, and may, notwithstanding, be exercised by entertaining applications as to their custody and education, although the question of sanity may be the principal point in dispute: (*Re Edwards*, L. Rep. 10 Ch. Div. 605; 40 L. T. Rep. N. S. 119; 48 L. J. Ch. 233; 27 W. R. 611.)

The jurisdiction as to appointment of guardians, and the protection of property of infants, is exercised only when the court has the means of applying property for the use and maintenance of the infants: (Dan. 1191.)

If an infant has no property, the jurisdiction may be attracted by purchasing consols and settling them upon trust for the children: (See *Re Agar-Ellis*, L. Rep. 10 Ch. Div. 52; 39 L. T. Rep. N. S. 380; 48 L. J. 1 Ch.; 27 W. R. 117.)

2. WHO MAY TAKE PROCEEDINGS.

Any person may commence proceedings for an infant's benefit, subject to being made to pay costs if the proceedings are improper: (Dan. 1191.)

3. WHAT PERSONS ARE WARDS.

Generally whenever proceedings are instituted for the court's direction as to the estate, person, or benefit of an infant, or the administration of property in which he is infant, he, whether plaintiff or defendant, becomes a ward of court: (Dan. 1190.)

He becomes such also—

- (a) By appointment of guardian on petition;
- (b) By payment in under the Trustee Relief Act;
- (c) By order for maintenance on summons;
- (d) By order for maintenance on petition where there are guardians.

But not on payment in under the Legacy Duty Act, or Lands Clauses Act: (Dan. 1190-1.)

4. PROTECTION TO WARDS.

A ward is under the protection of the court, whether he is under the immediate tutelage of his father (Dan. 1190), or under any guardian,

however appointed : (*Id.* ; *Re Alison's Trusts*, L. Rep. 8 Ch. Div. 1 ; 38 L. T. Rep. N. S. 304 ; 47 L. J. 755, Ch. ; 26 W. R. 450.)

The actual guardianship is not assumed by the court : (Dan. 1190.)

5. GUARDIAN.

(a) *Where Appointed.*

The court will appoint a guardian to an infant in a proper case, although his father is alive; or although there is a testamentary guardian, however large the property may be; or although the infant is out of the jurisdiction (if his property is within the jurisdiction) (Dan. 1192-4); or although no other proceedings as to the infant or his estate are pending : (Ayck. 591.)

The Chancery Division has jurisdiction to appoint guardians to infants, notwithstanding guardians have been appointed by the Lancaster Palatine Court : (*Re Alison's Trusts*, *sup.*)

(b) *Guardian of the Person.*

(1) Application.

The application is at chambers by ordinary summons when proceedings are pending; in other cases by original summons, intituled in the matter of the infant by his next friend : (Ayck. 591.)

The written authority of the next friend must be filed with the duplicate summons : (Dan., 192.)

The summonses must be served on the relatives named [see *post*] unless they acquiesce in the appointment proposed : (Dan. 1195.)

(2) Evidence.

Upon application for the appointment of guardians of infants, the evidence is to show :

1. The ages of the infants.

2. The nature and amount of the infants' fortunes and incomes.

3. What relations the infants have : (Ch. Reg. Aug. 1857, r. 19.)

Generally it must be shown what persons there are of or within the same degree of relationship as the proposed guardian, and, if the mother is proposed, the evidence must extend to paternal and maternal uncles and aunts. If the summons is not served on the relations, their acquiescence in the appointment must be proved, unless service on them is dispensed with : (Dan. 1195.)

The fitness of the proposed guardian must be proved and his written consent to act produced : (*Id.*)

Sometimes evidence of fitness is dispensed with : (*Id.*)

(3) Who Appointed.

The court disapproves of the appointment of a married woman as sole guardian (*Re Kaye*, L. Rep. 1 Ch. App., 387), and if any female guardian subsequently marries, her guardianship determines and a new appointment is necessary : (Dan. 1196.)

Where one of several guardians appointed by the court dies, the right of the survivors determines; not so with respect to testamentary guardians : (Dan. 1196.)

(c) *Guardian of the Estate.*

(1) When Appointed.

Where no action is pending, enabling the court to manage the property, a guardian of the estate as well as of the person is appointed : (Dan. 1196.)

(2) Application.

The application must be made as in the case of a guardian of the person : (see *sup.* (b) (1).)

(3) Who Appointed.

The guardian of the person is usually appointed : (*Id.*)

(4) Evidence.

Where a guardian of the estate is to be appointed, the evidence must show the nature, rental, or income, and other material particulars of the estate, the fitness of the proposed guardian, and his consent to act : (Dan. 1196.)

(5) Security.

Security, duly to account, is generally required, as in the case of a receiver : [See RECEIVER].

The recognisance is completed and the accounts are taken as in the case of a receiver : (Dan. 1197.) [See RECEIVER.]

(d) *Interference with Testamentary Guardians.*

A testamentary guardian may be removed, and another appointed in his place, or without removing him the court may appoint another person to have care of the infant : (Dan. 1194.)

The usual course is to make orders regulating the conduct of the testamentary guardian : (*Id.*)

An action is necessary to remove a testamentary guardian only when he has taken the trust upon him, and acted as guardian : (*Id.*)

(e) *Removing Guardians.*

The application is by summons, supported by evidence of the facts, of the fitness of the proposed new guardian, and his consent to act : (Dan. 1197.)

6. TAKING INFANTS OUT OF JURISDICTION.

Application by summons must be made before taking wards out of the jurisdiction, even to Ireland and Scotland, supported by an affidavit of grounds, and an undertaking to bring him back by the person taking him : (Dan. 1198.)

7. SANCTIONING MARRIAGE OF WARD.

(a) *Court's Leave Necessary.*

An order sanctioning the proposed marriage must be made notwithstanding the infant has a parent or guardian : (Dan. 1206.)

(b) *Who Applies.*

The petition should always be presented by the intended husband, whether the ward or not : (*Lucas v. Dalziel*, W. N. 1879, p. 151.)

Sometimes a female ward and sometimes both parties are petitioners : where the settlement can only be effected under 18 & 19 Vict. c. 43 [see *post*], the petition must be presented by the infant : (*Id.*)

(c) *How Application Made.*

The application is usually by petition : (Dan. 1209.)

Which must state the age of the ward ; the nature of his or her fortune ; the contemplated marriage ; the age, rank, position in life, and fortune of the person to whom the infant is proposed to be married ; and must pray for an inquiry whether the contemplated marriage is a proper one for the ward ; that, if so, proposals for a settlement may be received ; that a proper settlement may be approved ; and that, upon the execution thereof, the parties may be at liberty to intermarry : (Dan. 1210.)

(d) *Evidence.*

The allegations in the petitions must be supported by affidavit : (Dan. 1210.)

(e) *Adjournment to Chambers.*

On a petition for leave for an infant to marry, the whole matter is usually adjourned for consideration in chambers : (Seton, 4th edit. 54.)

(f) *Summons to Proceed.*

A summons to proceed is then taken out: (*Id.*)

(g) *Proceedings in Chambers.*

The propriety of the marriage is discussed; proposals of a settlement are brought in; the matter is adjourned for the settlement to be prepared: (Dan. 1210.)

(h) *Settlement.*

The draft is prepared by the lady's solicitor, and settled in chambers with the aid of the conveyancing counsel: (see DEED, CONVEYANCING COUNSEL.)

(i) *Trustees.*

The fitness of the trustees, and their consent to act, is shown: (*Id.*)

(k) *Order.*

A minute of the order and of the evidence adduced is written on the fold of the original petition, and sent to the registrar, who draws up the order: (Seton, 4th edit. 54.)

8. RESTRAINING MARRIAGE OF WARD.

(a) *Where Order Made.*

If the court suspects that the marriage of its ward is intended without its sanction, it will restrain by injunction the marriage, and also communication between the ward and the intended husband or wife, and will, if necessary, remove the infant from the custody of a guardian, and restrain his giving consent without leave of the court: (Dan. 1206.)

(b) *Application.*

The application is usually by petition on motion supported by affidavit, and hearsay evidence and declaration have weight: (Dan. 1207.)

In urgent cases an *ex parte* application is sufficient: (*Id.*)

9. PROCEEDINGS ON MARRIAGE WITHOUT SANCTION.

(a) *Committal.*

A person marrying a ward of court without its consent, and all persons aiding and abetting, are guilty of contempt, and may be committed to prison, although ignorant of the fact of wardship: (Dan. 1207; and see ARREST.)

(b) *Application for Inquiry.*

An application may be made by motion or petition of the infant, guardian, or any other person, for an inquiry as to the validity of the marriage and the approval of a proper settlement: (*Id.*)

(c) *Attendance of Parties.*

The parties are ordered to attend personally to answer the contempt: (*Id.*)

(d) *Settlement.*

If the marriage is valid, the court, in the case of a female ward, directs a settlement to be made with the approval of the judge: (Dan. 1208.)

An application to commit may be ordered to stand over pending the approval and execution of the settlement.

(e) *Ordering Marriage Ceremony.*

If the marriage is not legal, and the parties have cohabited, the court will order them to be married again: (Simpson on Infants, 309.)

III. PRODUCTION OF INFANTS.

1. HABEAS CORPUS.

Production of the infant may be enforced by writ of *habeas corpus*, which will be issued at the instance of the person having the legal right

to his custody, in order that the infant may be brought up, or that it may be ascertained by the return how he has been disposed of: (*Seton*, 751.)

The application is by motion: (*Seton*, 754.)

2. ORDER.

An order for production may be made, which may be enforced by attachment: (*Re Holt*, L. Rep. 11 Ch. Div. 168; 40 L. T. Rep. N. S. 207; 27 W. R. 485.)

IV. CUSTODY OF INFANTS.

1. UNDER ACT OF 1873.

(a) *Where given to Mother.*

[The court may order that] the mother of any infant or infants under sixteen years of age . . . shall have access to such infant or infants at such times and subject to such regulations as the court shall deem proper, or . . . that such infant or infants shall be delivered to the mother, and remain in or under her custody and control, or shall, if already in her custody or under her control, remain therein until such infant or infants attain such age, not exceeding sixteen, as the court shall direct; and further, . . . that such custody or control shall be subject to such regulations as regards access by the father or guardian of such infant or infants, and otherwise, as the said court shall deem proper: (36 Vict. c. 12, s. 1.)

The application is by petition of the mother, by her next friend (*Id.*), and may be presented *in formâ pauperis*: (*Ex parte Hakewill*, 3 D. M. & G. 116.)

The Act is for the benefit of the wife and children, and in deciding who is to have their custody a great regard must be had to their interests: (*Re Taylor*, L. Rep. 4 Ch. Div. 157; 36 L. T. Rep. N. S. 169; 46 L. J. 399, Ch.; 25 W. R. 69.)

But the court will not, in the absence of misconduct on the husband's part, interfere with his right to remove the children from the influence of a mother, which is used to thwart his wishes and plans as to their religious training and education, and to impose as a condition of her access to the children a promise not to use that access for a purpose lawfully prohibited by him: (*Re Agar-Ellis*, L. Rep. 10 Ch. Div. 49, 71; 39 L. T. Rep. N. S. 380; 48 L. J. 1, Ch.; 27 W. R. 117.)

Where the husband was a co-respondent in a divorce action charging him with adultery, had kidnapped the only child, and abandoned his wife, the court ordered immediate delivery of the child to her, with liberty of access by the father and paternal grand-parent, and liberty to apply as to the maintenance and education on the child's attaining seven years' of age: (*Re Taylor*, *sup.*)

The order must be intitled in the matter of the infant (naming her) and in the matter of the Act 36 & 37 Vict. c. 12: (*Re Holt*, *Infant*, L. Rep. 11 Ch. Div. 168; 40 L. T. Rep. N. S. 207.)

(b) *Enforcing Covenants in Separation Deeds.*

No agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother: Provided always, that no court shall enforce any such agreement if the court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto: (36 Vict. c. 12, s. 2.)

Where the mother had published atheistical opinions, refused any religious instruction to the child, and published an obscene book, the

Court of Appeal ordered the child to be removed altogether from her custody, notwithstanding a covenant, by the father, in the separation deed, that the child should remain in the mother's custody for eleven months in each year: (*Re Besant*, L. Rep. 11 Ch. Div. 508; 40 L. T. Rep. N. S. 469; 48 L. J. 497, Ch.; 27 W. R. 741.)

The application may be made by petition of the infant by his or her next friend: (*Id.*)

The order must be intitled in the matter of the infant, naming him, and in the matter of the Act: (*Re Holt*, *sup.*)

2. WHERE CONVICTED OF FELONY.

(a) *Power to make Orders.*

In every case in which any person, being under the age of twenty-one years, shall . . . be convicted of felony, it shall be lawful for [the Chancery Division], upon the application of any person or persons who may be willing to take charge of such infant, and to provide for his or her maintenance and education, if such court shall find that the same will be for the benefit of such infant, due regard being had to the age of the infant, and to the circumstances, habits, and character of the parents, testamentary or natural guardian, of such infant, to assign the care and custody of such infant, during his or her minority, or any part thereof, to such person or persons, upon such terms and conditions, and subject to such regulations respecting the maintenance, education, and care of such infant as the said Court of Chancery shall think proper to prescribe and direct: (3 & 4 Vict. c. 90, s. 1.)

Upon any order for that purpose being made, and so long as the same shall remain in force, the same shall be binding and obligatory upon the father, and upon every testamentary or natural guardian of such infant, and no person or persons shall be entitled to use or exercise any power or control over such infant which may be inconsistent with such order: (3 & 4 Vict. c. 90, s. 1.)

(b) *No Fees to be taken.*

No fee, reward, emolument, or gratuity whatsoever shall be demanded, taken, or received by any officer or minister of the [court] for any matter or thing done in the said court in pursuance of [the] Act, and . . . upon the making or opposing of any such application it shall be lawful for any judge of the said court to assign counsel learned in the law, and to appoint a clerk or practitioner of the said court to advise and carry on or to oppose such application, who are hereby required to do their duties therein without fee or reward: (3 & 4 Vict. c. 90, s. 3.)

(c) *Order to Provide for keeping within Jurisdiction.*

In every case it shall be a part of the terms and conditions upon which such care and custody shall be assigned, that the infant shall not, during the period of such care and custody, be sent beyond the seas, or out of the jurisdiction of [the court]: (3 & 4 Vict. c. 90, s. 2.)

(d) *Conviction not Affected.*

Nothing in [the] Act contained shall affect or in any manner interfere with the execution of the sentence which may have been passed upon such infant upon his or her conviction: (3 & 4 Vict. c. 90, s. 4.)

(e) *Costs.*

[The court] shall and may award such costs as to it may seem fit against any such person or persons who shall make such application as aforesaid, if such application shall not appear to the said court well founded . . . and such costs shall be payable to any parent, or other natural or testamentary guardian, of any such child, who shall oppose such application: (3 & 4 Vict. c. 90, s. 1.)

(f) *Rescinding Order.*

The said court may at any time rescind such assignment, or from time to time rescind, alter, or vary any such terms or conditions, or such regulations, as to the said court may seem fit: (3 & 4 Vict. c. 90, s. 1.)

V. APPROVAL OF MARRIAGES, UNDER 4 GEO. 4, c. 76.

In case the father of [an infant is] *non compos mentis*, or the guardian . . . or mother . . . whose consent is . . . necessary . . . is *non compos mentis*, or in parts beyond the seas, or . . . unreasonably or from undue motives refuse or withhold . . . consent to a proper marriage . . . in case the marriage proposed . . . appear proper . . . [the court] shall judicially declare the same to be so: (4 Geo. 4, c. 76, s. 17.)

The section does not apply in case of a father beyond the seas or unreasonably withholding consent: (Dan. 1209.)

The application is by petition of the party desirous of marrying: (4 Geo. 4, c. 76.)

The court either makes the declaration without inquiry, adjourns petition to chambers generally, or directs inquiries to be made: (Dan. 1209.)

VI. CARE OF INFANTS' ESTATES.

1. JURISDICTION.

Causes and matters relating to the care of infants' estates are expressly assigned to the Chancery Division: (J. A. 1873, s. 34.)

VI. MAINTENANCE.

(a) *Dividends from Stock.*

The court . . . may, by an order to be made on the petition of the guardian of an infant, in whose name any stock [is] standing, or any sum of money, by virtue of any Act for paying off any stock, and who [is] beneficially entitled thereto; or if there . . . be no guardian, by an order to be made in any cause depending in the said court, direct all or any part of the dividends due or to become due in respect of such stocks or any such sum of money, to be paid to any guardian of such infant, or to any other person, according to the discretion of such court, for the maintenance and education, or otherwise for the benefit of such infant, such guardian or other person to whom such payment [is] directed to be made being named in the order directing such payment: (11 Geo. 4 & 1 Will. 4, c. 65, s. 32.)

The receipt of such guardian or other person, for such dividends or sum of money, or any part thereof [is] as effectual as if such infant had attained the age of twenty-one years, and had signed and given the same: (*Id.*)

An order was made relating to stock bequeathed by a Spanish will: (*Ramon v. Ramon*, 39 L. T. Rep. N. S. 532; 27 W. R. 260.)

(b) *Other Cases.*

Where there is a fund in or under the control of the court, belonging to an infant, or the income of which is applicable for his maintenance, such maintenance may be ordered: (Dan. 1198.)

Where there is property vested in trustees in which infants are intended, and there is no express or statutory power of maintenance, it may be ordered: (Dan. 1199.)

If there is a trust for maintenance it is unnecessary to show that the father is in distressed circumstances. Otherwise the court directs a reference as to his ability to support the infant: (Ayck. 591.)

(c) *Application.*

The application, where not made under 11 Geo. 4 & 1 Will. 4, c. 65, s. 32, is by ordinary summons when a suit or matter is pending, and in other cases by original summons : (see CHAMBERS.)

(d) *Service.*

The summons must be served on the trustees or other persons interested in the fund : (Dan. 1201.)

(e) *Evidence.*

The evidence must show that the income or corpus of the fund is applicable for the purpose : (Dan. 1201-2.)

A scheme showing the heads of intended expenditure should be put in evidence : (Dan. 1202.)

(f) *Order.*

The order should state it if it intended that payments are to be free from income tax : (*Id.*)

(g) *Where Capital Applied.*

The capital may be applied where the infant has no other means, or it is necessary for the infant's advancement : (Dan. 1201.)

The court may charge the expenses of past maintenance, and the costs of the application on the *corpus* of an estate to which the infant is entitled in fee : (*Re Howarth*, L. Rep. 8 Ch. App. 415.)

(h) *Increasing Allowance.*

The application is by ordinary summons, supported by affidavit showing the necessity for the increase, and to be served on the trustee or other persons mentioned, *sup.* . (Dan. 1202.)

3. ADVANCEMENT.

(a) *Where Ordered.*

Where the fund is in court, or the infant is a ward, or the administration of his estate, or his maintenance, is under the direction of the court, a sum may be ordered by way of advancement : (Dan. 1203.)

(b) *Application.*

The application is by summons : (*Id.*)

(c) *Evidence.*

The summons is supported by evidence, showing the amount required to be advanced, the wishes of the infant, and his fitness for the intended occupation : (*Id.*)

Where he is to be articled or apprenticed, the master's respectability and the propriety of the proposed premium are proved : (*Id.*)

4. SURRENDER BY AND RENEWAL TO INFANT LESSEES.

(a) *Power to Order.*

An infant entitled to any lease or leases for the life of one or more person or persons, or for any term of years, either absolute or determinable upon the death of one or more person or persons, or otherwise or his or her guardian [or any person appointed by the court in the place of such infant] [may] by the order and direction of [the court] be enabled from time to time, by deed or deeds, to surrender such lease or leases, and accept and take, in the place and for the benefit of such [infant] one or more new lease or leases of the premises for and during such lives or for such terms as [the court directs] : (11 Geo. 4 & 1 Will. 4, c. 65, s. 12.)

(b) *Application.*

The application may be made by the infant, his guardian, or other person on his behalf, by petition or motion in a summary way, or by summons where the infant is a ward of court, or the administration of

his estate, or his maintenance is under the court's direction: (*Id.*; Dan. 1917.)

(c) *Expenses of Renewal.*

Every sum of money and other consideration paid by any guardian [or] trustee, or other person as a fine, premium, or income, or in the nature [thereof], and all reasonable charges incident thereto [are to] be paid out of the estate or effect of the infant . . . or [to] be a charge upon the leasehold premises, together with interest for the same as the [court directs]: (11 Geo. 4 & 1 Will. 4, c. 65, s. 14.)

5. RENEWAL BY INFANT LESSORS.

(a) *Where Ordered.*

Where any [infants] might, in pursuance of any covenants or agreement, if not under disability, be compelled to renew any lease [for lives or years] such infant, or his guardian in the name of such infant . . . [may] by the direction of the court . . . signified by an order . . . accept of a surrender of such lease, and . . . make and execute a new lease of the premises . . . for [such lives or term] as the court by such order [directs]: (11 Geo. 4 & 1 Will. 4, c. 65, s. 16.)

(b) *Application.*

The application is by the infant, guardian, or persons entitled to renewal, by petition, or where the infant is a ward, or the administration of his estate or his maintenance is under the court's direction, by summons: (*Id.*, Dan. 1919.)

(c) *Premiums.*

All fines, premiums, and sums of money . . . on account of . . . renewal . . . after deduction of all necessary incidental charges and expenses . . . [are] paid . . . to [the] guardian, and . . . applied for the benefit [of the] infants in such manner as the court [directs]: (11 Geo. 4 & 1 Will. 4, c. 65, s. 21.)

6. LEASES BY INFANTS.

(a) *Where Ordered.*

Where any . . . infant is . . . seised or possessed of or entitled to any land in fee or in tail, or to any leasehold land for an absolute interest, and it [appears] to the court . . . to be for the benefit of such person, that a lease or underlease should be made of such estates for term of years, for encouraging the erection of buildings thereon, or for repairing buildings actually being thereon, or the working of mines or otherwise improving the same, or for farming or other purposes, such infant, or his guardian in the name of such infant [may], by the direction of the court . . . to be signified by an order, make such lease of the lands of such person respectively, or any part thereof according to his or her interest therein respectively, and to the nature of the tenure of such estates respectively, for such term or terms of years, and subject to such rents and covenants as [the] court [directs] but in no such case [is] any fine or premium [to] be taken, and in every such case the best rent that can be obtained, regard being had to the nature of the lease [is to] be reserved: (11 Geo. 4 & 1 Will. 4, c. 65, s. 17.)

No lease [is to] be made of the capital mansion house and the park and grounds respectively held therewith for any period exceeding . . . minority: (*Id.*)

The infant need not be seized of an indefeasible estate in fee simple or fee tail. Leases have been granted when the fee was defeasible in certain events, and where the estate was subject to the father's tenancy by the

curtesy: (*Re Letchford*, L. Rep. 2 Ch. Div. 719; 45 L. J. 530, Ch.; Seton, 744.)

(b) *Application.*

The application may be made by the infant, or his guardian by petition (11 Geo. 4 & 1 Will. 4, c. 65, s. 17), or by summons on behalf of such infant if he is a ward, or the administration of his property, or his maintenance is under the direction of the court: (C. O. 35, r. 1.)

(c) *Conditional Contract.*

Generally a conditional contract is entered into before application is made: (Dan. 1920.)

(d) *Order.*

On petition, if the court is satisfied, that the lease is for the infants' benefit, an order is made directing the contract to be carried into effect, and the lease to be settled [see DEEDS]. If not satisfied, the court may direct an inquiry, or may adjourn the petition to chambers, and approve the lease there. On summons, the contract may be affirmed, and the lease ordered to be executed by the same order: (Dan. 1920.)

(e) *Settling Lease.*

The lease and covenants and provisions therein [will] be settled by [the judge]: (*Id.*, 15 & 16 Vict. c. 80, s. 36.)

(f) *Counterpart.*

A counterpart [is] executed by the lessee: (11 Geo. 4 & 1 Will. 4, c. 65, s. 17.)

Counterparts shall be deposited for safe custody in the [Central Office], until [the infant attains] twenty-one, but with liberty to proper parties to have the use thereof, if required, in the meantime, for the purpose of enforcing any of the covenants therein contained: (*Id.*, J. A. 1879.)

7. SANCTIONING SETTLEMENTS UNDER 18 & 19 VICT. c. 43.

(a) *Power to Sanction.*

Every infant [who has attained the age, if a male of twenty years, or, if a female, of seventeen years, may] upon or in contemplation of his or her marriage, with the sanction of the court . . . make a valid and binding settlement or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder, or expectancy; and every conveyance, appointment, and assignment of such real or personal estate, or contract to make a conveyance, appointment, or assignment thereof, executed by such infant, with the approbation of the . . . court, for the purpose of giving effect to such settlement, [is] as valid and effectual as if the person executing the same were of the full age of twenty-one years: (18 & 19 Vict. c. 43, s. 1.)

[The] enactment does not extend to powers of which it is expressly declared that they [are not to] be exercised by an infant: (*Id.*)

In case any appointment under a power of appointment, or any disentailing assurance [has] been executed by any infant tenant in tail under the provisions of [the] Act, and such infant afterwards [dies] under age, such appointment or disentailing assurance thereupon becomes absolutely void: (*Id.*)

A post-nuptial settlement may be sanctioned in the case of a ward, but not of any other infant married at a competent age: (Dan. 1212.)

(b) *Application.*

The sanction of the court . . . to any such settlement or contract for a settlement may be given, upon petition presented by the infant or his or

her guardian, in a summary way, without the institution of a suit: (18 & 19 Vict. c. 43, s. 3.)

A petition is necessary though a suit has been instituted: (Dan. 1212.)

If there be no guardian, the court may require a guardian to be appointed or not, as it shall think fit: (18 & 19 Vict. c. 43, s. 3, and see *sup.*)

A petition by a next friend on behalf of an infant is improper: (*Re Potter*, L. Rep. 7 Eq. 484.)

(c) *Ordering Service of Petition.*

The court . . . may, if it shall think fit, require that any persons interested or appearing to be interested in the property should be served with notice of the petition: (18 & 19 Vict. c. 43, s. 3.)

(d) *Adjournment to Chambers.*

On the petition being opened in court, it is usually at once adjourned to chambers: (Dan. 1212; *Seton*, 766.)

(e) *Summons to Proceed.*

A summons to proceed is taken out [see CHAMBERS.]

(f) *Evidence and Proposals.*

[At the return of the summons to proceed] evidence is to be produced to show—

1. The age of the infant.
2. Whether the infant has any parents or guardians.
3. With whom or under whose care the infant is living, and if the infant has no parents or guardians, what near relations the infant has.
4. The rank and position in life of the infant and parents.
5. What the infant's property and fortune consist of.
6. The age, rank, and position in life of the person to whom the infant is about to be married.
7. What property, fortune and income such person has.
8. The fitness of the proposed trustees and their consent to act: (Ch. Reg. Aug. 1857, r. 20.)

The proposals for the settlement of the property of the infant, and of the person to whom such infant is proposed to be married, are to be submitted to the judge: (*Id.*)

The court need not inquire into the propriety of the proposed marriage, except in the case of a ward of court: (Dan. 1213.)

(g) *Settlement.*

The judge considers the proposals for the settlement, and, if they are approved, a direction is given for preparation of a settlement in conformity with the proposals (*Ayck.* 593) with or without the conveyancing counsel's assistance: (Dan. 1213.)

The draft is prepared by the lady's solicitor with or without such assistance, and the chief clerk initials the engrossment: (Dan. 1213; and see CONVEYANCING COUNSEL; DEEDS.)

The court has ordered a name and arms clause to be inserted in the settlement: (*Re Williams*, 8 W. R. 678; cited Dan. 1213-4.)

(h) *Order.*

After the engrossment is signed, the chief clerk prepares a minute of the order, which directs execution of the settlement by the parties: (Dan. 1214; but see *Seton*, 755, 766.)

Whenever the dealing by the Chancery paymaster with money or securities in court is, by an order, made contingent upon the execution of some document, the document shall be described, and the parties thereto by whom it is to be executed shall be named in an order or in a certificate

. . . . of a chief clerk. The execution of such document shall be certified by a chief clerk, or may be verified by affidavit, if the order by which such execution is required shall so direct: (Ch. F. R., 1874, r. 11.)
The order is drawn up by the registrar: (Dan. 1214.)

INJUNCTION.

- I. RESTRAINING PROCEEDINGS.
 1. NOT GENERALLY ALLOWED.
 2. EXCEPTIONS.
 - (a) *By Court of Bankruptcy.*
 - (b) *By Exchequer Division in Revenue Cases.*
- II. JURISDICTION IN OTHER CASES.
- III. WRIT.
- IV. INTERLOCUTORY INJUNCTIONS.
 1. POWER TO GRANT [see *sup.* II.]
 2. WHERE APPLICATION MADE.
 3. BY WHOM APPLICATION MADE.
 4. HOW APPLICATION MADE.
 5. WHEN APPLICATION MADE.
 6. EVIDENCE.
 7. ORDER.
 8. UNDERTAKING AS TO DAMAGES.
 9. NOTICE AND SERVICE OF ORDER [see *post.* V. 2].
 10. COSTS OF INTERLOCUTORY MOTION.
 11. DISCHARGING ORDER.
- V. INJUNCTION AT HEARING.
 1. FORM IN WHICH ISSUED.
 2. NOTICE AND SERVICE.
- VI. DAMAGES IN LIEU OF INJUNCTION.
- VII. ADDING NEW PARTIES AFTER JUDGMENT.
- VIII. BREACH OF INJUNCTION.

I. RESTRAINING PROCEEDINGS.

1. NOT GENERALLY ALLOWED.

No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained [if the Judicature Act, 1873] had not been passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: (J. A., 1873, s. 24, sub-sect. 5; and see STAYING PROCEEDINGS; TRANSFER.)

Where goods were taken in execution under a *fi. fa.*, the sheriff took out an interpleader summons in the Common Pleas Division, upon which an order was made that in default of payment being made, he should sell and pay the proceeds into court, and that the parties should proceed to the trial of an issue as to the title to the goods, and the sheriff advertised the goods for sale, an injunction to restrain the sheriff from selling the goods or remaining in possession of them, granted by Malins, V.C., in an action concerning the goods, was held, on appeal, to be inconsistent with the Judicature Act, 1873, and discharged: (*Wright v. Redgrave*, L. Rep. 11 Ch. Div. 24; 40 L. T. Rep. N. S. 206; 27 W. R. 562.)

2. EXCEPTIONS.

(a) *By Court of Bankruptcy.*

The Court of Bankruptcy may restrain actions and other proceedings in the Chancery Division: (*Ex parte Ditton, Re Woods*, L. Rep. 1. Ch. Div. 557; 34 L. T. Rep. N. S. 109; 45 L. J. 87, Bk.; 24 W. R. 289.)

(b) *By Exchequer Division in Revenue cases.*

The Exchequer Division may, on an application on behalf of Her Majesty, restrain, by injunction, actions commenced in other divisions of the High Court of Justice touching the revenue of the Crown: (*Attorney-General v. Constable*, L. Rep. 4 Ex. Div. 172; 48 L. J. 455, Ex.; 27 W. R. 661.)

II. JURISDICTION IN OTHER CASES.

An injunction may be granted . . . by an interlocutory order of the Court in all cases in which it shall appear to the court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just: (J. A., 1873, s. 25, sub-sect. 8.)

Any injunction which can be granted by interlocutory order can, *à fortiori*, be granted at the trial: (*Beddow v. Beddow*, L. Rep. 9 Ch. Div. 89; 47 L. J. 588, Ch.; 26 W. R. 570.)

If an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable: (J. A., 1873, s. 25, sub-sect. 8.)

In ascertaining what is "just," regard must be had to what is "convenient:" (*Beddow v. Beddow, sup.*; *Day v. Brownrigg*, L. Rep. 10 Ch. Div. 307; 39 L. T. Rep. N. S. 645; 48 L. J. 173, Ch.; 27 W. R. 217.)

Per James, L.J. (in *Day v. Brownrigg, sup.*), and per Thesiger, L.J. (in *Gaskin v. Balls*, L. Rep. 13 Ch. Div. 324), the words do not in the least alter the principles on which the court should act.

Per Quain, J. the words must be interpreted by reference to the practice of the Court of Chancery (*Habershon v. Gill*, W. N. 1875, p. 231), the jurisdiction of which was limited by the practice of different Chancellors (per Jessel, M.R., *Beddow v. Beddow, sup.*), though it included the granting of injunctions to restrain the committing of waste or injury to property, especially where it was irreparable, as cutting ornamental timber; to restrain the publication of documents to the injury of reputation; to restrain applications to Parliament, &c. (Ayck. 9th edit. 282-3; and see Kerr on Injunctions; Joyce on Injunctions), but where there was an entire want of priority between plaintiff and defendant, and the defendant was simply a wrong-doer at law, the Court of Chancery only interfered in very exceptional cases: (*Earl Talbot v. Hope Scott*, 4 K. & J. 96; *London and North-Western Railway Company v. Lancashire and Yorkshire Railway Company*, L. Rep. 4 Eq. 174.)

Per Jessel, M.R. the Chancery Division has unlimited power to grant any injunction which any of the courts, whose jurisdiction was transferred to the High Court of Justice, might grant, that is, where it is right and just; and what is right or just is to be decided, not by caprice of the judge, but according to sufficient legal reason or on settled legal principles: (*Beddow v. Beddow, sup.*)

And the ancillary remedy by injunction to protect a right is a mode of

preventing that being done which if done would be an offence. Whenever an act is illegal, and is threatened, the court will interfere and prevent the act being done, and will grant an injunction either when the illegal act is threatened but has not been actually done, or when it has been done and seemingly is intended to be repeated: (Per Jessel, M.R. *Cooper v. Whittingham*, 43 L. T. Rep. N. S. 16; 28 W. R. 720.)

Per Fry, J. the words of the section enlarge, rather than diminish, the arm of the court in respect of injunction: (*Thomas v. Williams*, 43 L. T. Rep. N. S. 94; 49 L. J. 605, Ch.)

In all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action, he may claim [an] injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right: (C. L. P. A., 1854, s. 79; *Beddow v. Beddow*, *sup.*)

In such action judgment may be given that the . . . injunction do or do not issue, as justice may require: (C. L. P. A. 1854, s. 80.)

Libels affecting property and trade may be restrained: (*Id.*; *Thorley's Cattle Food Company v. Massam*, L. Rep. 14 Ch. Div. 763; 42 L. T. Rep. N. S. 851; 28 W. R. 295; and see *Saxby v. Easterbrook*, L. Rep. 3 C. P. Div. 339.)

An injunction claimed in aid of a legal right will not be refused for delay, unless the plaintiff is barred by the Statute of Limitations: (*Fulwood v. Fulwood*, 38 L. T. Rep. N. S. 380; 47 L. J. 459, Ch.; 26 W. R. 435.)

Where the court has power to grant a prohibition to an inferior court it may grant an injunction instead, and, as it is shorter and cheaper, will do so: (*Hedley v. Bates*, L. Rep. 13 Ch. Div. 492; 42 L. T. Rep. N. S. 41; 28 W. R. 365.)

As to granting injunctions to restrain building which will interfere with lights in a building erected in place of one pulled down containing ancient lights, see *Ecclesiastical Commissioners v. Kino* (W. N. 1880, p. 42.)

If a defendant, in an action to restrain building interfering with the plaintiff's lights, erects any building after commencement of the action or notice not to do so given by the plaintiff, the court may order the buildings to be pulled down, though no undertaking to pull them down has been given: (*Smith v. Day*, L. Rep. 13 Ch. Div. 651.)

If no complaint has been made the court will rarely interfere to pull down a building: (*Gaskin v. Balls*, *sup.*)

In cases of obstruction to ancient lights, the question whether a mandatory injunction will be granted to compel the removal of the obstruction depends on whether the damages which would be granted in lieu of an injunction would or would not be substantial. Where the total damages recoverable for such an obstruction, coupled with two other causes of complaint, amounted to less than 20*l.*, it was held that the damages were not substantial, and that no injunction could be granted, but only damages: (*Webster v. Whewall*, 42 L. T. Rep. N. S. 868; and see, on the question of substantial damage, *Aynsley v. Glover*, L. Rep. 10 Ch. App. 283; 31 L. T. Rep. N. S. 219.)

Property, which is the subject of an action, may be preserved, under O. LII., r. 3, by means of an injunction: (*Strelley v. Pearson*, 43 L. T. Rep. N. S. 155.)

Proceedings in a foreign court will not be restrained for mere hardship or inconvenience: (*Fletcher v. Rodgers*, 27 W. R. 97.)

III. WRIT.

Where the injunction is a substantial object of the action, the writ should be indorsed with a claim for the injunction: (*Colebourne v. Colebourne* (L. Rep. 1 Ch. Div. 690.))

An injunction may, however, be granted though not claimed by the writ: (*Norton v. Gover*, W. N. 1877, p. 206.)

If the injunction be claimed as well as other relief the indorsement to be added is:

“And for an injunction”: (App. A. to Rules of 1875, p. ii., s. 4.)

IV. INTERLOCUTORY INJUNCTIONS.

1. POWER TO GRANT.

[See *sup.* II.]

2. WHERE APPLICATION MADE.

The application must, subject to the power of transfer, be made in the division of the court to which the action is attached (J. A. 1875, s. 11, sub-s. 1; see ACTION); and to the judge to whose court the action is assigned.

3. BY WHOM APPLICATION MADE.

An application . . . may be made to the court or a judge by any party: (O. LII., r. 4.)

A mortgagor may maintain an action for an injunction without joining the mortgagee: (*Fairclough v. Marshall*, L. Rep. 4 Ex. Div. 37; 39 L. T. Rep. N. S. 389; 48 L. J. 146, Ex.; 27 W. R. 145.)

4. HOW APPLICATION MADE.

If the application be by the plaintiff . . . it may be made either *ex parte* or with notice, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application: (O. LII., r. 4.)

The application is generally by motion in court: (*English v. Vestry of Camberwell*, W. N. 1875; p. 256.)

The order will not be granted on an *ex parte* application except in cases of urgency: (*Tozer v. Walford*, W. N. 1875, p. 250; *Blewitt v. Dowling*, *Id.*, 202.)

And an *ex parte* application is improper, where notice has been given: (see *post*, 7.)

If notice to the defendant is considered necessary, leave of the court may be obtained *ex parte* to serve the writ, and notice of motion for an injunction at the same time and for a particular day: (Jarm. 70.)

5. WHEN APPLICATION MADE.

As to defendant's application, see *sup.*, 4. He may obtain an order before judgment: (*Sargant v. Read*, L. Rep. 1 Ch. Div. 602; 45 L. J. 206, Ch.).

The court often grants an injunction on the plaintiff's application before service of the writ: (*Re H.'s Estate*, L. Rep. 1 Ch. Div. 276.)

Acquiescence or delay is sometimes sufficient to take away the plaintiff's right to an order, his relief being in that case postponed till the hearing; and therefore the application should be made at the earliest moment after the writ is issued: (Ayck. 285; Jarm. 64.)

A plaintiff is not bound to move till the hearing of the action; and his delay until then is not such acquiescence as will disentitle him to relief: (*Davies v. Marshall*, 4 L. T. Rep. N. S. 105.)

The Court of Chancery, in cases of injunction to stay waste, gave leave to serve notice of motion before the bill was filed: (*Id.* 286.)

6. EVIDENCE.

The evidence is generally by affidavit. The affidavit should be made by the plaintiff himself, and on an *ex parte* application all material facts should be stated: (Ayck. 286.)

Statements as to belief, with the grounds thereof, may be admitted: (O. XXXVII., r. 3.)

The affidavit must not be sworn till after the writ is issued: (Ayck. 286.)

It should be filed, and an office copy obtained before motion made: (*Id.*)

If the affidavit cannot be filed, or the order drawn up the day it is granted, an order should be obtained on motion, that the affidavit shall be filed as of the date of the day on which the order was pronounced.

In the case of an *ex parte* application for an injunction . . . the party making such application is to furnish copies of the affidavits upon which it is granted upon payment of the proper charges immediately upon the receipt of [a] written request and undertaking [to pay the proper charges] or within such time as may be specified in such request, or may have been directed by the court: (Add. R. Aug. 1875, O. V., r. 10.)

7. ORDER.

[The] order may be made either conditionally or upon such terms and conditions as the court shall think just: (J. A., 1873, s. 25, sub-sect. 8.)

Where notice of motion has been given it is improper to grant an injunction *ex parte*, though pressure of business of the court may prevent the motion on notice being brought on: (*Graham v. Campbell*, L. Rep. 7 Ch. Div. 490; 38 L. T. Rep. N. S. 195; 47 L. J. 593, Ch.; 26 W. R. 336.)

Where an order is made on an *ex parte* motion it will generally be only till over next motion day: (*Bolton v. London School Board*, L. Rep. 7 Ch. Div. 766; 47 L. J. 461, Ch.)

Where both plaintiff and defendant have applied for the same order, one order will be made, the conduct of proceedings being generally given to the plaintiff: (*Sargant v. Read*, *sup.*)

In an action to enforce his lien by an unpaid purchaser of land taken by a railway company for the purposes of their undertaking, the court will not grant an injunction before judgment has been obtained in the action, even though the company admit their liability: (*Latimer v. The Aylesbury and Buckingham Railway Company*, L. Rep. 9 Ch. Div. 385; 39 L. T. Rep. N. S. 460.)

[And see INTERLOCUTORY PROCEEDINGS.]

Where the plaintiff's motion is dismissed, and he discontinues the action, he is not thereby estopped from obtaining an injunction in a subsequent action: (*Massam v. Thorley's Cattle Food Company*, L. Rep. 14 Ch. Div. 751.)

8. UNDERTAKING AS TO DAMAGES.

An interlocutory judgment ought to be made upon an undertaking to abide by any order of the court as to damages resulting from the other party being restrained: (*Graham v. Campbell*, *sup.*)

The court refused to grant an interlocutory injunction at the instance of the Secretary for War, unless the plaintiff would give the usual undertaking: (*Secretary for War v. Chubb*, W. N. 1880, p. 128; 43 L. T. Rep. N. S. 83.)

Where an interlocutory injunction is granted to restrain a building which, it is alleged, will interfere with the plaintiff's light, and the defendant stops building till the trial, when it is found that the building

would not have interfered with the lights, he is entitled to damages : (per Jessel, M.R., W. N., 1879, p. 74.)

9. NOTICE AND SERVICE OF ORDER.

[See *post*, V. 2.]

10. COSTS OF INTERLOCUTORY MOTION.

Where the plaintiff's motion for an interim injunction was ordered to stand over till the trial of the action, no order being made as to costs, and at the trial the judge awarded the plaintiff damages in lieu of an injunction, and ordered the defendant to pay the plaintiff's costs of action, the order reserving liberty to apply, the judgment as passed and entered being silent as to the costs on the previous motion, it was held that the court might order the costs of the motion to be paid by the defendant : (*Fritz v. Hobson*, L. Rep. 14 Ch. Div. 542; 42 L. T. Rep. N. S. 677; 28 W. R. 459.)

11. DISCHARGING ORDER.

An application to discharge an order for an injunction, whatever the ground may be, is by motion on notice : (Ayck. 289.)

If the facts are complicated the application may be by petition : (Ayck. 289, citing *Bourbaud v. Bourbaud*, 12 W. R. 1024.)

The application must be supported by affidavit.

[And see REHEARING.]

12. CONTINUING INJUNCTION.

Notice of motion to continue the injunction ought to be given for the motion day over which the injunction has been granted : (*Bolton v. London School Board*, *sup.*)

V. INJUNCTION AT HEARING.

1. FORM IN WHICH ISSUED.

No writ of injunction shall be issued. An injunction shall be by a judgment or order, and any such judgment or order shall have the effect which a writ of injunction previously had : (O. LII., r. 8, April, 1880.)

2. NOTICE AND SERVICE.

As soon as the judgment or order has been pronounced, the party obtaining it should serve a notice on the opposite party, personally, stating that the injunction has been granted, and that the order or judgment will be served as soon as it is ready : (Ayck. 288.)

As to service of the judgment or order, see EXECUTION, XX., 2; XXI., 3.

VI. DAMAGES IN LIEU OF INJUNCTION.

The High Court of Justice and Court of Appeal . . . have power to grant, and shall grant, either absolutely, or on such reasonable terms and conditions as . . . shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter : (J. A. 1873, s. 24, sub-sect. 7.)

In all cases in which the . . . Chancery [Division] has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct : (21 & 22 Vict. c. 27, s. 2.)

The Act still applies: (*White v. Boby*, 37 L. T. Rep. N. S. 625; *Kino v. Rudkin*, L. Rep. 6 Ch. Div. 160; *National Provincial Plate Glass Insurance Company v. Prudential Assurance Company*, L. Rep. 6 Ch. Div. 761; *Krehl v. Burrell*, 38 L. T. Rep. N. S. 407; L. Rep. 7 Ch. Div. 551; *Fritz v. Hobson*, L. Rep. 14 Ch. Div. 542; 42 L. T. Rep. N. S. 255; 28 W. R. 459.)

Where damages are claimed in substitution for an injunction to restrain a wrongful act commenced before the issue of the writ and continued afterwards, if the wrongful act has come to an end before the trial the court has jurisdiction, under the Act, to assess the whole of the damages accrued: (*Davenport v. Rylands*, L. Rep. 1 Eq. 302; *Fritz v. Hobson*, *sup.*)

VII. ADDING NEW PARTIES AFTER JUDGMENT.

Where an injunction was granted, but its operation was suspended for five years, to give the defendants time to prevent the nuisance, and in the meantime, by Act of Parliament, a new local body was created, upon whom devolved all the duties and liabilities of the old defendants, a summons by the plaintiffs at the expiration of the five years, for leave to amend the bill by adding the new body as defendants, was dismissed: (*Attorney-General v. Council of Birmingham*, 43 L. T. Rep. N. S. 77.)

VIII. BREACH OF INJUNCTION.

In case of a breach of an injunction, the plaintiff may move on notice to commit the offending party: (see EXECUTION.)

The court may enforce the order by attachment: (C. L. P. A. 1854, s. 82; *Beddow v. Beddow*, *sup.*)

Where the disobedient party is a person entitled to privilege (see ARREST) or a corporation, the proper process is sequestration, not attachment or committal: (see EXECUTION.)

To found an application for committal, sufficient notice of the granting of an injunction may be given by telegram; but, if it is sought to commit for contempt a person who, after receiving such a notice, disregards it, the court must decide upon the particular facts whether he had in fact notice of the injunction, and it is the duty of those who ask for the committal to prove this beyond reasonable doubt: (*Ex parte Langley*, L. Rep. 13 Ch. Div. 110; 41 L. T. Rep. N. S. 388.)

When the contemnor swore that, though he had received notice by telegram, he *bonâ fide* believed that no injunction had been granted, the Court of Appeal refused to commit him: (*Id.*)

If the notice is given to the solicitor of the party restrained, in the country, he ought to telegraph to the solicitors of the other party to inquire whether the telegram is a forgery: (per Jessel, M.R., *Tonkinson v. Cartledge*, 69 L. T. 229.)

Where a person was in court when the order was pronounced, or if he was in court when the order was about to be pronounced and then went away, he need not be served with notice or a copy of the order before motion to commit: (Dan. 1534.)

And he may be committed, if he was informed of the order, if there has been no neglect in drawing up, and serving a copy of the order: (*Id.*)

Where on motion for injunction to restrain publication of a cautionary advertisement, or any other of a like nature, as calculated to injure the plaintiff's business, the defendant undertook until the trial not to issue the advertisements, and afterwards published in a newspaper a notice of the hearing of the motion, and of his undertaking, which virtually repeated the caution, it was held that he had not thereby committed a

contempt of court: (*The Buenos Ayres Gas Company v. Wilde*, 42 L. T. Rep. N. S. 657.)

INQUIRIES.

I. DIRECTING AT ANY STAGE.

II. AS TO DAMAGES.

1. BEFORE MASTER.

2. ON WRIT OF INQUIRY.

(a) *Where Writ issued.*

(b) *Præcipe.*

(c) *Form.*

(d) *Before Whom executed.*

(e) *Notice of Inquiry.*

(f) *Countermand Notice of Inquiry.*

(g) *Leaving with Sheriff.*

(h) *Execution of Writ.*

(i) *Return of Writ.*

(k) *Setting aside Inquisition, Staying Judgment, &c.*

(l) *Final Judgment and Execution.*

III. BEFORE DISTRICT REGISTRAR [see DISTRICT REGISTRIES].

IV. BEFORE REFEREE [see REFEREE].

I. DIRECTING AT ANY STAGE.

The court or a judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries . . . to be made . . . notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner: (O. XXIII.)

As to how the order is worked out, see CHAMBERS.

As to ordering further inquiries, see C. O. 35, r. 19, cited *sup.*, p. 15.

II. AS TO DAMAGES.

1. BEFORE MASTER.

In actions in which it shall appear to the court or a judge that the amount of damages sought to be recovered by the plaintiff is substantially a matter of calculation, it shall not be necessary to issue a writ of inquiry, but the court or a judge may direct that the amount for which final judgment is to be signed shall be ascertained by one of the masters of the said court: (C. L. P. A., 1852, s. 94.)

The order is obtained on summons supported by affidavit of the facts: (Ch. Archb. 806.)

After order made an appointment must be obtained from the master: (*Id.*)

A copy of the order and appointment must be served a reasonable time before the time appointed: (*Id.*)

The attendance of witnesses and the production of documents before such master may be compelled by *subpœna*: (C. L. P. A., 1852, s. 94.)

It shall be lawful for such master to adjourn the inquiry from time to time, as occasion may require; and the master shall endorse upon the rule or order for referring the amount of damages to him the amount found by him, and shall deliver the rule or order with such indorsement to the plaintiff; and such and the like proceedings may thereupon be had as to taxation of costs, signing judgment, and otherwise, as upon the finding of

a jury upon a writ of inquiry: (C. L. P. A., 1852, s. 94; and see *post*, 2.)

On a reference to the master to ascertain the amount for which final judgment is to be signed, the master's certificate shall be filed in the office when judgment is signed: (R. G. H. T. 1853, r. 171.)

2. ON WRIT OF INQUIRY.

(a) *Where Writ Issued.*

Where interlocutory judgment for damages is recovered, a writ of inquiry is issued: (Ch. Arch. 802; and see JUDGMENT.)

(b) *Præcipe.*

The form of *præcipe* is given in Schedule E. 11 to the Rules of April, 1880.

(c) *Form.*

The form of writ is given in Schedule G. 7 to the Rules of April, 1880.

A memorandum must be endorsed of the day on which the writ is to be executed: (Ch. Arch. 808.)

The writ is returnable on any day certain in term or vacation: (1 Will. 4, c. 7, s. 1.)

The return day must not be before that on which the writ is to be executed: (Ch. Arch. 808.)

(d) *Before whom Executed.*

The writ is usually executed before the sheriff or his deputy: (Ch. Arch. 809.)

In case of difficulty an order may be obtained on motion on notice, or summons, for an order for the writ to be executed before a judge of the High Court in London or Middlesex, or as assistant to the sheriff in any other county: (*Id.*)

(e) *Notice of Inquiry.*

Written notice of inquiry must be given to the defendant: (Ch. Arch. 809.)

Notice of . . . inquiry, and of continuance of inquiry, shall be given in town; but countermand of notice of . . . inquiry may be given either in town or country, unless otherwise ordered by the court or a judge: (R. G. H. T. 1853, r. 34.)

Ten days' notice of trial or inquiry shall be given, and shall be sufficient in all cases, . . . unless otherwise ordered by the court or a judge: (C. L. P. A. 1852, s. 97.)

If the writ is to be executed before a judge the notice is general as in case of a notice of trial: (Ch. Arch. 811.)

If before sheriff, a day certain must be named, and a time, generally between two certain hours: (*Id.*)

(f) *Countermand Notice of Inquiry.*

Countermand of notice of inquiry shall be given four days before the day of inquiry mentioned in the notice, unless short notice of inquiry has been given, and then two days before such day, unless otherwise ordered by the court or a judge, or by consent: (R. G. H. T. 1853, r. 37.)

[If the plaintiff give notice of trial on delivering his reply, and] issue is not joined on such [reply] or other subsequent pleading, and the plaintiff [signs] judgment for want thereof, and forthwith gives notice of executing a writ of inquiry, such notice shall operate from the time that notice of trial was given as aforesaid: (O. XXXVI., r. 3; R. G. H. T. 1853, r. 40.)

Under the former practice notice of executing a writ of inquiry might

also be given on the back of a plaintiff's demurrer to a defendant's plea in bar, rejoinder, &c.: (see R. G. H. T. 1853, r. 40.)

(g) *Leaving with Sheriff.*

The writ must be left with the sheriff two days at least before it is to be executed, if to be executed in the country, and one day at least, if to be executed in London or Middlesex: (Ch. Archb. 808.)

(h) *Execution of Writ.*

The inquest takes place nearly in the same manner as on a trial at Nisi Prius: (See Ch. Archb. 812-4.)

(i) *Return of Writ.*

If the sheriff refuse to make a return the court will order him to do so: (Ch. Archb. 814.)

The defendant is entitled to have the inquisition filed: (*Id.*)

(k) *Setting Aside Inquisition, Staying Judgment, &c.*

Within four days after return day, or any time before judgment, the defendant may move to set aside the execution, or if it is in vacation may apply to a judge to stay proceedings.

Judgment may also be postponed at the instance of the sheriff by certificate on the writ: (1 Will. 4, c. 7, s. 1.)

If such certificate is not granted, the court may order judgment to be vacated, and execution to be stayed or set aside, or may grant a new writ of inquiry: (1 Will. 4, c. 7, s. 4.)

(l) *Final Judgment and Execution.*

After the return of a writ of inquiry judgment may be signed at the expiration of four days from such return: (R. G. H. T. 1853, r. 55.)

After which execution may be issued: (Ch. Archb. 817.)

[As to writs of inquiry on debt or bond: (See Ch. Archb. 817, 824.)]

III. BEFORE DISTRICT REGISTRAR.

[See DISTRICT REGISTRIES.]

IV. BEFORE REFEREE.

[See REFEREE.]

INSPECTION.

[See DISCOVERY.]

INTERLOCUTORY PROCEEDINGS.

The court will not, by an interlocutory order, interfere on behalf of one party in a way which might injure the other in case he should succeed: (*Hill v. Kirkwood*, 42 L. T. Rep. N. S. 105; 28 W. R. 358; *Evans v. Puleston*, W. N. 1880, p. 127.)

[See also APPEAL, INJUNCTION, INQUIRIES, MOTION, ORDER, RECEIVER.]

INTERPLEADER.

I. ORIGINAL PROCEEDINGS.

1. BY ACTION.

2. BY SHERIFF'S APPLICATION.

II. PROCEEDINGS IN ACTION ALREADY COMMENCED.

1. FORMER COMMON LAW PRACTICE APPLIES.

2. APPLICATION.

3. EVIDENCE.

4. EFFECT OF PENDING INTERPLEADER PROCEEDINGS.

5. ORDER TO APPEAR.

6. SUBSEQUENT ORDER.

7. WHEN JUDGMENT OR ORDER FINAL.

8. COSTS.

I. ORIGINAL PROCEEDINGS.

1. BY ACTION.

Where two or more persons claim the same thing, by different or separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears he may be hurt by some of them, he may commence an action of interpleader against them (Dan. 1412, citing Mitf. Pl. 48, 141, &c.); although no legal proceedings have been taken: (Seton, 361; *Re New Hamburg and Brazilian Railway Company*, W. N. 1875, p. 239; Ch. Archb. 13th edit. 1115.)

An affidavit of no collusion, and, in the case of a debt or sum of money, payment of the amount into court, are required: (Seton, 361.)

The affidavit must be filed when the writ is issued: (Dan. 1413.)

Any action pending against the plaintiff cannot be restrained by injunction, but application may be made for a stay of proceedings, and the plaintiffs in them may be added as third parties: [see INJUNCTION, PLEADING, STAYING PROCEEDINGS.]

[Where there has been made] any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal *chose in action*, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or *chose in action* . . . if the debtor, trustee, or other person liable in respect of such debt or *chose in action* shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or *chose in action*, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees: (J. A., 1873, s. 25, sub-sect. 6.)

2. BY SHERIFF'S APPLICATION.

Where claims are made by assignees of bankrupts and other persons, not being the parties against whom . . . process has issued, to any goods or chattels taken or intended to be taken in execution under any process, or to the proceeds or value thereof (though the titles of the claimants have not a common origin, but are adverse to and independent of one another), it shall and may be lawful to and for the court from which such process issued, or any judge thereof, upon application of such sheriff or other officer made before or after the return of such process, as

well before as after any action brought against such sheriff or other officer, to call before them, by rule of court, as well the party issuing such process as the party making such claim, and thereupon to exercise, for the adjustment of such claims and the relief and protection of the sheriff or other officer, all or any of the powers and authorities [in the Act] contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case; and the costs of all such proceedings shall be in the discretion of the court or judge: (1 & 2 Will. 4, c. 58, s. 6, as amended by 1 & 2 Vict. c. 45, s. 2; and C. L. P. A. 1860, s. 1.)

If the sheriff intends to levy, he may apply before actual seizure made: (Ch. Archb. 1126.)

Relief will not be granted unless an actual claim has been made: (*Id.*)

Relief will be granted not only where claim is made to the goods, but where an action of trespass has been brought for breaking into a house of the claimant: (*Id.*)

The claim may be legal or equitable, but must be of such a nature that an action may be brought on it by the person making it: (Ch. Archb. 1124-5.)

The sheriff, before applying, must inquire of the nature of the claims set up by the adverse parties, and ascertain whether the execution creditor submits to, or intends to contest them, for if it turns out there are no conflicting claims he may be made to pay costs: (Ch. Archb. 1128.)

An affidavit must be made stating the seizure, that the goods are in the sheriff's hands, the notice of claim, and other facts to be relied on, but need not deny collusion: (Ch. Archb. 1129.)

The subsequent proceedings are the same as in interpleader in an action: (See *post*, II.)

When goods or chattels have been seized in execution by a sheriff or other officer under process of the [High Court of Justice] and some third person claims to be entitled under a bill of sale or otherwise to such goods or chattels, by way of security for a debt, the court or a judge may order a sale of the whole or part thereof, upon such terms as to payment of the whole or part of the secured debt or otherwise as they or he shall think fit, and may direct the application of the proceeds of such sale in such manner and upon such terms as to such court or judge may seem just: (C. L. P. A. 1860, s. 13.)

Where neither the claimant nor the creditor appears, the sheriff will be allowed to sell so much of the goods seized as will satisfy his poundage and expenses, and then withdraw from possession: (Ch. Archb. 11, 31.)

For forms of orders where sheriffs are parties to interpleader proceedings, see Schedules H. 48 and 50-54 to the Rules of April, 1880.

Pending the trial of an interpleader issue at the instance of a sheriff, the execution creditor has no right to the immediate return of the writ of execution: (*Angell v. Baddeley*, L. Rep. 3 Exch. Div. 49.)

II. PROCEEDINGS IN ACTION ALREADY COMMENCED.

1. FORMER COMMON LAW PRACTICE APPLIES.

With respect to interpleader, the procedure and practice . . . used by courts of common law under the Interpleader Acts (1 & 2 Will. 4, c. 58, and 23 & 24 Vict. c. 126) shall apply to all actions and all the divisions of the High Court of Justice: (O. I., r. 2.)

2. APPLICATION.

Except under special circumstances, the application should be by summons: (Ch. Archb. 1120.)

The application by a defendant shall be made at any time after being

served with a writ of summons, and before delivering a defence: (O. I., r. 2.)

It shall be lawful for the court or a judge to whom such application is made, to exercise all the powers and authorities given to them by [the Act], though the titles of the claimants to the money, goods, or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to and independent of one another: (C. L. P. A., 1860, s. 12.)

A defendant can obtain an interpleader order, although the claims of the claimants are not co-extensive: (*Attenborough v. London and St. Katherine's Dock Company*, L. Rep. 3 C. P. Div. 450; 38 L. T. Rep. N. S. 404; 26 W. R. 583.)

But the claims must have some element in common: (*Wright v. Freeman*, 40 L. T. Rep. N. S. 134; 48 L. J. 276, C. P.; affirmed, 40 L. T. Rep. N. S. 358.)

3. EVIDENCE.

See *post*, 5.

The form of affidavit is given in Schedule B. 27 to the Rules of April, 1880.

4. EFFECT OF PENDING INTERPLEADER PROCEEDINGS.

Proceedings taken against the goods, pending an interpleader summons, constitute a contempt of court: (Ch. Archb. 1135.)

A judge of the Chancery Division may grant an injunction restraining the removal of goods; though they are the subject of an interpleader proceedings in another division, but no order will be made by him in the interpleader proceedings: (*Marston v. Smith*, W. N. 1877, p. 169.)

And there is no universal rule that an action cannot be brought while an interpleader summons is pending: (*Hooke v. Ind, Coope, and Co.*, W. N. 1877, p. 90.)

5. ORDER TO APPEAR.

Upon application made by or on behalf of any defendant in any action by affidavit or otherwise, showing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into court or to pay or dispose of the subject-matter of the action in such manner as the court (or any judge thereof) may order or direct, it shall be lawful for the court, or any judge thereof, to make rules and orders calling upon such third party to appear and state the nature and particulars of his claims: (1 & 2 Will. 4, c. 58, s. 1.)

The granting or refusing of the order is purely discretionary: (*Wright v. Freeman*, 40 L. T. Rep. N. S. 358.)

6. SUBSEQUENT ORDERS.

[The court or judge may] upon such rule or order hear the allegations as well of such third party as of the plaintiff, and in the meantime stay the proceedings in such action, and finally (1) order such third party to make himself defendant in the same or some other action, or (2) to proceed to trial on one or more . . . issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or (3) with the consent of the plaintiff and such third party, their counsel or [solicitors], or wherever, from the smallness of the amount in dispute, or of the value of the goods seized, it shall appear to the court or judge desirable and right so to do, at the request of either party, dispose of the merits of their claims and determine the same in a summary manner,

and make such other rules and orders therein, as to costs and all other matters as may appear to be just and reasonable: (see 1 & 2 Will. 4, c. 58, s. 1, as amended by C. L. P. A. 1860, s. 14.)

In all cases of interpleader proceedings where the question is one of law, and the facts are not in dispute, the judge shall be at liberty, at his discretion, to decide the question without directing an action or issue, and, if he shall think it desirable, to order that a special case be stated for the opinion of the court: (C. L. P. A. 1860, s. 15.)

For form of order that the claimant be substituted as defendant in the action in lieu of the present defendant, see Sched. H. 49 to the Rules of April, 1880.

For form of order directing trial of an issue, see Schedules H. 50-52 to the Rules of April, 1880.

For form of order, or request, that the merits of the claim made by the claimant be disposed of and determined in a summary manner, see Sched. H. 53 to the Rules of April, 1880.

If such third party shall not appear upon such rule or order to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the court or judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors and administrators, saving nevertheless the right or claim of such third party against the plaintiff, and thereupon to make such order between such defendant and the plaintiff, as to costs and other matters, as may appear just and reasonable: (1 & 2 Will. 4, c. 58, s. 3; *Cusden v. Clapham*, W. N. 1877, p. 90.)

For form of order barring claim, see Sched. H. 48 to the Rules of April, 1880.

If the claimant does not appear on the interpleader rule or summons, he cannot be ordered to pay the costs of the application, nor will the costs be ordered to be paid out of the funds in dispute: (Ch. Archb. 1122.)

7. WHEN JUDGMENT OR ORDER FINAL.

The judgment in any such action or issue as may be directed by the court or judge in any interpleader proceedings, and the decision of the court or judge in a summary manner, shall be final and conclusive against the parties and all persons claiming by, from, or under them: (1 & 2 Will. 4, c. 58, s. 2; C. L. P. A. 1860, s. 17.)

The decision of a judge in chambers, disposing of the matter summarily, is final (*Dodds v. Shepherd*, L. Rep. 1 Ex. Div. 75; 34 L. T. Rep. N. S. 358; 45 L. J. 457, Ex.; 24 W. R. 322; *Eade v. Winsor*, 47 L. J. 584, Q. B.; *Buse v. Roper*, 41 L. T. Rep. N. S. 457); and jurisdiction on appeal cannot be given, even by consent: (*Buse v. Roper*, *sup.*)

Although the order made on an interpleader issue substantially decides the dispute between the parties, it is an interlocutory order, an appeal against which cannot, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days: (*McAndrew v. Barker*, L. Rep. 7 Ch. Div. 701; 37 L. T. Rep. N. S. 810; 47 L. J. 340, Ch.; 26 W. R. 317; *Witt v. Parker*, 36 L. T. Rep. N. S. 538; 46 L. J. 450, Q. B.; 25 W. R. 518.)

8. COSTS.

Where the claimant as to all the goods paid money into court, and at the trial it was found that part of the goods only belonged to him, and the rest to a third party, the Court of Appeal ordered the money in court to be paid

to the claimant, and gave him the costs of the issue and of the appeal: (*Price v. Plummer*, 39 L. T. Rep. N. S. 657; 26 W. R. 45.)

Where after an interpleader order had been made by which the question of costs was reserved, the defendant obtained an order to discharge the interpleader order unless the plaintiff took certain steps within a given time, and, failure being made, obtained an order that the plaintiff should pay the costs, it was held that the court had jurisdiction to make the order, as an interpleader order does not remove the case from the control of the court: (*Wicks v. Wood*, 26 W. R. 680.)

[And see *sup.*, 6.]

INTERPRETATION.

In the construction of [the Judicature Act, 1873], unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned shall have, or include, the meanings following; (that is to say,)

- "Lord Chancellor" shall include Lord Keeper of the Great Seal.
- "The High Court of Chancery" shall include the Lord Chancellor.
- "The Court of Appeal in Chancery" shall include the Lord Chancellor as a Judge on Rehearing or Appeal.
- "London Court of Bankruptcy" shall include the Chief Judge in Bankruptcy.
- "The Treasury" shall mean the Commissioners of Her Majesty's Treasury for the time being, or any two of them.
- "Rules of Court" shall include forms.
- "Cause" shall include any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown.
- "Suit" shall include action.
- "Action" shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court; and shall not include a criminal proceeding by the Crown.
- "Plaintiff" shall include every person asking any relief (otherwise than by way of counter-claim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.
- "Petitioner" shall include every person making any application to the court, either by petition, motion, or summons, otherwise than as against any defendant.
- "Defendant" shall include every person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings.
- "Party" shall include every person served with notice of, or attending any proceeding, although not named on the record.
- "Matter" shall include every proceeding in the court not in a cause.
- "Pleading" shall include any petition or summons, and also shall include the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counter-claim of a defendant.
- "Judgment" shall include decree.
- "Order" shall include rule.
- "Oath" shall include solemn affirmation and statutory declaration.
- "Crown cases reserved" shall mean such questions of law reserved in

criminal trials as are mentioned in the Act of the eleventh and twelfth years of Her Majesty's reign, chapter seventy-eight.

"Pension" shall include retirement and superannuation allowance.

"Existing" shall mean existing at the time appointed for the commencement of this Act: (J. A., 73, s. 100.)

The provisions of the 100th section of the [Judicature Act, 1873] apply to the rules.

In the construction of these rules, unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned or referred to shall have or include the meanings following:

"Person" shall include a body corporate or politic:

"Probate actions" shall include actions and other matters relating to the grant or recall of probate or of letters of administration other than common form business:

"Proper officer" shall, unless and until any rule to the contrary is made, mean an officer to be ascertained as follows:

(a.) Where any duty to be discharged under the Act or these rules is a duty which has heretofore been discharged by any officer, such officer shall continue to be the proper officer to discharge the same:

(b.) Where any new duty is under the Act or these rules to be discharged, the proper officer to discharge the same shall be such officer, having previously discharged analogous duties, as may from time to time be directed to discharge the same, in the case of an officer of the Supreme Court, or the High Court of Justice, or the Court of Appeal, not attached to any division, by the Lord Chancellor, and in the case of an officer attached to any division, by the president of the division, and in the case of an officer attached to any judge, by such judge:

"The Act" and "the said Act" shall respectively mean the Supreme Court of Judicature Act, 1873, as amended by [the Judicature Act, 1875]: (O. LXIII., r. 1.)

In these rules the expression "Central Office" means the Central Office of the Supreme Court of Judicature; and the expression "master" means a Master of the Supreme Court of Judicature.

In the Supreme Court of Judicature (Officers) Act, 1879, and in Order LX., the expression "Officer of the Supreme Court" shall mean any officer paid wholly or partly out of public money who is attached to the Supreme Court, the High Court of Justice, or the Court of Appeal, or to any judge of any of those courts, and is not an officer attached to the person of a judge, and removable by him at pleasure.

The term "these rules" as used in the Rules of the Supreme Court shall include any rules made in amendment of or addition to those rules: (O. LXIII., r. 2, April, 1880.)

The words in a statute "it shall be lawful" of themselves merely make that legal and possible which there would, otherwise, be no right or authority to do. Their natural meaning is permissive and enabling only.

But there may be circumstances which may couple the power with a duty to exercise it. It lies upon those who call for the exercise of the power to show that there is an obligation to exercise it: (*Julius v. Bishop of Oxford*, L. Rep. 5 App. Cas. 214; 42 L. T. Rep. N. S. 546; 49 L. J. 577, Q. B.; 28 W. R. 726.)

"To deem" means to decide judicially: (per Jessel, M.R., *Russell v. Russell*, L. Rep. 14 Ch. Div. 479; 42 L. T. Rep. N. S. 112; 49 L. J. 268, Ch.)

INTERROGATORIES.

[See DISCOVERY.]

INVESTMENT.

I. OF MONEY IN OR UNDER CONTROL OF COURT.

[See PAYMENT INTO AND OUT OF COURT; PROPERTY].

II. ON REAL SECURITIES IN IRELAND.

Any person or persons who, under or by virtue of any direction, trust or power, given, created or reserved, or hereafter to be given, created or reserved as aforesaid, is or are or shall be authorised or directed to lend money at interest on real securities in England, Wales, or Great Britain, may lend the same or any part thereof at interest on real securities in Ireland, in the same manner in all respects, as if such investment had been expressly authorised in or by such direction, trust or power as aforesaid: (4 & 5 Will. 4, c. 29, s. 1.)

All loans of money on real securities in Ireland under [the] Act, in which any minor or unborn child, or person of unsound mind, is or may be interested, shall be made by the direction and under the authority of the [Chancery Division] in England, such direction or authority being obtained in any cause upon petition in a summary way: (*Id.*, s. 2.)

The word “or” was accidentally omitted after the word “cause,” and a petition may be presented, though no other proceedings are pending: (*Ex parte French*, 7 Sim. 510.)

If the consent of a married woman be required by the trust, she must appear separately from her husband: (Dan. 1925; Lewin, 6th edit., 290.)

The petition must be entitled in the matter of the Act, and of the cause if any, and all parties interested must join as petitioners or be served: (Dan. 1925.)

The proceedings are conducted like those on investments on mortgages: (*Id.*; see PROPERTY.)

Any consents required by the instrument are not dispensed with by the Act: (see s. 4.)

IRREGULARITY.

Non-compliance with any of [the] rules shall not render the proceedings in any action void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit: (O. LIX.; and see AMENDMENT.)

The court cannot dispense with the printing of a statement of claim over ten folios long: (per Fry, J., *Attorney-General v. Moass*, 21 S. J. 631.)

The application to set aside a proceeding for irregularity must be made within what, in the opinion of the judge, is a reasonable time: (*Claridge v. Mackenzie*, 7 Jur. 329; *Lane v. Newman*, 925.)

Irregularity may be waived by the opposite party taking a fresh step after knowledge of the irregularity, as by entering an appearance or giving an undertaking to appear: (*Oulton v. Radcliffe*, L. Rep. 9 C. P. 189; *Hooke v. Ind, Coope, and Company*, W. N. 1877, p. 90; see also *Beresford v. Geddes*, L. Rep. 2 C. P. 285; and APPEARANCE.)

ISSUES.

- I. PREPARATION OF WHERE PLEADINGS INSUFFICIENT.
- II. NOTICE OF TRIAL OF [see TRIAL].
- III. ORDERING TRIAL OF.

I. PREPARATION OF, WHERE PLEADINGS INSUFFICIENT.

Where in any action it appears to a judge that the statement of claim or defence or reply does not sufficiently define the issues of fact in dispute between the parties, he may direct the parties to prepare issues, and such issues shall, if the parties differ, be settled by the judge: (O. XXVI.)

Issues are settled on summons by either party to show cause why the issue should not be settled by the judge at chambers: (Baxter, 234.)

II. NOTICE OF TRIAL OF.

[See TRIAL.]

III. ORDERING TRIAL OF.

Different questions of fact may be ordered to be tried by different modes of trial (O. XXXVI., r. 6), and in all cases one or more issues of fact may be ordered to be tried before any other or others: (*Id.*)

Issues of law may be directed to be tried before issues of fact: (O. XXXIV., r. 2.)

A trial without a jury of an issue of fact, or partly of fact and partly of law may be directed where a trial by jury cannot be insisted on: (O. XXXVI., r. 26.)

A trial of an issue before a jury may be directed any time before, or at, the trial: (O. XXXVI., r. 27.)

Issues of fact, or partly of fact and partly of law, may be ordered to be tried in London or Middlesex, or at the assizes (O. XXXVI., r. 29; *Id.*, r. 29a, Dec., 1876), or before a referee: (J. A., 1873, s. 57.)

Trial of issues may also be directed where discovery or inspection is applied for (see O. XXXI., r. 19); in interpleader proceedings (1 & 2 Will. 4, c. 58, s. 1); on motion for judgment or a new trial (O. XL., r. 10); on giving leave to issue execution, where necessary either by lapse of time or change of parties: (O. XLII., rr. 18, 19.) [And see DISCOVERY, EXECUTION, INTERPLEADER, JUDGMENT, TRIAL.]

JUDGMENT.

I. BY DEFAULT.

1. OF ENTERING APPEARANCE.

- (a) *General Rules.*
- (b) *To Writ specially indorsed.*
- (c) *To Writ indorsed for Liquidated Demand.*
- (d) *To Writ for Detention of Goods and Damages, or either.*
- (e) *To Writ for Recovery of Land.*
 - (1) *Solely.*
 - (2) *With Mesne Profits, Rent, or Damages.*
- (f) *To Writ for Account.*
- (g) *In Special Chancery and other Actions.*

2. OF PLEADING.

- (a) *Statement of Claim.*
- (b) *Defence or Demurrer to Claim.*
 - (1) *Liquidated Demand.*

- (2) Detention of Goods and Damages, or either.
 - (3) Liquidated Demand and Detention of Goods and Damages or Damages only.
 - (4) Recovery of Land.
 - (5) Other Actions.
- (c) *Reply or Subsequent Pleading.*
- (d) *Pleading to Issues other than between Plaintiff and Defendant.*
3. IN GIVING DISCOVERY [see DISCOVERY].
4. IN GIVING NOTICE OF TRIAL.
5. OF APPEARANCE AT TRIAL.
 - (a) *By Plaintiff.*
 - (b) *By Defendant.*
- II. DISMISSING ACTION FOR WANT OF PROSECUTION [see *sup.*, II., 2 (a) (c) and 4; DISMISSING ACTION].
- III. BY LEAVE ON SPECIALLY INDORSED WRIT.
 1. HOW APPLICATION MADE.
 2. SHOWING CAUSE.
 3. WHERE LEAVE TO DEFEND GIVEN.
 4. JUDGE'S DISCRETION.
 5. CONDITIONAL LEAVE TO DEFEND.
 6. LEAVE TO DEFEND AS TO PART.
 7. LEAVE TO ONE OF SEVERAL DEFENDANTS.
 8. ORDER FOR AND SIGNING JUDGMENT.
 9. FORM OF JUDGMENT.
 10. RIGHTS TO MONEY PAID IN.
- IV. BY LEAVE FOR ACCOUNT [see ACCOUNT].
- V. ON DISCONTINUANCE.
- VI. ON CONFESSION OF DEFENCE.
- VII. ON ADMISSIONS IN PLEADINGS.
 1. WHERE ALLOWED.
 2. APPLICATION.
 3. ORDER.
- VIII. ON PAYMENT INTO COURT.
- IX. AT TRIAL.
 1. GENERALLY.
 2. FOR SOME PLAINTIFFS ONLY.
 3. AGAINST SOME DEFENDANTS ONLY.
 4. FOR BALANCE OF SET-OFF OR COUNTER-CLAIM.
- X. AFTER TRIAL BY JUDGE.
- XI. AFTER TRIAL BY REFEREE [see *post*, XII.]
- XII. ON MOTION FOR JUDGMENT.
 1. WHERE MOTION MADE.
 - (a) *Trial before Referee.*
 - (b) *Trial of Issues.*
 - (c) *Leave to Move.*
 - (d) *Other Cases.*
 2. NOTICE OF MOTION.
 3. SETTING DOWN.
 - (a) *When.*
 - (b) *Where.*
 4. TO WHAT COURT MOTION MADE.
 5. THE JUDGMENT.
- XIII. ON NEW TRIAL [see NEW TRIAL].
- XIV. ON APPEAL [see APPEAL].

XV. ENTERING JUDGMENT.

1. BY DEFAULT OF APPEARANCE OR PLEADING.

(a) *In London.*

- (1) Where Entered.
- (2) Documents Produced.
- (3) Marking Judgment.
- (4) Filing Documents.
- (5) Signing Judgment.
- (6) Entering and Indexing.

(b) *In District Registry.*

2. IN OTHER CASES.

(a) *Where Entered.*(b) *How Entered.*

- (1) Materials from which Prepared.
- (2) Bespeaking.
- (3) Leaving Documents.
- (4) Default in Bespeaking, &c., within seven days.
- (5) Delivering out Copy Draft Minutes.
- (6) How Evidence stated.
- (7) Settling Draft without Appointment or Notice.
- (8) Appointment to Settle.
- (9) Settling Draft after Appointment to Settle.
- (10) Varying Minutes.
- (11) Engrossment or Print.
- (12) Filing Copy Pleadings.
- (13) Passing Judgment without Appointment or Notice.
- (14) Appointment to Pass.
- (15) Passing Judgment.
- (16) Entry.
- (17) Transmitting Office Copy to District Registry [see *sup.* (a)].

XVI. NOTICE OF JUDGMENT.

1. IN WHAT CASES SERVED.

2. DIRECTIONS FOR SERVICE.

(a) *On what Persons Generally.*(b) *On Infants or Lunatics not so found.*(c) *On Persons out of Jurisdiction.*

3. HOW SERVED.

(a) *Generally.*(b) *On Infants or Lunatics not so found.*

4. FORM OF NOTICE AND MEMORANDUM.

5. DISPENSING WITH OR ORDERING SUBSTITUTED SERVICE.

6. FILING MEMORANDUM.

7. IRREGULAR SERVICE.

8. LEAVING MASTER'S CERTIFICATE AT CHAMBERS.

9. EFFECT OF SERVICE.

(a) *On Interests.*(b) *Liberty to Attend.*(c) *Adding to Judgment* [see *post*, XVIII.]

XVII. AMENDING JUDGMENT.

XVIII. ADDING TO JUDGMENT.

1. WHO MAY APPLY [see *sup.*, XVI.]

2. HOW APPLICATION MADE.

3. TIME

4. APPEAL FROM ORDER.

XIX. ENROLMENT.

XX. REGISTRATION.

XXI. SATISFACTION.

- XXII. SEARCHES FOR JUDGMENTS, &c.
- XXIII. SETTING ASIDE.
- XXIV. HOW JUDGMENT AFFECTS INFANTS.
 - 1. GENERALLY.
 - 2. SUBPENA TO SHOW CAUSE.
 - 3. HOW JUDGMENT MADE ABSOLUTE.
 - 4. GROUNDS FOR IMPEACHING.
 - 5. TIME FOR IMPEACHING.
- XXV. ENFORCING JUDGMENTS.
 - 1. ENGLISH JUDGMENT.
 - (a) *House of Lords* [see APPEAL].
 - (b) *Supreme Court* [see EXECUTION].
 - (c) *Ecclesiastical Court*.
 - (d) *Lancaster Palatine Court*.
 - (e) *Stannaries Court*.
 - 2. IRISH JUDGMENT.
 - 3. SCOTCH JUDGMENT.
 - 4. FOREIGN JUDGMENT.

I. BY DEFAULT.

1. OF ENTERING APPEARANCE.

(a) *General Rules*.

In cases other than that mentioned in the rule next cited, judgment may be signed as soon as the time limited for appearance has expired. (see O. XIII. rr. 3, 4, 5, 6, 7, 8, 9; *post*.)

Where a defendant fails to appear to a writ of summons issued out of a district registry, and the defendant had the option of entering an appearance, either in the district registry or in the London office, judgment for want of appearance shall not be entered by the plaintiff until after such time as a letter, posted in London on the previous evening in due time for delivery to him on the following morning, ought in due course of post, to have reached him: (O. XIII. r. 5a, Feb. 1876.)

If notice is not then received, the plaintiff may proceed to obtain judgment by default: (*Smith v. Dobbin*, L. Rep. 3 Ex. Div. 338; 37 L. T. Rep. N. S. 777; 26 W. R. 122.)

The person serving a writ of summons shall, within three days at most after such service, indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default: (O. IX. r. 13.)

The indorsement is unnecessary in case of substituted service being effected by order: (*Dymond v. Croft*, L. Rep. 3 Ch. Div. 512); 34 L. T. Rep. N. S. 786; 45 L. J. 604, Ch.; 24 W. R. 842.)

No further leave is necessary where leave has been obtained to serve the writ out of the jurisdiction: (*Scott v. Royal Wax Candle Company*, L. Rep. 1 Q. B. Div. 404; 34 L. T. Rep. N. S. 683; 45 L. J. 586, Q. B.; 24 W. R. 668.)

Where any defendant fails to appear to a writ of summons, and the plaintiff is desirous of proceeding upon default of appearance under any of the following Rules of this Order, or under Order XV., rule 1 [see ACCOUNT] he shall, before taking such proceeding upon default, file an affidavit of service, or of notice in lieu of service as the case may be: (O. XIII., r. 2.)

Every affidavit of service . . . shall mention the date on which [the] indorsement was made: (O. IX., r. 13.)

As to entry of judgment by default, see *post* XV., 1.

(b) To Writ Specially Indorsed.

In case of non-appearance by the defendant where the writ of summons is especially indorsed, under Order III., r. 6, the plaintiff may sign final judgment for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs, but it shall be lawful for the court or a judge to set aside or vary such judgment upon such terms as may seem just: (O. XIII., r. 3.)

Where there are several defendants to a writ specially indorsed for a debt or liquidated demand in money, under Order III., r. 6, and one or more of them appear to the writ, and another or others of them do not appear, the plaintiff may enter final judgment against such as have not appeared, and may issue execution upon such judgment without prejudice to his right to proceed with his action against such as have appeared: (O. XIII., r. 4.)

(c) To Writ Indorsed for Liquidated Demand.

Where the defendant fails to appear to the writ of summons, and the writ is not specially indorsed, but the plaintiff's claim is for a debt or liquidated demand only, no statement of claim need be delivered, but the plaintiff may file an affidavit of service or notice in lieu of service, as the case may be, and a statement of the particulars of his claim in respect of the causes of action stated in the indorsement upon the writ, and may, after the expiration of eight days, enter final judgment for the amount shown thereby and costs to be taxed, provided that the amount shall not be more than the sum indorsed upon the writ, besides costs: (O. XIII., r. 5.)

The rule does not provide for final judgment being entered in default of appearance by one of several defendants. But the form shows that it was intended that in such case final judgment should be entered. If this cannot be done, the plaintiff should file a statement of claim (see O. XIX., r. 6; PLEADING), and in default of pleading, move for judgment as mentioned, *post*, XII.

The form used by the registrars is as follows:

In the High Court of Justice,
Chancery Division.

1876. B. No.

M.R. or V.C.

Mr. , Registrar.

Between A. B.

and

Plaintiff,

C. D. and E. F.

Defendants.

30th November, 1876.

The defendants [or the defendant C. D.] not having appeared to the writ of summons herein, it is this day adjudged that the plaintiff recover against the said defendant £., and costs, to be taxed.

(App. D. 1; Reg. Form.)

(d) To Writ for Detention of Goods and Damages, or Either.

Where the defendant fails to appear to the writ of summons, and the plaintiff's claim is not for a debt or liquidated demand only, but for detention of goods and pecuniary damages, or either of them, no statement of claim need be delivered, but interlocutory judgment may be entered and a writ of inquiry shall issue to assess the value of the goods and the damages, or the damages only, as the case may be, in respect of the causes of action disclosed by the indorsement on the writ of summons. But the court or a judge may order that, instead of a writ of inquiry, the value and

amount of damages, or either of them, shall be ascertained in any way in which any question arising in an action may be tried : (O. XIII., r. 6; see *sup.*, p. 412.)

The rule does not provide for interlocutory judgment being entered in default of appearance of one of several defendants. In such a case the plaintiff should file a statement of claim (O. XIX., r. 6; PLEADING), and proceed in default of pleading under O. XXIX., r. 5 : (see *post*, p. 456.)

Where the return of the specific goods is sought, leave has been given to enter final judgment for such return, and for execution to issue, without any writ of inquiry; but such leave is unnecessary : (*Ivory v. Cruickshank*, W. N. 1875, p. 249).

The first judgment is in the following form :

In the High Court of Justice,
Chancery Division.

18 . No.

M.R. or V.C.

Mr. , Registrar.

Between

Plaintiff

and

Defendant.

No appearance having been entered to the writ of summons herein, it is this day adjudged that the plaintiff do recover damages against the defendant ["The value of the goods" or "damages" as the case may be] to be assessed.

(Sched. D. 8 to Rules April, 1880; Ch. Reg. Form.)

After the damages are assessed, the form of judgment is as follows :

In the High Court of Justice,
Chancery Division.

M.R. or V.C.

Mr. , Registrar.

The defendants not having appeared to the writ of summons herein, and a writ of inquiry, dated, &c., having been issued directed to the sheriff of to assess the damages which the plaintiff was entitled to recover, and the said sheriff having by his return, dated, &c., returned (or such damages, &c., having by direction of the judge been ascertained at chambers, and it appearing by the chief clerk's certificate) [or if any other method has been adopted state it] that the said damages, &c., have been assessed (or ascertained) at l., it is this day adjudged that the plaintiff recover l., and costs to be taxed.

(Registrar's Form.)

(e) *To Writ for Recovery of Land.*

(1) *Solely.*

In case no appearance shall be entered in an action for the recovery of land, within the time limited for appearance, or if an appearance be entered but the defence be limited to part only, the plaintiff shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply : (O. XIII., r. 7.)

The form of judgment used by the registrars is as follows :

In the High Court of Justice,
Chancery Division.

M.R. or V.C.

Mr. , Registrar.

No appearance having been entered to the writ of summons herein, it is this day adjudged that the plaintiff recover possession of the land in the said writ mentioned.

(2) With Mesne Profits, Rent, or Damages.

Where the plaintiff has endorsed a claim for mesne profits, arrears of rent, or damages for breach of contract, upon a writ for the recovery of land, he may enter judgment as in the last preceding rule mentioned for the land : and may proceed as in the other preceding rules of this order as to such other claim so indorsed : (O. XIII., r. 8.)

The form used by the registrars is the same as the one given *sup.*, (d)

(f) To Writ for Account.

In default of appearance to a summons indorsed under Order III., r. 8, and after appearance unless the defendant, by affidavit or otherwise, satisfy the court or a judge that there is some preliminary question to be tried, an order for the account claimed, with all directions now usual in the Court of Chancery in similar cases, shall be forthwith made : (O. XV., r. 1.)

An application for such order as mentioned in the last preceding rule shall be made by summons, and be supported by an affidavit filed on behalf of the plaintiff, stating concisely the grounds of his claim to an account. The application may be made at any time after the time for entering an appearance has expired ; (*Id.*, r. 2, and see ACCOUNT.)

Where an executorship or administration account is claimed at the Rolls, the usual judgment is given, besides the order for account : (Dan. Forms, 3rd edit. 206.)

(g) In Special Chancery and other Actions.

In actions assigned by the 34th section of the Act to the Chancery Division . . . and in all other actions not by the Rules in this order otherwise specially provided for, in case the party served with the writ does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service the action may proceed as if such party had appeared : (O. XIII., r. 9.)

The statement of claim must be delivered by being filed with the proper officer : (O. XIX., r. 6 ; PLEADING.)

Non-appearance cannot be taken as equivalent to dispensing with delivery of the statement of claim : (*Minton v. Metcalfe*, W. N. 1877, p. 142 ; 36 L. T. Rep. N. S. 683 ; 46 L. J. 584, Ch.)

If the defendant does not appear and deliver a defence within time, the plaintiff may set the action down on motion for judgment, and such judgment will be given as on the statement of claim the court considers the plaintiff entitled to : (O. XXIX., rr. 9, 10, and see *post* 2 ; XII.)

Two clear days' notice of such motion must be given, unless otherwise ordered : (O. LIII., rr. 3, 4 ; *Roupell v. Parsons*, W. N. 1876, p. 61.)

The notice is sufficiently served by being filed in the office from which the writ issued : (*Morton v. Miller*, L. Rep. 3 Ch. Div. 516 ; 45 L. J. 613, Ch. ; 24 W. R. 723 ; *Dymond v. Croft*, L. Rep. 3 Ch. Div. 512 ; 34 L. T. Rep. N. S. 786 ; 45 L. J. 604, Ch. ; 24 W. R. 842 ; *Gardner v. Hardy*, W. N. 1876, p. 185.)

The plaintiff shall, without any special leave, be at liberty to serve any notice of motion . . . upon any defendant, who, having been duly served with a writ of summons to appear in the action, has not appeared within the time limited for that purpose : (O. LIII., r. 7.)

If service is effected, filing is unnecessary : (*Whitaker v. Thurston*, W. N. 1876, p. 232.)

It would seem, however, that the notice need neither be filed nor delivered : (*Williams v. Cardwell*, W. N. 1877, p. 140 ; 25 W. R. 646.)

When one of several defendants has not appeared, and the rest have admitted the cause of action by their pleadings, the plaintiff may move for

judgment on the admission as against them (see *post*, VII.), but as against the defaulting defendant, must set down the action on motion for judgment: (*Parsons v. Harris*, L. Rep. 6 Ch. Div. 694.)

(h) *By Party added by Order of Revivor.*

When a person has been added as party by order of revivor, and does not enter appearance, it is unnecessary to file the pleadings or notice of motion for judgment: (*Chorlton v. Dickie*, L. Rep. 13 Ch. Div. 160; 41 L. T. Rep. N. S. 467; 49 L. J. 40, Ch.; 28 W. R. 228.)

2. OF PLEADING.

(a) *Statement of Claim.*

If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the court or a judge to dismiss the action with costs, for want of prosecution; and on the hearing of such application the court or judge may, if no statement of claim have been delivered, order the action to be dismissed accordingly, or may make such other order on such terms as to the court or judge shall seem just: (O. XXIX., r. 1.)

Each case must stand on its own merits: (*Higginbottom v. Aynesley*, L. Rep. 3 Ch. Div. 288; 24 W. R. 782.)

When, after appearance in an action against the indorser of a bill, nothing had been done, and the bill had been subsequently paid by the acceptor, proceedings were stayed, and the defendant was ordered to pay the costs of the writ: (W. N. 1876, p. 37.)

When default had been made on account of negotiations, time was given for delivery, the plaintiff being ordered to pay the costs of the motion: (*Higginbottom v. Aynesley*, *sup.*)

When pending the action the plaintiff has become bankrupt, the notice must be given to the trustees, and the order will only be made on the terms that it shall only be enforced against the estate: (*Wright v. Swindon &c. Railway Company*, L. Rep. 4 Ch. Div. 164; 36 L. T. Rep. N. S. 590; 46 L. J. 199, Ch.)

If a sole plaintiff dies insolvent and intestate, an application may be made for an order appointing a person to represent his estate, to whom notice may be given: (see PARTIES.)

For form of judgment, see Sched. H 13 to Rules of April, 1880 [and see DISMISSING ACTION.]

(b) *Defence or Demurrer to Claim.*

(1) *Liquidated Demand.*

If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose, deliver a defence or demurrer, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed, with costs: (O. XXIX., r. 2.)

This is the proper method where the action is on a replevin bond: (*Dix v. Groom*, L. Rep. 5 Ex. Div. 91; 49 L. J. 430, Ex.; 28 W. R. 370.)

If a demurrer is overruled and no leave to amend is given, the defence is deemed to be struck out, and the rights of the parties are the same as if he had not pleaded (O. XXVIII., r. 10), and final judgment may be signed.

When in any such action as in [O. XXIX., r. 2] mentioned there are several defendants, if one of them make default as mentioned in the last preceding rule, the plaintiff may enter final judgment against the defendant so making default, and issue execution upon such judgment without prejudice to his right to proceed with his action against the other defendants: (O. XXIX., r. 3.)

When the writ is specially indorsed, and the defendant has obtained leave to defend, the plaintiff need not deliver a statement of claim, and on default in delivery of defence final judgment may be entered: (*Atkins v. Taylor*, W. N. 1876, p. 11; *Margate Pier and Harbour Co. v. Perry*, W. N. 1876, p. 52.)

The form of judgment is as follows:

In the High Court of Justice,
Chancery Division.

18 , No.

M.R. or V.C.

Mr. Registrar.

The defendants [or the defendant C.D.] not having delivered any statement of defence, it is this day adjudged that the plaintiff recover against the defendants [or the said defendant] £, and costs to be taxed.

(Registrar's Form.)

(2) Detention of Goods and Damages, or either.

If the plaintiff's claim be for detention of goods and pecuniary damages, or either of them, and the defendant makes default [in delivery of a defence or demurrer within the time allowed, at the end of such time] the plaintiff may enter an interlocutory judgment against the defendant, and a writ of inquiry shall issue to assess the value of the goods and the damages, or the damages only, as the case may be. But the court or a judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way in which any question arising in an action may be tried: (O. XXIX, r. 4.)

The rule is the same where the demurrer has been overruled without leave to amend: (See O. XXVIII, r. 10; PLEADING.)

When . . . there are several defendants, if one of them make such default [in delivery of defence or demurrer], the plaintiff may enter an interlocutory judgment against the defendant so making default, and proceed with his action against the others. And in such case, damages against the defendant making default shall be assessed at the same time with the trial of the action or issues therein against the other defendants, unless the court or judge shall otherwise direct: (O. XXIX, r. 5.)

The form of the first judgment is as follows:

In the High Court of Justice,
Chancery Division.

18 , No.

M.R. or V.C.

Mr. Registrar.

Between

and

Plaintiff.

Defendant.

The day of , 18 .

No statement of defence or demurrer having been delivered by the defendant herein, it is this day adjudged that the plaintiff recover against the defendant ["the value of the goods" or "damages," or both, as the case may be].

(Sched. D. 8 to Rules of April, 1880.)

The form of judgment when the damages are ascertained is as follows:

In the High Court of Justice,
Division.

1876. B. No.

Between A. B. and C. D.

and

Plaintiffs,

E. F. and G. H.

Defendants.

30th November, 1876.

The defendants not having delivered a statement of defence, and a writ of inquiry, dated 1876, having been issued directed to the sheriff of

to assess the damages which the plaintiff was entitled to recover, and the said sheriff having by his return dated the 1876, returned (or such damages, &c., having by direction of the judge been ascertained at chambers, and it appearing by the chief clerk's certificate) [or if any other method has been adopted state it] that the said damages, &c., have been assessed (or ascertained) at £., it is this day adjudged that the plaintiff recover £., and costs to be taxed.

(Registrar's Forms.)

(3) Liquidated Demand, and Detention of Goods and Damages, or Damages only.

If the plaintiff's claim be for a debt or liquidated demand, and also for detention of goods and pecuniary damages, or pecuniary damages only, and the defendant makes default as mentioned in Rule 2 [delivering defence or demurrer], the plaintiff may enter final judgment for the debt or liquidated demand, and also enter interlocutory judgment for the value of the goods and the damages, or the damages only, as the case may be, and proceed as mentioned in Rule 4: (O. XXIX., r. 6; see *sup.*, (2).)

The rule is the same where the demurrer has been overruled without leave to amend: [see O. XXVIII., r. 10; PLEADING.]

(4) Recovery of Land. Solely.

In an action for the recovery of land, if the defendant makes default as mentioned in Rule 2 [delivering defence or demurrer], the plaintiff may enter a judgment that the person whose title is asserted in the writ of summons shall recover possession of the land with his costs: (O. XXIX., r. 7.)

The rule is the same where a demurrer to the whole claim is overruled, no leave to amend being given: [see O. XXVIII., r. 10.]

The form of judgment is as follows:

In the High Court of Justice,
Chancery Division.

M.R. or V.C.

Mr. Registrar.

No statement of defence having been delivered herein, it is this day adjudged that the plaintiff recover possession of the land in the writ of summons mentioned, with his costs to be taxed.

(Registrar's Forms, July, 1876.)

As to this form see *Gossett v. Campbell* (W. N. 1877, p. 134).

With claim for mesne profits, rent, or damages.

Where the plaintiff has indorsed a claim for mesne profits, arrears of rent, or damages for breach of contract upon a writ for the recovery of land, if the defendant makes default as mentioned in Rule 2 [delivery of defence, or demurrer], or if there be more than one defendant, some or one of the defendants make such default, the plaintiff may enter judgment against the defaulting defendant or defendants and proceed as mentioned in Rules 4 and 5: (O. XXIX., r. 8.)

For forms of judgment, see *sup.* (2); *Gossett v. Campbell* (W. N. 1877, p. 134).

(5) Other Actions.

Rule 9 relates to Probate actions only.

In all other actions than those in the preceding rules of this order mentioned, if the defendant makes default in delivering a defence or demurrer, the plaintiff may set down the action on motion for judgment,

and such judgment shall be given as upon the statement of claim the Court shall consider the plaintiff to be entitled to : (O. XXIX. r. 10.)

This rule applies where a defence has been struck out for disobedience to an order to give discovery (*Fisher v. Hughes*, 25 W. R. 528); or where a demurrer to the whole claim is overruled : (See O. XXVII., r. 10; PLEADING.)

A vesting order under the Trustee Act, 1850, has been made under r. 10 : (*Fisher v. Hughes*, *sup.*)

Where, in any such action as mentioned in the last preceding rule, there are several defendants, then if one of such defendants, make such default as aforesaid, the plaintiff may either set down the action at once on motion for judgment against the defendant so making default, or may set it down against him at the time when it is entered for trial or set down on motion for judgment against the other defendants : (O. XXIX., r. 11.)

Where one of several defendants has made default, and the rest have admitted the plaintiff's claim by their defence, the plaintiff may set down the action on motion for judgment against all at the same time : (*Re Smith*, W. N. 1876, p. 103.)

Where the defendant consents, the action may be set down on motion for judgment before the time for delivering the defence has expired : (*Palin v. Brooks*, W. N. 1875, p. 188; 24 W. R. 20.)

Where on defendants default of pleading, the plaintiff moved for judgment on admissions of the statement of claim, and the application was refused, an order was made that the plaintiff might set the action down on motion for judgment without any further notice of motion : (*Gillot v. Ker*, W. N. 1876, p. 116; 24 W. R. 428.)

(c) *Reply or Subsequent Pleading.*

Where the defendant has delivered a counter-claim, and the plaintiff has delivered a reply, but has not pleaded to the counter-claim, the defendant cannot move for judgment, but the counter-claim is dealt with at the hearing or trial : (*Rolfe v. Maclaren*, L. Rep. 3 Ch. Div. 106; 24 W. R. 816.)

And when the plaintiff has not delivered a reply at all, judgment cannot be obtained on the counterclaim until the original claim has been dealt with. The proper course is to give notice of motion to dismiss the original action for want of prosecution, and for judgment on the counter-claim : (*Aitken v. Dunbar*, 46 L. J. 489, Ch.; 25 W. R. 366; and see *Litton v. Litton*, *inf.*)

If the plaintiff does not deliver a reply or demurrer, or any party does not deliver any subsequent pleading, or a demurrer, within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and the statements of fact in the pleading last delivered shall be deemed to be admitted : (O. XXIX., r. 12.)

Where the plaintiff makes default in delivering his reply, the defendant cannot move to dismiss for want of prosecution, until the time for the plaintiff to give notice of trial has elapsed : (*Litton v. Litton*, L. Rep. 3 Ch. Div. 793; 24 W. R. 962.)

Where the defendant has delivered a defence and counterclaim, and the plaintiff has delivered a reply, on the defendant's default to deliver a rejoinder, the plaintiff may obtain an order to enter judgment on the defence and counter-claim : (*Ellis v. Munson*, W. N. 1876, p. 253.)

Where plaintiff has agreed with some defendants to extend the time for delivery of their defence, other defendants who do not know of this, can-

not move to have the action dismissed on the ground that plaintiff is out of time in delivering his reply to their defence: (*Ambroise v. Evelyn*, L. Rep. 11 Ch. Div. 759; 27 W. R. 639.)

(d) *Pleading to Issues other than between Plaintiff and Defendant.*

In any case in which issues arise in an action other than between plaintiff and defendant, if any party to any such issue makes default in delivering any pleading, the opposite party may apply to the court or a judge for such judgment, if any, as upon the pleadings he may appear to be entitled to. And the court may order judgment to be entered accordingly, or may make such other order as may be necessary to do complete justice between the parties: (O. XXIX., r. 13.)

3. IN GIVING DISCOVERY.

[See DISCOVERY.]

4. IN GIVING NOTICE OF TRIAL.

If the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as a court or judge may allow, give notice of trial (O. XXXVI., r. 4), the defendant, instead of giving notice of trial, may apply to the court or judge to dismiss the action for want of prosecution; and, on the hearing of such application, the court or a judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the court or judge may seem just: (O. XXXVI., r. 4a., June, 1876.)

[See *Litton v. Litton*, *sup.*, and DISMISSING ACTION.]

For form of judgment see Sched. H. 13 to Rules of April, 1880.

5. OF APPEARANCE AT TRIAL.

(a) *By Plaintiff.*

If, when an action is called on for trial, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action, but if he has a counter-claim, then he may prove such claim so far as the burden of proof lies upon him: (O. XXXVI., r. 19.)

It is unnecessary to swear the jury: (*Lane v. Eve*, W. N. 1876, p. 86; O. XXXVI., r. 22a., Dec. 1876.)

Where the plaintiff appears, but refuses to proceed, judgment will be given against him: (*Robinson v. Chadwick*, L. Rep. 7 Ch. Div. 878; 38 L. T. Rep. N. S. 415; 47 L. J. 607, Ch.; 26 W. R. 421.)

The defendant need not prove service of notice of motion: (*James v. Crow*, L. Rep. 7 Ch. Div. 410; 37 L. T. Rep. N. S. 749; 47 L. J. 200, Ch.; 26 W. R. 236.)

(b) *By Defendant.*

If, when an action is called on for trial, the plaintiff appears, and the defendant does not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon him: (O. XXXVI., r. 18.)

Proof of the service of the notice of trial need not be given: (*Chorlton v. Dickie*, L. Rep. 13 Ch. Div. 160; 41 L. T. Rep. N. S. 467; 49 L. J. 40, Ch.; 28 W. R. 228.)

When a person has been added as a party, by order of revivor, and does not enter appearance, it is unnecessary for the plaintiff to file the pleadings or notice of motion for judgment on him, but notice of trial should be served on the solicitor on the record: (*Id.*)

II. DISMISSING ACTION FOR WANT OF PROSECUTION.

[See *sup.* I., 2 (a), (c) and 4; DISMISSING ACTION.]

III. BY LEAVE, ON SPECIALLY INDORSED WRIT.

1. HOW APPLICATION MADE.

Where the defendant appears on a writ of summons specially indorsed, the plaintiff may, on affidavit made by himself or by any other person who can swear positively to the debt or cause of action, verifying the cause of action, and stating that in his belief there is no defence to the action, call on the defendant to show cause why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs: (O. XIV., r. 1, May 1877.)

Where plaintiffs brought an action against defendant, a widow, in respect of bills of exchange given by her while under coverture, and having specially indorsed, the writ took out a summons to show cause why they should not sign final judgment, it was held that the defendant not being personally liable the procedure did not apply: (*Ortner v. Fitzgibbon*, 43 L. T. Rep. N. S. 60.)

The rule applies to the Chancery Division: (*Anglo-Italian Bank v. Davies*, 38 L. T. Rep. N. S. 197.)

A copy of the affidavit must accompany the summons or notice of motion: (O. XIV., r. 1, May, 1877.)

No time is limited within which the application must be made.

The making of the affidavit is not a condition precedent to the issue of the summons: where the plaintiff made a defective affidavit, then obtained his summons, and afterwards swore a fresh and good affidavit, it was held that the issue of the summons was good: (*Begg v. Cooper*, 40 L. T. Rep. N. S. 29; 27 W. R. 224.)

The application by the plaintiff for leave to enter final judgment under the last preceding rule shall be made by summons returnable not less than two clear days after service: (O. XIV., r. 2.)

The summons may be issued against a defendant corporation: (*Shelford v. Louth and East Coast Railway Company*, L. Rep. 4 Ex. Div. 317; 28 W. R. 407.)

2. SHOWING CAUSE.

The defendant may show cause against such application by offering to bring into court the sum indorsed on the writ, or by affidavit. In such affidavit he shall state whether the defence he alleges goes to the whole or to part only, and if so, to what part, of the plaintiff's claim. And the judge may, if he think fit, order the defendant to attend and be examined upon oath; or to produce any books or documents or copies of or extracts therefrom: (O. XIV., r. 3.)

A defendant corporation cannot make the affidavit, and can only show cause under the words "or otherwise" in r. 1: (*Muirhead v. Direct United States Cable Company*, 27 W. R. 708; and see *Bank of Montreal v. Cameron*, L. Rep. 2 Q. B. Div. 536; 36 L. T. Rep. N. S. 413; 25 W. R. 593, decided under the old rule.)

Hearsay evidence may be admitted on the part of the defendant: (*Harrison v. Bottenheimer*, 26 W. R. 362.)

Per Cockburn, L.C.J. and Pollock, B., the rule does not warrant the receiving of an affidavit by the plaintiff in reply to the defendant's affidavit: (*North Central Waggon Company v. North Wales Waggon Company*, 39 L. T. Rep. N. S. 628.)

Per the Common Pleas Division, the court or judge may in their discretion allow the plaintiff to file an affidavit in reply: (*Davis v. Spence*, L. Rep. 1 C. P. Div. 719; 25 W. R. 229); but he cannot do so, as of right: (*Rotherham v. Priest*, W. N. 1879, p. 190; 41 L. T. Rep. N. S. 558; 49 L. J. 104, C. P.)

Per Jessel, M.R. the plaintiff may file affidavits in reply: (*Girvin v. Grepe*, L. Rep. 13 Ch. Div. 174; 41 L. T. Rep. N. S. 522; 49 L. J. 63, Ch.); apparently as of right: (*Id.*)

3. WHERE LEAVE TO DEFEND GIVEN.

The defendant [must] by affidavit or otherwise, satisfy the judge that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to be permitted to defend the action: (O. XIV., r. 1, May, 1877.)

For form of order without condition, see Sched. H. 5 to the Rules of April, 1880.

Per Cairns, L.C.: The means should exist of coming by a short road to a final judgment, when there is no *bonâ fide* defence to an action, but it is of at least equal importance, that parties should not in such a way, by a summary procedure in chambers, be shut out from their defence, when they ought to be admitted to defend: (*Wallingford v. Mutual Society*, L. Rep. 5 App. Cas. 685.)

Per Lord Blackburn: If the judge is satisfied upon the affidavits before him that there really is a defence upon the merits, it is a matter of right, unless there be something very extraordinary, that the defendant should be able to raise that defence upon the merits, either to the whole or a part. There may very well be facts brought before the judge which satisfy him that it is reasonable, with or without terms, that the defendant should be able to fight the question, although the judge is by no means satisfied that there is what amounts to a defence upon the merits. It is not enough to swear, "I say I owe the man nothing," but the judge must be satisfied that there is ground for saying so. If fraud be alleged, the defendant must give such an extent of definite facts pointing to the fraud as to satisfy the judge that those are facts which make it reasonable that the defendant should be allowed to raise that defence. And in like manner as to illegality, and every other defence that might be mentioned: (*Wallingford v. Mutual Society*, *sup.*)

The order contemplates that a defendant shall be allowed to defend whenever the affidavits disclose reasonable ground for supposing that he has a plausible defence, and the powers ought to be sparingly used, the defence being precluded only where it is plainly vexatious and groundless: (Per Bramwell, L.J., *Beckingham v. Owen*, W. N. 1878, p. 215.)

If the defendant by his affidavits shows such a state of facts as leads to the inference that at the trial he may be able to establish a defence to the claim, leave to defend ought to be given, and the defendant's affidavits need not show a complete defence: (Per Brett, L.J. *Ray v. Barker*, L. Rep. 4 Ex. Div. 279; 48 L. J. 569, Ex.; 27 W. R. 745.)

Per the Court of Appeal: Leave to sign judgment should be given only where there is clearly no defence to the action, and where there is any doubt the defendant should have liberty to defend: (*Thompson v. Marshall*, 41 L. T. Rep. N. S. 720.)

Though the question of liability must, to a certain extent, be tried on the application, leave to defend will be given where it is shown that the defence is *bonâ fide*, and not for the purpose of delay: (*Lloyd's Banking Company v. Ogle*, L. Rep. 1 Ex. Div. 262; 45 L. J. 616, Ex.; and see *Andrews v. Stewart*, W. N. 1876, p. 7; *Phillips v. Harris*, W. N. 1876, p. 54; W. N. 1876, p. 23; *Ameny v. Nawab of Bengal*, W. N. 1875, p. 239; *Berridge v. Roberts*, W. N. 1876, p. 86; *Thorne v. Seel*, W. N. 1878, p. 215.)

Where, in a claim for payment of sums of money, the defence set up is that of a denial and contradiction of the accounts on which the claim is

founded, it is erroneous to make an order under Order XIV., r. 1a., refusing to a defendant the liberty to defend, except upon the condition that he must pay into court a definite sum of money within a certain time, and that, unless he does so, judgment shall be signed against him. And this is especially the case where there are mortgages, and the creditor has been a mortgagee in possession: (*Wallingford v. Mutual Society, sup.*)

The defendant in an action for calls, brought by the liquidator of a company which is being voluntarily wound-up under the Companies Act, 1862, is entitled to have leave to defend unconditionally, if he has a set-off, exceeding the amount of the claim, due to him from the company: (*Groom v. Rathbone*, 41 L. T. Rep. N. S. 591; but compare *Branwhite's Case*, 40 L. T. Rep. N. S. 652.)

Per Jessel, M.R.: The only question which can be tried is whether there is a good defence upon the merits: (*Ex parte Marshall*, L. Rep. 5 Ch. Div. 877.)

When the judge is satisfied not only that there is no defence, but that there is no fairly arguable point to be argued on behalf of the defendant, it is his duty to give judgment: (Jessel, M.R., in *Anglo-Italian Bank v. Wells*, 38 L. T. Rep. N. S. 197.)

Order to sign final judgment has been made in the following cases:

Where the only defence was that the defendant had commenced proceedings in bankruptcy (W. N. 1875, p. 220; W. N. 1876, p. 23);

In an action against two defendants, where one admitted the debt and allowed judgment to go by default, and the other only deposed that his co-defendant was acting in collusion with the plaintiff, and that he was willing to pay his share (*East Assam Company v. Roche*, W. N. 1875, p. 238);

Notwithstanding defendant had sailed to join his regiment, and that the writ was served only the day before he started (W. N. 1875, 260.);

Where the defendant's affidavit stated that there was a good defence, but did not specify what it was: (W. N. 1875, p. 249; and see *Wallingford v. Mutual Society, sup.*)

Where the judge considered on the evidence that the plaintiff was entitled to sign judgment, on the defendant's undertaking to give notice of appeal, and to set down the appeal within four days of the passing of the order, the judge stayed execution till after the decision on appeal: (*Anglo-Italian Bank v. Wells*, 38 L. T. Rep. N. S. 197.)

4. JUDGE'S DISCRETION.

The judge's discretion will not ordinarily be interfered with on appeal: (*Harrison v. Bottenheimer*, 26 W. R. 362; and see *Wallingford v. Mutual Society, sup.*)

When leave to defend has been given appeals are not encouraged: (*Papayanni v. Coutpas*, W. N. 1880, p. 109.)

5. CONDITIONAL LEAVE TO DEFEND.

Leave to defend may be given unconditionally or subject to such terms as to giving security, or otherwise, as the court or a judge may think fit: (O. XIV., r. 6.)

Leave to defend may be given on condition that the defendant pays the amount into court: (*German Bank of London v. Schmidt*, W. N. 1876, p. 10; *Roberts v. Guest, Id.*)

As to the amount ordered to be paid in, see *Oriental Bank Company v. Fitzgerald* (W. N. 1880, p. 119.)

Where the defendant also shows what his defence is, and his reasons for thinking it substantial, he ought not to be ordered to bring money into

court: (*Runnacles v. Mesquita*, L. Rep. 1 Q. B. Div. 416; 45 L. J. 407, Q. B.; *Beckingham v. Owen*, W. N. 1878, p. 215.)

A defendant who shows cause by offering to bring into court the sum indorsed on the writ, is not thereby entitled as of right to have leave to defend: (*Crumph v. Cavendish*, L. Rep. 5 Ex. Div. 211; 42 L. T. Rep. N. S. 136; 28 W. R. 562.)

For form of order giving conditional leave, see Scheds. H. 6-7 to the Rules of April, 1880.

Where the defendant has obtained leave to defend upon the terms of paying money into court, if a divisional court subsequently hold that there was no evidence of his liability to go to the jury and enter judgment for him, he is entitled to receive the money that he has paid into court, notwithstanding that the plaintiff has given notice of appeal from the judgment of the divisional court: (*Mycock v. Yorkshire Banking Company*, L. Rep. 4 C. P. Div. 213; 41 L. T. Rep. N. S. 92; 27 W. R. 914.)

6. LEAVE TO DEFEND AS TO PART.

If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim; or that any part of his claim is admitted to be due; the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to, or as is admitted to be due, subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into court by the sheriff, the taxation of costs, or otherwise, as the judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim: (O. XIV., r. 4.)

Where the defendant by affidavit admitted part of the claim to be due, but disclosed a defence upon the merits as to the residue, it was held by the Exchequer Division that the master had no power to make the payment of the sum admitted by the defendant to be due a condition of his being allowed to defend as to the residue of the plaintiff's claim, and they varied the order by giving leave to the plaintiff to sign judgment for the admitted portion of his claim, and gave leave also to the defendant unconditionally to defend the action as to the residue of the claim: (*Dennis v. Seymour*, L. Rep. 4 Ex. Div. 80; 42 L. T. Rep. N. S. 31; 27 W. R. 475.)

For form of order, see Sched. H. 7 to the Rules of April, 1880.)

7. LEAVE TO ONE OF SEVERAL DEFENDANTS TO DEFEND.

If it appears to the judge that any defendant has a good defence to or ought to be permitted to defend the action, and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter, and may issue execution upon such judgment without prejudice to his right to proceed with his action against the former: (O. XIV., r. 5.)

8. ORDER FOR AND SIGNING JUDGMENT.

The judge may, unless the defendant, by affidavit or otherwise, satisfy the judge that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to be permitted to defend the action, make an order empowering the plaintiff to sign judgment accordingly: (O. XIV., r. 1, May, 1877.)

For form of order for immediate judgment, see Sched. H. 4 to the Rules of April, 1880.

For order, if money not paid in within limited time, see Sched. H. 6 to the same rules.

Where, under O. XIV., r. 1, plaintiff obtains an order for liberty to

sign judgment notwithstanding the appearance of the defendant, such judgment may be signed upon production of the order duly passed and entered, and without any other evidence.

9. FORM OF JUDGMENT.

The judgment must now be in the following form :—

In the High Court of Justice.

Chancery Division.

18 , No. .

M.R. or V.C.

Mr. Registrar.

Between

Plaintiff.

and

Defendant.

The day of 18 .

The defendant having appeared to the writ of summons herein, and the plaintiff having by the order of , dated the day of , 18 , obtained leave to sign judgment under the Rules of the Supreme Court, Order XIV., r. 1a, for [*recite Order*]. It is this day adjudged that the plaintiff recover against the defendant l. and costs to be taxed.

The above costs have been taxed and allowed at l. , as appears by a master's certificate dated the day of , 18

(Sched. O. 9, Rules, April, 1880 ; Ch. Reg. Forms.)

IV. BY LEAVE FOR ACCOUNT.

[See ACCOUNT.]

V. ON DISCONTINUANCE.

A defendant may sign judgment for costs of an action if it is wholly discontinued, or for the costs occasioned by the matter withdrawn, if the action be not wholly discontinued : (O. XXIII., r. 2a, June, 1876.)

[When the discontinuance or withdrawal is by plaintiff's notice] such costs shall be taxed : (O. XXIII., r. 1.)

Such discontinuance or withdrawal, as the case may be [on notice] shall not be a defence to any subsequent action : (*Id.*)

The defendant is entitled as of right to all the costs of the action : (*The St. Olaf*, L. Rep. 2 P. Div. 113.)

A form of judgment for defendant's costs is given in Sched. D. 13 to the Rules of April, 1880.

[And see DISCONTINUANCE and WITHDRAWAL.]

VI. ON CONFESSION OF DEFENCE.

Whenever any defendant, in his statement of defence, or in any further statement of defence . . . alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence . . . and he may thereupon sign judgment for his costs up to the time of the pleading of such defence unless the court or a judge shall, either before or after the delivery of such confession, otherwise order : (O. XX., r. 3.)

Where defendant has pleaded in bar and also pleaded subsequent matter, the plaintiff on confessing a defence is entitled to his costs up to the time of pleading unless it is otherwise ordered : (*Foster v. Gamgee*, L. Rep. 1 Q. B. Div. 666 ; see also *Cappeleus v. Brown*, W. N., 1875, p. 231 ; *Ellis v. Munson*, W. N. 1876, p. 253.)

A form of judgment for plaintiff's costs is given in Schedule D. 14 to the Rules of April, 1880.

VII. ON ADMISSIONS IN PLEADINGS.

1. WHERE ALLOWED.

Any party to an action may at any stage thereof apply to the court or a judge for such order as he may, upon any admissions of fact in the pleadings, be entitled to, without waiting for the determination of any other question between the parties : (O. XL., r. 11.)

A judge has a discretion, which will not be interfered with on appeal, as to whether a case involves questions which cannot conveniently be disposed of on a motion of this kind : (*Mellor v. Sidebottom*, L. Rep. 5 Ch. Div. 342; 37 L. T. Rep. N. S. 7; 46 L. J. 378, Ch.; 25 W. R. 401; *Pike v. Fitz-Gibbon*, 41 L. T. Rep. N. S. 148.)

Where both defendants put in a statement of defence purporting to be the defence of both, but which raised no defence on the part of one defendant, an order was made against him : (*Jenkins v. Davies*, L. Rep. 1 Ch. Div. 696; 24 W. R. 690.)

Where the defendant has delivered his statement of defence, but omitted to deny facts alleged in the statement of claim which, if admitted, would entitle the plaintiff to judgment, an order will be made : (*Symonds v. Jenkins*, 34 L. T. Rep. N. S. 277; 24 W. R. 512.)

The motion may be made where allegations are not specifically denied : (*Rutter v. Tregent*, L. Rep. 12 Ch. Div. 758; 41 L. T. Rep. N. S. 16; 48 L. J. 791, Ch.; 27 W. R. 902; and see *Green v. Sevin*, L. Rep. 13 Ch. Div. 589; 41 L. T. Rep. N. S. 719; 49 L. J. 166, Ch.)

Where there were several defendants, and one by his defence admitted the plaintiff's claim, and the rest made default, a direction was given to set the action down on motion for judgment against the defaulting defendants, and leave was given for the plaintiff to give the others notice of motion for judgment, on the same day and time as against the other defendants : (*Bridson v. Smith*, W. N. 1876, p. 103; *Parsons v. Harris*, L. Rep. 6 Ch. Div. 694; 25 W. R. 410.)

But where defendant has raised a defence, good if uncontradicted, failure to deliver a reply is not such an admission as to entitle the defendant to an order : (*Litton v. Litton*, L. Rep. 3 Ch. Div. 793; 25 W. R. 962); and where the defendant has not delivered a defence, the default is not an admission entitling the plaintiff to an order : (*Gillott v. Ker*, W. N. 1876, p. 116.)

Where to a counter-claim the plaintiff replies only by joining issue, the defendant cannot apply for an order for judgment on the counter-claim before the principal claim has been dealt with : (*Rolfe v. Maclaren*, L. Rep. 3 Ch. Div. 106; 24 W. R. 816.)

The party moving must have a clear case, and if he claims a right which does not exist in law, the fact that it is not denied in the other party's pleading is not sufficient to entitle him to a judgment establishing the right : (*Chilton v. Corporation of London*, L. Rep. 7 Ch. Div. 735; 38 L. T. Rep. N. S. 498; 47 L. J. 433, Ch.; 26 W. R. 474.)

An application may be made where plaintiff is entitled to final judgment : (*Gilbert v. Smith*, L. Rep. 2 Ch. Div. 686; 45 L. J. 415, Ch; *Jenkins v. Davies*, *sup.*)

Where defendant, in an action for partnership accounts, admitted the partnership, an order for an account was made : (*Turquand v. Wilson*, L. Rep. 1 Ch. Div. 85; 45 L. J. 104, Ch.; 24 W. R. 56.)

In an action for an account of moneys received by an agent and delivery up of documents, on admissions of the agency and possession of the documents, an order for account and delivery of the documents was made :

(*Rumsey v. Reed*, L. Rep. 1 Ch. Div. 643; 33 L. T. Rep. N. S. 803; 45 L. J. 489, Ch.; 24 W. R. 245.)

Where, in a suit commenced before the Act, the plaintiff claimed a charge upon certain bonds of a foreign state which were deposited in the bank to the credit of the cause, the defendants in their answer admitted the plaintiff's title. On an application for an order for the sale of the bonds, as perishable goods within the meaning of Order LII., r. 2; or upon admission of facts in the pleadings, a sale was ordered on the ground that the defendants, having by their answer admitted the plaintiff's title, rule 11 of Order XL. applied, and there was no reason why the relief to which he was entitled should be delayed until the hearing: (*Coddington v. The Jacksonville, Pensacola, and Mobile Railway Company*, 39 L. T. Rep. N. S. 12; W. N. 1878, p. 78.)

An order for inquiries as to persons interested in property, the subject of a partition action, was made on admission of the allegations of the claim: (*Gilbert v. Smith*, *sup.*)

The court will not on a motion for judgment on admissions of fact in the pleadings, make a declaration charging the separate estate of a married woman with the amount of debts contracted by her with reference to such estate, in the absence of the trustee of such estate, unless the trustee cannot be found: (*Pike v. Fitz-Gibbon*, 41 L. T. Rep. N. S. 148.)

2. APPLICATION.

The foregoing rules of this order shall not apply to such applications, but any such application may be made by motion, so soon as the right of the party applying to the relief claimed has appeared from the pleadings: (O. XL., r. 11.)

A motion of this kind is not the proper mode for determining whether a defence is demurrable: (*Mellor v. Sidebottom*, *sup.*)

Where a defendant makes his defence, and the plaintiff moves under Order XL., r. 11, for such order as he is entitled to on the admissions of the defendant, the action need not be set down, but if, on the motion being made, it appears that there must be a discussion or argument, it may be ordered to go into the general paper, subject to any order for its being advanced: (Ch. Reg. Notice, April, 1877.)

It is not necessary to apply under the rule before trial, as judgment on admissions may be then given: (*Tildesley v. Harper*, L. Rep. 7 Ch. Div. 403; 38 L. T. Rep. N. S. 60; 47 L. J. 263, Ch.; 26 W. R. 263.)

3. ORDER.

The court or a judge may, on any such application, give such relief, subject to such terms, if any, as such court or judge may think fit: (O. XL., r. 11.)

The court may reserve further consideration: (*Bennett v. Moore*, 45 L. J. 275, Ch.)

VIII. ON PAYMENT INTO COURT.

The plaintiff, if payment into court is made before delivering a defence, may, within four days after receipt of notice of such payment, or if such payment is first stated in a defence delivered, then may before reply, accept the same in satisfaction of the causes of action in respect of which it is paid in; in which case he shall give notice to the defendant in the Form No. 6 in Appendix (B). . . . , and shall be at liberty, in case the sum paid in is accepted in satisfaction of the entire cause of action, to tax his costs, and, in case of non-payment within forty-eight hours, to sign judgment for his costs so taxed: (O. XXX., r. 4.)

If the notice is not given, but the money is accepted, the absolute right

to costs is gone, but the plaintiff may apply for costs: (*Greaves v. Fleming*, L. Rep. 4 Q. B. Div. 226; 48 L. J. 335, Q. B.)

A form of judgment for costs after acceptance of money paid into court is given in Sched. D. 15, to the Rules of April, 1880.

IX. AT TRIAL.

1. GENERALLY.

Upon the trial of an action the judge may at the trial—

- (1) Direct that judgment be entered for any or either party, or
- (2) Adjourn the case for further consideration, or
- (3) Leave any party to move for judgment (O. XXXVI., r. 22a., Dec. 1876), or
- (4) Nonsuit the plaintiff: (see O. XLI., r. 6.)

Any judgment of nonsuit, unless the court or a judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant: (O. XLI., r. 6.)

2. FOR SOME PLAINTIFFS ONLY.

All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person or persons who shall not be found entitled to relief, unless the court in disposing of the costs of the action shall otherwise direct: (O. XVI., r. 1.)

3. AGAINST SOME DEFENDANTS ONLY.

All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment: (O. XVI., r. 3.)

4. FOR BALANCE OF SET-OFF OR COUNTER-CLAIM.

Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case: (O. XXII., r. 10.)

The balance is the balance which results at the hearing. Judgment cannot be given on the counter-claim, until the claim in the original action has been disposed of: (*Rolfe v. Maclaren*; *Aitken v. Dunbar*, *sup.*)

5. FORMS WHERE NO JURY.

See App. D. 4 to the Rules of 1875, and Sched. D. 10 to the Rules of April, 1880.

6. FORM WHERE JURY.

See App. D. 5 to the Rules of 1875.

X. AFTER TRIAL BY JUDGE.

The judge may . . . after the trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration, or leave any party to move for judgment.

No judgment shall be entered after a trial without the order of a court or judge: (O. XXXVI., r. 22a, Dec., 1876.)

For form where there was a jury, and judgment was not ordered to be entered, see Sched. D. 16 to the Rules of April, 1880.

For form on motion for judgment after leave reserved, see Sched. D. 17 to the same rules.

For form of judgment entered by order generally, see Sched. D. 11 to Rules of April, 1880.

Where a verdict is entered for the plaintiff subject to a reference judgment may be signed on the award without an order: (*Lloyd v. Lewis*, L. Rep. 2 Ex. Div. 7.)

Where an action has been ordered to be tried in a County Court, judgment may be entered on the certificate of the result of the trial without any order: (*Scutt v. Freeman*, L. Rep. 2 Q. B. Div. 177; 46 L. J. 173, Q. B.)

For form of judgment see Sched. D. 12 to the Rules of April, 1880.

XI. AFTER TRIAL BY REFEREE.

[See *post*, XII.]

XII. ON MOTION FOR JUDGMENT.

1. WHERE MOTION MADE.

(a) *Trial before Referee.*

Where at the trial of an action the judge or referee abstains from directing any judgment to be entered, the plaintiff may set down the action on motion for judgment. If he does not so set it down and give notice thereof to the other parties within ten days after the trial, any defendant may set down the action on motion for judgment, and give notice thereof to the other parties: (O. XL., r. 3.)

It is not usual for a judge of the Chancery Division to abstain from directing judgment to be entered. The Court of Appeal has held that a referee cannot order judgment to be entered: (See REFEREE.)

For forms of judgment, see Appendix D. 6 to the Rules of 1875, and Sched. D. 6a to the Rules of April, 1880.)

(b) *Trial of Issues.*

Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, the plaintiff may set down the action on motion for judgment as soon as such issues or questions have been determined. If he does not so set it down, and give notice thereof to the other parties within ten days after his right so to do has arisen, then after the expiration of such ten days any defendant may set down the action on motion for judgment, and give notice thereof to the other parties: (O. XL., r. 7.)

Where issues have been tried before a referee, either party may move for judgment: (*Mellin v. Monico*, L. Rep. 3 C. P. Div. 142; 38 L. T. Rep. N. S. 8; 26 W. R. 183.)

For form of judgment, see Sched. D. 18 to the Rules of April, 1880.

Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, and some only of such issues or questions of fact have been tried or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others of them unnecessary, or renders it desirable that the trial or determination thereof should be postponed, may apply to the court or a judge for leave to set down the action on motion for judgment, without waiting for such trial or determination. And the court or judge may, if satisfied of the expediency thereof, give such leave, upon such terms, if any, as shall appear just, and may give any directions which may appear desirable as to postponing the trial of the other questions of fact: (O. XL., r. 8.)

Where an issue in an action in the Chancery Division has been tried

before a judge of another division and a jury, motion for judgment must be made in the Chancery Division: (*Jones v. Baxter*, L. Rep. 5 Ex. Div. 275; 28 W. R. 817.)

(c) *Leave to Move.*

Where at the trial of an action the judge or a referee has ordered that any judgment be entered subject to leave to move, the party to whom leave has been reserved shall set down the action on motion for judgment, and give notice thereof to the other parties within the time limited by the judge in reserving leave, or if no time has been limited, within ten days after the trial. The notice of motion shall state the grounds of the motion, and the relief sought, and that the motion is pursuant to leave reserved: (O. XL., r. 2.)

For form of judgment, see Sched. D. 17 to Rules of April, 1880.

(d) *Other Cases.*

Except where by the Act or by these rules it is provided that judgment may be obtained in any other manner, the judgment of the court shall be obtained by motion for judgment: (O. XL., r. 6.)

Where there are no pleadings the proper course is to set the action down on motion for judgment; not to give notice of trial: (Reg. Not. W. N. 1877, p. 58.)

2. NOTICE OF MOTION.

Unless the court or judge give special leave to the contrary, there must be at least two clear days between the service of a notice of motion, and the day named in the notice for hearing the motion: (O. LIII., r. 4; *Daubney v. Shuttleworth*, L. Rep. 1 Ex. Div. 53; 34 L. T. Rep. N. S. 357; 45 L. J. 177, Ex.; 24 W. R. 321.)

It will be advisable that the notices of motion for judgment should, if it is intended to mark them short, contain a statement to that effect, and also a statement that no further notice will be given of their having been so marked. Such statement will dispense with the necessity for giving defendants further notice that motions for judgment have been marked short: (Reg. Not. April, 1876.)

As to filing pleadings, and serving or filing the notice of motion where no appearance has been entered, see *sup.* I. 1 (g).

Substituted service of the writ, and of the notice of motion by advertisement, may be directed by one order: (*Hamilton v. Davies*, W. N. 1880, p. 82.)

3. SETTING DOWN.

(a) *When.*

No action shall, except by leave of the court or a judge, be set down on motion for judgment after the expiration of one year from the time when the party seeking to set down the same first became entitled so to do: (O. XL., r. 9.)

A copy of the notice of motion is produced to the registrar: (Seton, 39.)

(b) *Where.*

The Master of the Rolls and the Vice-Chancellors have given directions that motions for judgment in actions shall not be brought on as ordinary motions, but shall be set down in the cause-book.

They can be marked short on production of the usual certificate of counsel, and will then be placed in the paper on the first short-cause day after the day for which notice is given. If not marked short, they will come into the general paper in their regular turn: (Reg. Not. April, 1876.)

4. TO WHAT COURT MOTION MADE.

All interlocutory and other steps and proceedings in or before the said

High Court in any cause or matter subsequent to the commencement thereof, shall be taken (subject to any Rules of Court and to the power of transfer) in the division of the said High Court to which such cause or matter is for the time being attached: (J. A. 1875, s. 11, sub-s. 1.)

Where an action in the Chancery Division has been tried before a judge and jury of another division, a motion for judgment when necessary must be made to the latter division: (*Hunt v. City of London Real Property Company*, L. Rep. 3 Q. B. Div. 19; *Jones v. Baxter*, L. Rep. 5 Ex. Div. 275; 28 W. R. 817.)

Where only an issue has been so tried, motion for judgment must be made in the Chancery Division: (*Id.*)

5. THE JUDGMENT.

Upon a motion for judgment, or for a new trial, the court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made as it may think fit: (O. XL., r. 10.)

Apparently, judgment of nonsuit may be entered on a motion for judgment: (*Dawn v. Simmins*, 40 L. T. Rep. N. S. 556; W. N. 1879, p. 178.)

For form of judgment generally, see Sched. D. 19 to the Rules of April, 1880. For form when no judgment was entered on trial by jury, see Sched. D. 16 to the Rules of April, 1880.

XIII. ON NEW TRIAL.

[See NEW TRIAL.]

XIV. ON APPEAL.

[See APPEAL.]

XV. ENTERING JUDGMENT.

1. BY DEFAULT OF APPEARANCE OR PLEADING.

(a) *In London.*

(1) Where entered.

The judgment will be entered at the Registrars' Office in the Central Office, Royal Courts of Justice.

(2) Documents produced.

In any case the solicitor should produce two forms of judgment properly filled up in duplicate, according to the forms set forth or referred to above.

Where the writ is specially indorsed, interest, if claimed, calculated up to the day of entering judgment, should be added to the amount indorsed on the writ.

There must be produced to one of the principal clerks at the order of course seat:—

On entering final or interlocutory judgment in default of entering appearance—

The Original Writ;

The Original Affidavit of Service (which must show the day on which service was effected, namely eight clear days before entering judgment, and the day on which the indorsement of service was made on the writ, and that such indorsement was made within three days at most after service (see *sup.* I. 1 (a);

The Master's Certificate (which must be of no appearance if the application is to sign judgment on writ specially indorsed [*sup.*, I., 1 (b)]; on writ indorsed for liquidated demand [*sup.*, I., 1 (c)]; on writ for detention of goods and damages, or either [*sup.*, I., 1 (d)]; on writ for recovery of land solely [*sup.*, I., 1 (e)], and which certificate if the writ is for a liquidated demand, but not specially indorsed [see *sup.* I., 1 (c)], that the statement of the particulars of the plaintiff's claim was filed eight clear days before the day on which the judgment is entered.

On application to enter judgment for recovery of possession of part of land there must also be produced the Master's certificate of limited appearance, or the notice signed by the defendant or his solicitor, of limited appearance: [see APPEARANCE.]

On entering final judgment . . . for default of defence or demurrer where the claim is only for a debt or liquidated demand [see *sup.*, I., 2 (b) (1)]; or for recovery of land solely or with mesne profits, rent, or damages [see *sup.*, I., 2 (b) (4)], or

On entering interlocutory judgment for default of defence or demurrer where the claim is for detention of goods and damages, or either [see *sup.*, I., 2 (b) (3)]; or for recovery of land with mesne profits, rent, or damages [see *sup.*, I., 2 (b) (4)]

The Master's certificate of appearance, and the statement of claim, unless it appears by such certificate that the defendant did not require a statement of claim to be delivered. If the statement of claim does not show the date of delivery (which must be eight clear days before judgment is entered) the solicitor must indorse such date.

(3) Marking Judgment.

The officer shall examine the affidavit or document produced: (O. XLI., r. 4.)

If found correct, he will mark both copies of the judgment as examined, and also see that the proper fee stamp is affixed to one of such copies.

(4) Filing Documents.

In judgments for default of appearance the affidavit of service, if accepted as sufficient, and in judgments for default of pleading, the statement of claim, must be filed by the solicitor in the Central Office, and a note of such filing will be made on the copy judgment to which the fee stamp is so affixed.

(5) Signing Judgment.

The registrar of the day for signing certificates of sale and transfer will then pass the judgment as he would a decree or order [see *post*] by putting his initials to it, and affixing his seal to the duplicate.

The judgment is to be dated as of the day on which the documents are left at the office (O. XLI., r. 3), and will be entered immediately at the entering seat.

(6) Entering and Indexing.

The duplicate must be left with the clerks of entries for the purpose of entry.

When entered in the registrar's book it will be marked with the folio of the entry indexed, and forthwith transmitted by the clerks of entries to the proper seat in the Central Office, to be recorded in the cause-book kept in that office, and to be filed there.

Copies of the judgments so transmitted will be arranged according to the name of the person against whom the judgment is entered. Such copies can be inspected on payment of the proper fee: (see *post*.)

Execution on a final judgment or writ of inquiry on any interlocutory judgment will be issued from the Central Office, on producing the judgment duly passed and entered.

(b) *In District Registry.*

Where an action proceeds in a district registry every final judgment and every order for an account by reason of the default of the defendant or by consent shall be entered in the district registry in the proper book, in the same manner as a like judgment or order in an action proceeding in London would be entered in London: (O. XXXV., r. 1a, June, 1876.)

Where under the Act or these rules, or otherwise, it is provided that any judgment may be entered or signed upon the filing of any affidavit or production of any document, the officer shall examine the affidavit or document produced, and if the same be regular and contain all that is by law required he shall enter judgment accordingly: (O. XLI., r. 4.)

As to when the judgment must be entered for default of appearance which defendant had the option of entering either in the district registry or London, see *sup.*, I., 1 (a).

Where the writ of summons is issued out of a district registry and the plaintiff is entitled to enter interlocutory judgment [for default of appearance to a writ for detention of goods and damages or either of them, see *sup.*, I., 1 (d)], or where the action proceeds in the district registry and the plaintiff is entitled to enter interlocutory judgment [for default in delivery of a defence or demurrer to a claim for detention of goods and damages, or either of them (see *sup.*, I., 2 (b) (2))], in either case such interlocutory judgment, and, when damages shall have been assessed, final judgment, shall be entered in the district registry, unless the court or judge shall otherwise order: (O. XXXV., r. 1a, June, 1876.)

The entry of the judgment shall be dated as of the day on which the requisite documents are left with the proper officer for the purpose of such entry, and the judgment shall take effect from that date: (O. XLI., r. 3.)

Where final judgment is entered in the district registry costs shall be taxed in such registry unless the court or a judge shall otherwise order: (O. XXXV., r. 3.)

2. IN OTHER CASES.

(a) *Where Entered.*

Upon every trial at the assizes, or at the London and Middlesex sitting of the Queen's Bench, Common Pleas, or Exchequer Division, where the officer present at the trial is not the officer by whom judgments ought to be entered, the associate shall enter all such findings of fact as the judge may direct to be entered, and the directions, if any, of the judge as to judgment, and the certificates, if any, granted by the judge, in a book to be kept for the purpose: (O. XXXVI., r. 23.)

Where an action proceeds in the district registry every [judgment] by consent shall be entered in the district registry in the proper book, in the same manner as a like judgment or order in an action proceeding in London would be entered in London: (O. XXXV., r. 1, June, 1876.)

Where an action proceeds in the district registry, final judgment shall be entered in such registry unless the judge at the trial, or the court, or a judge should otherwise order: (*Id.*)

Subject to the foregoing rules, where an action proceeds in the district

registry the judgment and all such orders therein as require to be entered, except orders made by the district registrar under the authority and jurisdiction vested in him under these rules, shall be entered in London, and an office copy of every judgment and order so entered shall be transmitted to the district registry to be filed with the proceedings in the action : (O. XXXV., r. 2.)

(b) *How Entered.*

(1) Materials from which Prepared.

When a judgment is pronounced or an order made by the court, a note of it is taken down by the registrar, and a similar note is indorsed by counsel on the briefs; and from these notes the draft or minute of the formal judgment or order is prepared : (Seton, 1545.)

(2) Bespeaking.

Every [judgment] or order shall be bespoken. The briefs and such other documents as are mentioned in [C. O. 1, r. 20] shall be . . . left with the registrar within seven days after the decree or order is pronounced or finally disposed of by the court : (C. O. 1, r. 21.)

[The period] shall (except as to [judgments] and orders made in vacation) be computed exclusive of vacations : (Pr. C. O. r. 10.)

(3) Leaving Documents.

At the time of bespeaking a [judgment] or order, the party bespeaking the same shall leave with the registrar his counsel's briefs, and such other documents as may be required by the registrar, for the purpose of enabling him to draw up the same : (C. O. 1, r. 20.)

"Party" means any person appearing at the hearing of the [action] or of the application, as the case may be : (Pr. C. O. r. 10.)

Besides the senior counsel's brief, the following documents are to be left with the registrar on bespeaking the judgment or order.

Generally any documents or evidence required to be produced to the court : (Pr. C. O. r. 15.)

Office copies of any affidavits, and all exhibits therein referred to (if any affidavits have been read at the hearing) : (*Id.*, r. 27.)

The original paper of admissions, signed by the parties or their solicitors, to be indorsed by the registrar, and an office copy of the affidavit of due signature of any admissions (if any admissions, are to be entered as read) : (*Id.*, r. 23 ; O. XXXII., r. 4 ; ADMISSIONS.)

Documents proved at the hearing *vivâ voce* or by affidavit, with the order authorising them to be proved and office copies of the affidavits (if any) : (Pr. C. O. r. 28.)

A copy of the certificate for paying the lower scale of court fees, duly marked by the [Master], whether the proceedings are commenced by writ or original summons, but not in the case of orders made on ordinary summons or on petition (if the fees of court are payable according to the lower scale) : (*Id.*, r. 20.)

The Paymaster-General's certificate, and, if the funds are restrained by any order, the restraining order, or an office copy thereof (whenever any fund in court is dealt with) : (*Id.*, r. 16.)

The probate, or letters of administration, stamped for a sufficient amount (when payment out of court is ordered to legal personal representatives) : (*Id.*, r. 17.)

A certificate of the proper amount payable for legacy or succession duty (after calculation at the Legacy and Succession Duty Department, in case of orders for payment of specific sums to the Receiver-General of Inland Revenue, for legacy and succession duty) : (*Id.*, r. 18.)

A consent brief for the purchaser, or an affidavit of notice to him of the

intended application of the purchase money, and that the conveyance has been executed and delivered to him (if the order deals with any purchase money): (*Id.*, r. 30.)

Counsel's brief, the original decree or the last order on further consideration, and any subsequent orders to revive or carry on the proceedings, and the office copy of the chief clerk's certificate, and office copies of any affidavits, and any exhibits or other evidence used at the hearing (in the case of orders made on further consideration): (*Id.*, r. 29.)

(4) Default in Bespeaking, &c., within Seven Days.

In case any decree or order is not bespoken, and the briefs and other requisite documents are not left with the registrar within the time prescribed [see *sup.* (2)] the registrar may decline to draw up the decree or order without the leave of the court: (*Id.*, r. 22.)

(5) Delivering out Copy Draft Minutes.

A separate copy of the draft or minutes is prepared and delivered out to each party represented by a separate solicitor: (*Seton*, 1545.)

(6) How Evidence Stated.

Every order contains a reference to the evidence on which it is made, and particularly notices the documentary evidence, generally specifying the nature of the document and its date, if any, or if it be referred to as an exhibit, either specially noticing the exhibit mark, or identifying the exhibit by reference to the affidavit or deposition: (*Seton*, 18.)

As to how the evidence on which the judgment is founded is to be stated therein, see *Singer Manufacturing Company v. Wilson* (L. Rep. 3 App. Cas. 376; 38 L. T. Rep. N. S. 303; 47 L. J. 481, Ch.; 26 W. R. 664.)

(7) Settling Draft without Appointment or Notice.

Notwithstanding the . . . rules [mentioned *post*] the registrar shall be at liberty, in any case in which he may think it expedient so to do, to settle and pass the [judgment] or order without making any appointment for [the] purpose, and without notice to any party: (C. O. 1, r. 32.)

(8) Appointment to Settle.

At the time of delivering out the draft of any [judgment] or order which requires to be settled by the registrar in the presence of the parties, the registrar shall deliver out, to the party on whose application the draft has been prepared, an appointment in writing of a time for settling the same: (C. O. 1, r. 23.)

For form of appointment, see *post*.

A copy of such appointment shall be served on the opposite party one clear day at least before the time fixed thereby for settling the draft [judgment] or order: (C. O. 1, r. 24.)

Service of such appointment shall be effected by leaving a copy thereof at the place for service of the party to be served, or by transmitting a copy thereof by the post to such party at such place for service; (C. O. 1, r. 25.)

The registrar's appointment, with the indorsements, if any, thereon, shall be filed with the registrar: (C. O. 1, r. 30.)

(9) Settling Draft after Appointment to Settle.

At the time fixed for settling the draft, the original appointment, together with a memorandum indorsed thereon of the service of a copy thereof on the opposite party, and signed by a person by whom such service was effected, shall be delivered to the registrar, in order that he may be satisfied that service has been duly effected; but the registrar may require such service to be verified by affidavit: (C. O. 1, r. 26.)

The party serving such copy, and the party so served, shall attend such appointment, and produce to the registrar their briefs and such other documents as may be necessary to enable him to settle the draft: (C. O. 1, r. 24.)

If any party fails to attend the registrar's appointment for settling the draft of or passing any decree or order, or fails to produce his briefs and such other documents as the registrar may require to enable him to settle such draft or pass such decree or order, the registrar may proceed to settle the draft or pass the decree or order in his absence, and the registrar shall be at liberty to dispense with the production of counsel's briefs, and to act upon such evidence as he may think fit of the actual appearance by counsel of the party failing to attend or to produce such documents or papers as aforesaid, or may require the matter to be mentioned to the court: (C. O. 1, r. 28.)

A party not producing his briefs, when required, was ordered to do so within a limited time, and in default the order was to be drawn up without them: (Seton, 1545.)

Where a party attempted to back out of a compromise entered into with the court's sanction at the trial, and embodied in the judgment then pronounced, the court ordered, on motion, that such party should, within four days of service of the order, leave, or cause to be left, at the office of the registrar, the counsel's brief mentioned in the notice of motion; and, further, that the registrar should draw up the order accordingly: (*Davis v. Davis*, L. Rep. 13 Ch. Div. 861; 41 L. T. Rep. N. S. 790; 49 L. J. 241, Ch.)

The registrar may adjourn any appointment for settling the draft of, or passing any decree or order, to such time as he may think fit; and the parties who attended the appointment shall be bound to attend such adjournment without further notice: (C. O. 1, r. 31.)

(10) Varying Minutes.

After, but not before, the draft or minutes have been settled by the registrar, and before the judgment has been passed and entered, any party dissatisfied with the draft as settled, may, at his peril as to costs, move the court, on notice specifying the matter complained of, which must be given to both the parties and the registrar, to vary the minutes or draft: (Seton, 1546.)

Upon the motion the only question which the M.R. will permit to be argued is what was the actual order made, except where both parties consent to an addition being made, or when it cannot be ascertained what order was pronounced, in which case the matter will be allowed to be put into the paper and re-argued: (*Id.*)

Any variation made is inserted by the registrar, no further order being necessary unless costs are ordered to be paid: (*Id.*)

If there is fair ground for the application, and there has been no improper opposition the costs are usually in the cause, and the judgment is often post dated so as to include the costs of the day: (*Id.*)

(11) Engrossment or Print.

When the draft has been finally settled the registrar causes it to be engrossed or printed, and the engrossment or proof is delivered with the draft to the parties for comparison: (Seton, 1546; Dan. 876.)

(12) Filing Copy Pleadings.

[Before the judgment is passed] the party entering the judgment shall deliver to the officer a copy of the whole of the pleadings in the action other than any petition or summons; such copy shall be in print, except such parts (if any) of the pleadings as are by these rules permitted to be

written: Provided that no copy need be delivered of any pleading a copy of which has been delivered on entering any previous judgment in such action: (O. XLI., r. 1.)

Where two copies of the pleadings have been delivered in obedience to O. XXXVI., r. 17 [see TRIAL] the delivery of a further copy under O. XLI., r. 1, is unnecessary except where judgment is being drawn up after trial had before 19th April, 1877: (Reg. Not. 21, S. J., 486, 553.)

The pleadings are filed in the Central Office or District Registrar: (Seton, 33.)

(13) Passing Judgment without Appointment or Notice.

Notwithstanding the . . . rules [mentioned *post*] the Registrar shall be at liberty, in any case in which he may think it expedient so to do, to pass the [judgment] or order, without making any appointment for [the purpose] and without notice to any party: (C. O. I, r. 32.)

(14) Appointment to Pass.

When the draft decree or order has been settled by the registrar, he shall name a time in the presence of the several parties, or else deliver out an appointment in writing of a time for passing the decree or order: (C. O. I, r. 27.)

When the time is named verbally, this must be done by the registrar personally in the presence of the parties, but where an application is made to his clerk, the clerk should give an appointment in writing in the following form:

"A. v. B."

or,

"In the matter of A."

I have appointed the day of 18, at o'clock in the forenoon, to settle the draft of [or, to pass] the decree [or, order] pronounced in this cause [or matter] by [the Master of the Rolls] on the day of C. D., Registrar.

(Seton, 1545; C. O. I, r. 29.)

Such appointment shall be served on the opposite party, in like manner as directed by the 24th and 25th rules of [the] Order with reference to an appointment to settle the draft [judgment] or order [see *sup.* (8)]; and the original appointment, together with a memorandum indorsed thereon of the service of a copy thereof on the opposite party, and signed by the person by whom such service was effected, shall be delivered to the registrar, in order that he may be satisfied that service has been duly effected; but the registrar may require such service to be verified by affidavit: (C. O. I, r. 27.)

The registrar's appointment, with the indorsements, if any, thereon, shall be filed by the registrar: (C. O. I, r. 30.)

(15) Passing Judgment.

The judgment or order is said to be passed when the registrar has signed his initials to the engrossment or print, as an authority to the clerk of entries to enter it in the registrar's book: (Seton, 1546-7.)

The passing may be adjourned or effected in the absence of parties in the same manner as the settlement of the draft: (C. O. I, rr. 31, 28, *sup.* (9).)

(16) Entry.

Where, by the Act or these rules, or otherwise, any judgment may be entered pursuant to any order or certificate, or return to any writ, the production of such order or certificate sealed with the seal of the court, or

of such return, shall be a sufficient authority to the officer to enter judgment accordingly: (O. XLI., r. 5.)

If the judge [at a trial at the assizes or in London or Middlesex, directs] that any judgment be entered for any party absolutely, the certificate of the associate to that effect shall be a sufficient authority to the proper officer to enter judgment accordingly. The certificate may be in the form No. 15 in Appendix (B): (O. XXXVI., r. 24.)

Where under the Act or these rules, or otherwise, it is provided that any judgment may be entered or signed upon the filing of any affidavit or production of any document, the officer shall examine the affidavit or document produced, and if the same be regular and contain all that is by law required, he shall enter judgment accordingly: (O. XLI., r. 4.)

All decrees and orders drawn up by the registrars, or by the chief clerks to the judges, and all *præcipes* for attachments, and such other documents, if any, as, according to the present practice, or the practice for the time being, ought to be entered by the entering clerks to the registrars, shall be entered by them without abbreviations, and in a clear and legible hand, under the direction of the senior registrar for the time being, within one clear day after the same shall be left for entry; and all such entries shall be examined by one of the said entering clerks, and be marked with his initials to denote such examination: (C. O. 1, r. 18.)

Proper calendars or indexes of such entries shall be made by the said entering clerks, so that the same may be conveniently referred to when required. And such calendars or indexes, and the books in which such entries are made, shall, when completed, be . . . preserved under the direction of the [Master of the Supreme Court], and shall at all times during office hours be accessible to the public on payment of the usual fee: (C. O. 1, r. 19; J. A. 1879.)

Where any judgment is pronounced by the court or a judge in court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, and the judgment shall take effect from that date; (O. XLI., r. 2.)

As to entry *nunc pro tunc*, see Seton, 1547.

(17) Transmitting Office Copy to District Registry.

[See *sup.*, (a)]

XVI. NOTICE OF JUDGMENT.

1. IN WHAT CASES SERVED.

[Where in action for administration, executions of trusts, in the nature of waste, the protection of property pending litigation, or partition, a party may sue or be sued as representing a class, without joining other persons as parties who would formerly have been necessary parties (see ADMINISTRATION; TRUSTS; PARTIES)] the persons who [were formerly] necessary parties to the suit, shall be served with notice of the judgment: (15 & 16 Vict. c. 86, s. 42, r. 8; O. XVI., r. 11; 31 & 32 Vict. c. 40, s. 9.)

The Act applies to persons interested in the proceeds of sale of real estate to be sold under the judgment, to infants, and to parties out of the jurisdiction: (Ayck. 229; Dan. 359.)

2. DIRECTIONS FOR SERVICE.

(a) *On what Persons Generally.*

The judge in chamber will not in general, in the first instance, direct upon whom notice of judgment ought to be served, but he will entertain an application to dispense with service: (Dan. 360.)

(b) *On Infants and Lunatics not so Found.*

Where any person required to be served with notice of a [judgment] or order, pursuant to the 8th rule of the 42nd section of the stat. 15 & 16 Vict. c. 86, is an infant or a person of unsound mind not found so by inquisition, the notice shall be served upon such person or persons . . . and in such manner as the judge to whose court the cause is attached may direct: (C. O. 7, r. 5.)

The court cannot order service to be effected in any other manner than that in which it could order a writ of summons to be served: (see O. XVI., r. 12a, April, 1880, cited *post*.)

It seems now to be unnecessary to apply for directions as to service, unless service on the father, guardian, or person with whom the infant or lunatic resides, or under whose care he is, cannot be effected: (see O. IX., rr. 4, 5; WRIT OF SUMMONS.)

For the purpose of procuring the direction of the judge [where necessary] as to the manner of serving notice of a [judgment] or order, pursuant to C. O. 7, r. 5 (*sup.*), the plaintiff is to make an *ex parte* application by summons, and thereupon to show by affidavit as far as he is able—

1. With respect to Infants:

The ages of the infants.

Whether they have any parents or testamentary guardians, or guardians appointed by the court. . . .

Where and under whose care the infants are residing, at whose expense they are maintained, and in case they have no father or guardian, who are their nearest relations.

And that the parents, guardians, relations, or persons on whom it is proposed to serve the notice, have no interest in the matters in question, or if they have, the nature of such interest, and that it is not adverse to the interests of the infants: (Ch. Reg. Aug. 1857, r. 7.)

2. With respect to persons of unsound mind not found so by inquisition:

Where and under whose care such persons are residing, and at whose expense they are maintained.

Who are their nearest relations, and that such relations, or persons upon whom it is proposed to serve the notice, have no interest in the matters in questions, or if they have, the nature of such interest, and that it is not adverse to the interest of the persons of unsound mind: (Ch. Reg., Aug., 1857.)

The order on the summons is drawn up by the registrar; and the service must be strictly in accordance therewith, a copy of the order being served at the same time: (Dan. 360.)

(c) *On Persons out of the Jurisdiction.*

An order is necessary for leave to serve persons out of the jurisdiction; it may be obtained on *ex parte* summons, supported by an affidavit showing the nature of his interest, and the place or country where he is supposed to be residing: (Dan. 360.)

3. HOW SERVED.

(a) *Generally.*

The notice of the decree must be served personally unless otherwise directed: (Dan. 359.)

Where a husband and wife have to be served, the notice must be served on each personally, notwithstanding the action does not relate to the wife's separate estate, and they are residing together: (*Id.*)

(b) *On Infants or Lunatics not so Found.*

Notice of a judgment or order pursuant to the Act (15 & 16 Vict. c. 86, s. 42), on an infant or person of unsound mind not so found by inquisition shall be served in the same manner as a writ of summons in an action: (O. XVI., r. 12a, April, 1880.)

4. FORM OF NOTICE AND MEMORANDUM.

Notice of a [judgment] or order shall be entitled in the cause, and there shall be indorsed thereon a memorandum in the form or to the effect following, that is to say, "Take notice, that, from the time of the service of this notice [*or, as the case may be, the infant, or person of unsound mind,*] will be bound by the proceedings in the above cause in the same manner as if you [*or, the said infant, or person of unsound mind*] had been originally made a party to the suit; and that you [*or, the said infant, or person of unsound mind*] may, by an order of course, have liberty to attend the proceedings under the within-mentioned [judgment] [*or, order*]; and that you [*or, the said infant, or person of unsound mind*] may, within one month after the service of this notice, apply to the court to add to the [judgment] [*or, order*]" (C. O. 23, r. 20.)

Service of a copy of the judgment endorsed as above is equivalent to service of notice: (Dan. 362.)

5. DISPENSING WITH, OR ORDERING SUBSTITUTED, SERVICE.

Where, upon the hearing of the summons to proceed [on a judgment] it appears to the judge that, by reason of absence, or for any other sufficient cause, the service of notice of the [judgment] or order upon any party cannot be made or ought to be dispensed with, the judge may, if he shall think fit, wholly dispense with such service, or may, at his discretion, order any substituted service, or notice by advertisement, or otherwise in lieu of such service: (C. O. 35, r. 18.)

[As to dispensing with service of notice of judgment in partition actions, see 39 & 40 Vict. c. 17, s. 3; PARTITION.]

[As to ordering any particular mode of service on infants or lunatics (not so found), see *sup.*, 3 (b); WRIT OF SUMMONS.]

The application is generally by *ex parte* summons, supported by evidence of the facts on which it is founded: (Dan. 361.)

Where a special mode of service is directed an order is generally drawn up by the registrar containing a direction that a copy of it will be served with the notice: (*Id.*)

When service is dispensed with, an order is not usually drawn up, but the fact is mentioned in the chief clerk's certificate of the result of the proceedings: (*Id.*)

The judge generally proceeds to give directions as to the manner in which the judgment shall be prosecuted, notwithstanding evidence is not adduced to satisfy him that all proper parties have been served with notice of it: (Dan. 361; O. XXXV., r. 16.)

6. FILING MEMORANDUM.

A memorandum of the service upon any person of notice of the [judgment] shall be entered in the [Central] Office . . . upon due proof by affidavit of such service: (C. O. 23, r. 19.)

The form of memorandum is given in Schedule E. 31 to the Rules of April, 1880.)

7. IRREGULAR SERVICE.

When it appears by the affidavit that the service has not been effected in accordance with the ordinary practice, and the master refuses to enter the memorandum, the court's sanction to the entry may be obtained by motion

ex parte; or when directions for service have been given at chambers, or service is required for the purpose of proceedings there, on *ex parte* application at chambers without summons. The sanction is evidenced by the registrar's or chief clerk's indorsement of the affidavit, and no formal order need be drawn up: (Dan. 362.)

8. LEAVING MASTER'S CERTIFICATE AT CHAMBERS.

A copy of every certificate by a [Master of the Supreme Court] of his entry of a memorandum of service of notice of a [judgment] or order, certified by the solicitor, is to be left at chambers: (Ch. Reg., Aug., 1857, r. 8.)

9. EFFECT OF SERVICE.

(a) *On Interests.*

After such notice [the persons served] shall be bound by the proceedings in the same manner as if they had been originally made parties: (15 & 16 Vict. c. 86, s. 42, r. 8; O. XVI., r. 11.)

The interest of the party served in the subject matter of the suit is bound, but he cannot be made to account unless he is made a party to the action, or some independent proceeding is taken to enforce his liability: *Walker v. Seligmann*, L. Rep. 12 Eq. 152.)

(b) *Liberty to Attend.*

[Any party served] may, by an order of course, [obtained on petition of course at the Rolls], have liberty to attend the proceedings: (15 & 16 Vict. c. 86, s. 42, r. 8; O. XVI., r. 11.) He is then entitled to notice of and to attend the proceedings as if originally a party: (Ayck. 232.)

Infants and lunatics not so found attend by their guardians *ad litem*: (see PARTIES.)

The order for them to attend is made on the same application as the order appointing the guardian: (*Id.*)

Where the plaintiff is, after judgment, found to have no title, the suit may be stayed on the application of a person served with notice of judgment: (*Houseman v. Houseman*, L. Rep. 1 Ch. Div. 535; 34 L. T. Rep. N. S. 663; 24 W. R. 592.)

(c) *Adding to Judgment* [see *post*, XVIII.]

XVII. AMENDING JUDGMENT.

Clerical mistakes in judgments or orders or errors arising therein from any accidental slip or omission, may at any time be corrected by the court or a judge on motion without an appeal: (O. XLIA., Dec., 1879.)

Where a motion for an interim injunction was adjourned to the trial of the action, no provision being made for the costs of the motion, and at the trial judgment was given for the plaintiff on the substantial question at issue, with the general costs of the action; but no express provision was made for the costs of the adjourned motion, though liberty to apply to the court was expressly reserved, and the judgment was drawn up, passed, and entered, it was held on motion, asking that the judgment might be varied or corrected by giving the plaintiff the costs of the adjourned motion, that, either under the liberty to apply reserved by the judgment, or under the liberty to apply implied in the order adjourning the motion, or by virtue of Order XLIA., the court had jurisdiction to order the payment of the costs in question; and a separate order was made, directing the taxation and payment of the plaintiff's costs of the motion: (*Fritz v. Hobson*, L. Rep. 14 Ch. Div. 542; 42 L. T. Rep. N. S. 677.)

For cases under the old rule (C. O. 23, r. 21), see Seton. 1547-8.

XVIII. ADDING TO JUDGMENT.

1. WHO MAY APPLY.

[See *sup.* XVI.]

2. HOW APPLICATION MADE.

The application is by summons served on the solicitors of all parties to the action, and of all persons who have obtained orders to attend: (Dan. 363; *Foster v. Foster*, L. Rep. 3 Ch. App. 330; 17 L. T. Rep. N. S. 403; 37 L. J. 138, Ch.; 16 W. R. 238.)

3. TIME.

The application must be made within one month after service of the judgment: (C. O. 23, r. 18.)

4. APPEAL FROM ORDER.

The order made in chambers may be appealed from by motion to vary or discharge (*Foster v. Foster*, *sup.*), and no time is limited, though delay is considered on the question of costs: (*Id.*)

XIX. ENROLMENT.

Enrolment of a judgment pronounced since the 2nd of Nov. 1875 is useless: (*Hastie v. Hastie*, L. Rep. 2 Ch. Div. 304.)

As to enrolment of decrees prior to that date, see Seton, 1549-51.

An application to vacate enrolment must be made to the Lord Chancellor: (*Allan v. United Kingdom Telegraph Company*, 24 W. R. 898, cited Seton, 1551.)

XX. REGISTRATION.

A memorandum on parchment of the judgment must be handed to the Registrar of Judgments at the Central Office: (Ayck. 234; CENTRAL OFFICE.)

The Registrar of Judgments shall not receive any memorandum of a judgment, execution, *lis pendens*, order, rule, annuity, Crown debt, or other incumbrance, or any memorandum of satisfaction relating to the same, for registration, after the hour of two in the afternoon: (O. LXA., r. 7, April, 1880.)

As to vacating registration, see 30 & 31 Vict. c. 47, s. 2.

XXI. SATISFACTION.

Satisfaction must be entered at the Central Office by filing a satisfaction piece in the form prescribed by the general rules of the judges, dated Hilary Term, 1853, section 80, with such modifications as may be proper: (Reg. Notice, 1876.)

In order to acknowledge satisfaction of a judgment it shall be requisite only to produce a satisfaction piece, in form . . . mentioned [in the rule] and such satisfaction piece shall be signed by the party or parties acknowledging the same, or their personal representatives; and such signature or signatures shall be witnessed by a practising [solicitor] expressly named by him or them, and attending at his or their request, to inform him or them of the nature and effect of such satisfaction piece before the same is signed, and which solicitor shall declare himself, in the attestation thereto, to be the solicitor for the person or persons so signing the same, and state he is witness as such solicitor (provided that a judge at chambers may make an order dispensing with such signature under special circumstances, if he thinks fit); and in cases where the satisfaction piece is signed by the personal representative of a deceased, his representative character shall be proved in such manner as the Master may direct: (R. G. H. T. 1853, r. 80.)

Upon a satisfaction piece duly signed and attested in accordance with the 80th Rule of Hilary Term, 1853, being presented to the clerk of the judgments of the masters in the court in which the judgment has been signed, he shall file the same and enter satisfaction in the judgment book against the entry of the said judgment, and no roll shall be required to be carried in for the purpose of entering satisfaction on a judgment: (R. G. E. T., 1857.)

XXII. SEARCHES FOR JUDGMENTS, &c.

[Any person is at liberty to make a search himself, as heretofore (Notice of Chief Clerk of Registrar of Judgments of the 10th April, 1880), but [the Registrar of Judgments shall, on request in writing giving sufficient particulars, and on payment of the prescribed fee, cause a search to be made in the registers or indexes under his custody, and issue a certificate of the result of the search: (O. LXA., r. 8, April, 1880.)

There must be a separate requisition for every person searched for: (Ch. Cl. Notice of 10th April, 1880.)

The form of requisition for a search may be obtained gratis at the register office: (*Id.*)

The form is as follows:

To the Registrar of Judgments, Royal Courts of Justice, London, W.C.
 The day of 18 .
 Search for judgments, *lites pendentes*, and Crown debts for five years ending the day of 18 . And for annuities and executions from the years 1855 and 1864 respectively, to the said day of 188 .
 In the following name:

Surname. (a)	Christian name or names.	Usual or last known place of abode.	Title, Trade or Profession.

(a) The name must be legibly written with full address and additions.
 Name and address of }
 Solicitor }

[State if it is desired that the certificate of result be forwarded through post-office.]: (*Id.*)

The period stated in the form over which the search should extend, is the usual search made for incumbrances in the office by solicitors. If it is required that the search should cover any other periods of time, the particulars on the face of the form can be varied to meet the case, or a full indorsement be written on the back of requisition, of the time over which the search is desired to be made: (*Id.*)

The requisition is so framed, that a search can be directed to be made up to two o'clock on any following day, after which hour no incumbrances can be registered. The object in limiting the time for registering is intended to enable a purchaser to complete his purchase, without risk of execution creditors and other incumbrancers registering their charges at the time, or immediately before his purchase, if such purchase takes place after two o'clock: (*Id.*)

The requisition for search should be forwarded to the registrar some days before the certificate of the result of search is required to be issued: (*Id.*)

As to the fee to be paid for the certificate, see FEES.

The fee is in addition to the search fee of one shilling : (Ch. Cl. Notice of 10th April, 1880.)

For further particulars, or forms of requisition for search, application can be made personally at the register office, or by letter addressed to the Registrar of Judgments, Royal Courts of Justice, London, W.C. : (*Id.*)

XXII. SETTING ASIDE.

1. BY DEFAULT.

Any judgment by default, whether under this order or under any other of these rules, may be set aside by the court or a judge, upon such terms as to costs or otherwise as such court or judge may think fit : (O. XXIX., r. 14.)

In case of [final judgment on] non-appearance by the defendant where the writ of summons is especially endorsed, under O. III., r. 6 . . . it shall be lawful for the court or a judge to set aside or vary such judgment upon such terms as may seem just : (O. XIII., r. 3.)

Where to a writ specially indorsed, defendant appeared and obtained leave to defend, and judgment was signed for default of delivering defence, it was set aside, default being made under a mistaken impression that plaintiff ought first to deliver statement of claim : (*Atkins v. Taylor*, W. N. 1876, p. 11.)

Where defendant obtained leave to amend his defence by pleading matter and adding a counter-claim that had arisen after delivery of defence, to which plaintiff delivered a reply saying that the defence and counter-claim had not arisen before action, and then, defendant having made default in delivering a rejoinder, plaintiff obtained an order to enter judgment on the defence and counter-claim, the Court of Appeal ordered the judgment to be set aside, the plaintiff to pay the defendant the balance due on the counter-claim after deducting the costs up to the time when the defence and counter-claim ought to have been properly pleaded and the costs of appeal : (*Ellis v. Munson*, W. N. 1876, p. 253.)

In the case of judgment for default in entering an appearance, lapse of time is not of itself a sufficient objection to an application to set it aside, if the defendant has acted *bonâ fide* and the delay has done no harm : (*Attwood v. Chichester*, L. Rep. 3 Q. B. Div. 722; 38 L. T. Rep. N. S. 733; 47 L. J. 300, Q. B.; 26 W. R. 320.)

Where substituted service, only, of the writ was effected, and judgment signed for default of appearance, the defendant, alleging that he had had no notice of the action, and that he had a good defence on the merits, was allowed to defend on the terms of giving security for the amount of the judgment remaining unsatisfied and the costs : (*Watt v. Barnett*, L. Rep. 3 Q. B. Div. 363; 38 L. T. Rep. 903; 26 W. R. 745.)

2. ON NON-APPEARANCE AT TRIAL.

Any verdict or judgment obtained where one party does not appear at the trial, may be set aside by the court or a judge upon such terms as may seem fit, upon an application made within six days after the trial; such application may be made either at the assizes or in Middlesex : (O. XXXVI., r. 20.)

Where a party's solicitor has inadvertently allowed judgment to go against his client through non-appearance or being unready to proceed at the trial, the judgment will, as a matter of course, be ordered to be set aside, and the case will be restored to the paper, on payment of the costs of the days, of all costs thrown away, and of the costs of the application : (*Burgoine v. Taylor*, L. Rep. 9 Ch. Div. 1; 38 L. T. Rep. N. S. 438; 47 L. J. 542, Ch.; 26 W. R. 568; *Cockle v. Joyce*, L. Rep. 7 Ch. Div. 56; 37 L. T.

Rep. N. S. 428; 47 L. J. 543, Ch.; 26 W. R. 59; *Wright v. Clifford*, W. N. 1878, p. 38; 47 L. J. 543, Ch.; 26 W. R. 568; *King v. Sandeman*, 38 L. T. Rep. N. S. 461; 26 W. R. 569.)

3. WHERE FINDING WRONGLY ENTERED.

Where, at or after the trial of an action by a jury, the judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment, and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the judge having caused the finding to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them: (O. XL., r. 4, Dec. 1876, repealing O. XL., r. 4, r. 5 so far as it affected trials before a judge, and r. 6.)

An application under this rule shall be to the court of appeal: (*Id.*)

Where a motion to set aside a judgment and enter any other judgment is made to the Court of Appeal, it must be made on the usual fourteen days' notice of appeal (*Foster v. Roberts*, W. N. 1877, p. 11), and not an *ex parte* motion: (*Jones v. Davis*, W. N. 1877, p. 86.)

Where the judge directs the jury that on the undisputed facts they ought to find a verdict for one of the parties, and a verdict is accordingly entered for that party, and judgment given thereon, the proper course is to move for a new trial, on the ground of misdirection, and not to appeal to the Court of Appeal: (*Yetts v. Foster*, 38 L. T. Rep. N. S. 742; 26 W. R. 745.)

Where the judge was asked to nonsuit the plaintiffs, or to direct a finding for the defendants upon the ground that no evidence had been given in support of the plaintiffs' case; but refused to do so, and the jury found the issues left to them in favour of the plaintiffs, and the judge directed judgment to be entered for the plaintiffs, and stated his reasons for holding that there was evidence to support the finding of the jury, it was held, that the defendants' ground of complaint being for misdirection, they ought not to have appealed, but applied to the Exchequer Division for a new trial: (*Davies v. Felix*, L. Rep. 4 Ex. Div. 32; 39 L. T. Rep. N. S. 322; 48 L. J. 3, Ex.; 27 W. R. 108.)

Where in an action tried by a jury the judge has given judgment for one party on the findings of the jury, the other party may, without appealing from such judgment, move for a new trial, on the ground that the findings are against evidence, and the Divisional Court may on such motion enter final judgment under Order XL., r. 10: (*Hamilton and Co. v. Johnson and Co.*, 41 L. T. Rep. N. S. 461.)

When at the close of the plaintiff's case the judge held that the evidence was not sufficient to maintain the action, and non-suited the plaintiff, the Court of Appeal has held that the plaintiff should move for a new trial in a divisional court, and cannot appeal from the judgment entered at the trial to the Court of Appeal: (*Eitty v. Wilson*, L. Rep. 3 Ex. Div. 359; 39 L. T. Rep. N. S. 83; 47 L. J. 664, Q. B.; 27 W. R. 160.)

4. WHERE JUDGMENT WRONG ON FINDING.

Where, at or after the trial of an action before a judge, the judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment, and to enter any other judgment, upon the ground that upon the finding as entered, the judgment so directed is wrong: (O. XL., r. 4, Dec. 1876.)

An application under this rule shall be to the Court of Appeal (*Id.*), by notice of appeal: (see *sup.*, 3.)

5. NONSUIT.

In any case of mistake, surprise, or accident, any judgment of nonsuit may be set aside on such terms, as to payment of costs and otherwise, as to the court or a judge shall seem just: (O. XLI., r. 6.)

When the facts are disputed the plaintiff must apply to a divisional court for a new trial: (*Eddy v. Wilson*, L. Rep. 3 Ex. Div. 359; 39 L. T. Rep. N. S. 83; 47 L. J. 664, Q. B.; 27 W. R. 160.)

6. WHERE OBTAINED BY FRAUD.

As to whether a judgment obtained adversely can be impeached for fraud or perjury, see *Flower v. Lloyd* (L. Rep. 10 Ch. Div. 327).

A judgment by consent can only be set aside on the ground of fraud, or of mistake (if at all), by a judgment in a substantive action impeaching the judgment: (see COMPROMISE.)

XXIV. HOW JUDGMENT AFFECTS INFANTS.

1. GENERALLY.

An infant defendant is as much bound by a judgment as an adult, and if absolute judgment is given against an infant, he can only impeach it on the same grounds as an adult: (Dan. 149.)

Where a conveyance is required from an infant, instead of inserting a clause allowing him a day to show cause, a vesting order may be made under the Trustee Act, 1850: [see TRUSTEES; *Foster v. Parker*, L. Rep. 8 Ch. Div. 147.]

2. SUBPŒNA TO SHOW CAUSE.

Where an infant has a day given him by the judgment to show cause against it, a subpœna to show cause is sealed without production of the decree or judgment: (Dan. 155.)

The subpœna is served by delivering a copy thereof, and of the indorsement to the late infant personally, or to his servant or some member of his family at his dwelling-house or usual place of abode, at the same time producing the original subpœna: (*Id.*)

If service cannot be thus effected, application is made to the court by *ex parte* motion, supported by affidavit, to direct some other mode of service, and a copy of the order (if any) made, must be served with the subpœna as prescribed: (*Id.*)

The service shall be of no validity if not made within twelve weeks after the teste of the writ: (C. O. 28, r. 9.)

3. HOW JUDGMENT MADE ABSOLUTE.

If the late infant does not appear within the time limited, the judgment is made absolute on an *ex parte* motion, supported by an affidavit of service, evidence of infant being of age, and registrar's certificate of no cause shown: (Dan. 155.)

4. GROUNDS FOR IMPEACHING.

The grounds are fraud or collusion between the plaintiff, and the late infant's guardian; error in the judgment, existence of grounds of defence which were not before the court, or were not insisted upon at the hearing; discovery of new matter upon which the judgment may be shown to be wrong: (Dan. 156.) [And see FORECLOSURE.]

5. TIME FOR IMPEACHING.

The infant need not wait till he is of age to impeach a judgment for fraud or collusion: (Dan. 156.)

In other cases he must generally so wait: (Dan. 158.)

XXV. ENFORCING JUDGMENT.

1. ENGLISH JUDGMENT.

(a) *House of Lords* [see *APPEAL*].(b) *Supreme Court* [see *EXECUTION*].(c) *Ecclesiastical Court*.

As to enforcing decrees of Ecclesiastical Courts by writ *de contumace capiendo*, and sequestration, see 2 & 3 Will. 4, c. 93, ss. 1 and 2; Seton, 1552.

(d) *Lancaster Palatine Court*.

Whenever a plaintiff or defendant in any suit or proceeding in which a judgment or order shall have been made by the County Palatine Court of [Lancaster, or on appeal therefrom], shall reside or withdraw his person or goods out of the jurisdiction of the [Palatine] Court, and also whenever any [judgment] or order of the same court cannot be fully enforced by [or on appeal therefrom] by reason of the non-residence of any party to be bound thereby within the jurisdiction of the [Palatine] Court, then and in every such case it shall be lawful for the [Chancery Division] upon the application of any person entitled to the benefit of such judgment or order, and upon the production of a transcript of such judgment or order, or such part thereof respectively as cannot be enforced for the reasons aforesaid, under the signature of the registrar of the said [Palatine] Court, and an affidavit that by reason of such non-residence or removal as aforesaid such judgment or order, or such part thereof as aforesaid cannot be enforced, to make such judgment or order, or so much thereof respectively as cannot be enforced for any of the reasons aforesaid, a [judgment] or order of the Court of Chancery Division, and thereupon such [judgment] or order, or such part thereof respectively as aforesaid, shall and may be enforced against such of the parties bound by the same as shall be within the jurisdiction of the [Chancery Division], and all proceedings shall and may be had thereupon as if such judgment or order had been originally made by the Chancery Division, and all the reasonable costs and charges of and consequent upon such application shall and may be recovered in like manner as if the same were part of such judgment or order: (13 & 14 Vict. c. 43, s. 15; 17 & 18 Vict. c. 82, s. 10.)

The Court of Appeal in Chancery of the County Palatine was empowered to make orders according to the practice of the Court of Chancery in all cases in which by reason of any person being out of the jurisdiction of the County Palatine Court, or otherwise, effectual protection could not be given to any ward of the court, or to any executor, administrator, officer of court, or other person entitled to its protection, or in which for the same reason, or otherwise, any contempt of the court could not be effectually punished: (17 & 18 Vict. c. 82, s. 7.)

There shall be transferred to and vested in [the Court of Appeal] all jurisdiction and powers of the Court of Appeal in Chancery of the County Palatine of Lancaster: (J. A., 1873, s. 18.)

The application must be made to the Court of Appeal, and is granted as a matter of course: (*Re Longdendale Cotton Spinning Company*, L. Rep. 8 Ch. Div. 150; 38 L. T. Rep. N. S. 776; 26 W. R. 491.)

(e) *Stannaries Court*.

Where any [judgments] or orders, whether for payment for money or otherwise, cannot be conveniently or effectually enforced by the ordinary process of the court of the vice-warden within the jurisdiction thereof, it shall be lawful for the [Chancery Division] or for any judge thereof,

sitting in court or at chambers, upon the application of a party entitled to the benefit of such [judgment] or order, and production of a certificate from the registrar of the court of the vice warden under the seal of the court of the . . . judgment or order, or of such part thereof as cannot be so enforced, as aforesaid, and a satisfactory affidavit of the ground of the application, to make the [judgment] or order, or so much thereof as cannot be enforced, a [judgment] or order of the [Chancery Division], and thereupon such [judgment] or order, or such part thereof as aforesaid, shall and may be enforced by such proceedings and writs as would or might have been taken or issued if the same had been originally made by the [Chancery Division], and all the reasonable costs of and consequent upon such certificate and application, shall and may be recovered as if the same had been and were part of such [judgment] or order: (18 & 19 Vict. c. 32, s. 10.)

2. IRISH JUDGMENT.

In all cases where, in any suit between party and party any [judgment] shall be pronounced, or any order made for payment, or for accounting for money, by the High Court of [Justice in] Ireland, the Lord Chancellor, Lord Keeper, or Lord Commissioners for the custody of the Great Seal of Ireland for the time being respectively, shall, upon application made to him or them respectively, cause a copy of such order or [judgment] to be exemplified and certified to the [Chancery Division] in England, under the Great Seal of Ireland; and [any judge of the Chancery Division] in England shall forthwith cause such order or decree when it shall be presented [to him], so exemplified, to be enrolled in the Rolls of the [Court], and shall cause process of attachment and committal to issue against the person of the party against whom such order or [judgment] shall have been made respectively, in order to enforce obedience to and performance of the same, as fully and effectually to all intents and purposes, as if such order or [judgment] had been originally pronounced in the [Chancery Division] in England: (41 Geo. 3, c. 90, s. 6; 40 & 41 Vict. c. 57, s. 71; Seton, 1551.)

By 5 Geo. 4, c. 3, these provisions are extended to orders made in any matter or proceeding by petition in cases of minors, bankrupts, idiots, or lunatics: (Seton, 1551.)

Where judgments are obtained or entered up in the High Court of Justice in . . . Ireland for any debt, damages, or costs, on production . . . to the master at the Central Office of a certificate of such judgment purporting to be signed by the proper officer of the court where such judgment has been obtained or entered up, such certificate is registered by such master in a register to be kept for that purpose, to be called "The Register for Irish Judgments;" and shall, from the date of such registration, be of the same force and effect, and all proceedings shall and may be had and taken on such certificate, as if the judgment of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid in the court in which it is so registered: (31 & 32 Vict. c. 54, s. 1.)

All the reasonable costs and charges attendant upon the obtaining and registering such certificate shall be recovered in like manner as if the same were part of the original judgment: (*Id.*)

No certificate of any such judgment shall be registered as aforesaid more than twelve months after the date of such judgment, unless application shall have been first made to and leave obtained from the court or a judge of the court in which it is sought to register such certificate: (*Id.*)

Orders, interlocutors, and decrees made by the court in Scotland for

or in the course of the winding-up of a company shall be enforced in England and Ireland, and orders made by the court in Ireland for or in the course of winding-up of a company shall be enforced in England and Scotland by the courts which would respectively have had jurisdiction in the matter of such company if the registered office of the company were situate in the division of the United Kingdom where the order is required to be enforced, and in the same manner in all respects as if such order had been made by the court required to enforce the same in the case of a company within its own jurisdiction: (Companies Act, 1862, s. 122.)

Where any order, interlocutor, or decree made by one court is required to be enforced by another court . . . an office copy of the order, interlocutor, or decree so made, shall be produced to the proper officer of the court required to enforce the same, and the production of such office copy shall be sufficient evidence of such order, interlocutor, or decree having been made, and thereupon such last-mentioned court shall take such steps in the matter as may be requisite for enforcing such order, interlocutor, or decree in the same manner as if it were the order, &c., of the court enforcing the same: (Companies Act, 1862, s. 123.)

3. SCOTCH JUDGMENT.

On production to the master of the Central Office of the certificate, none of the forms contained in the schedule of any extracted decret of the Court of Session in Scotland which shall be obtained for the payment of any debt, damages, or expenses purporting to be signed by the extractor of the Court of Session, or other officer duly authorised to make and subscribe extracts, or on production of the certificate of an extracted decret of registration in the books of council and session purporting to be signed by the keeper of the register of deeds, bonds, protests, and other writs registered for execution in the books of council and session which shall hereafter be obtained, for the payment of any debts, damages, or expenses, such certificate shall be registered by such master in a register to be kept and called "The Register for Scotch Judgments," and such certificate, when so registered, shall, from the date of such registration, be of the same force and effect as a judgment obtained or entered up in the court in which it is so registered, and all proceedings shall and may be had and taken on such certificate as if the decret of which it is a certificate had been a judgment originally obtained or entered upon date of such registration as aforesaid in the court in which it is so registered: (31 & 82 Vict. c. 54, s. 3.)

All the reasonable costs, charges, and expenses attendant upon the obtaining and registering such certificate shall be recovered in like manner as if the same were part of the decret of which it is a certificate: (*Id.*)

No certificate shall be registered as aforesaid more than twelve months after the date of such decret, unless application shall have been first made to and leave obtained from the court or a judge of the court in which it is sought so to register such certificate: (*Id.*)

Where a note of suspension of any such decret shall have been passed, or a sist of execution shall have been granted thereon, by the said Court of Sessions, or any judge thereof, on the production of a certificate, under the hand of the clerk to the bill chamber of the Court of Session, of the passing of such note on the granting of such sist, to a judge of the court in which such certificate of such decret has been registered, execution on such registered certificate shall be stayed until a certificate be produced under the hand of the clerk that such sist has been recalled or has expired,

or where the note of suspension has been passed, until there be produced an extract under the hand of the extractor of the Court of Session or other officer duly authorised to make and subscribe extracts, of a decret of the said court repelling the reasons of suspense: (*Id.*)

As to winding-up orders, see *sup.*, 2.

4. FOREIGN JUDGMENT.

The judgment of a foreign court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce, and that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action: (*Schibsby v. The Westenholtz*, L. Rep. 6 Q. B. 155.)

If an agreement contrary to the policy of the English law is entered into in a country by the law of which it is valid, an English court will not enforce it: (*Rousillon v. Rousillon*, L. Rep. 14 Ch. Div. 351; 42 L. T. Rep. N. S. 679; 49 L. J. 338, Ch.; 28 W. R. 623.)

JUDICIAL OPINION.

[See TRUSTEES.]

JURISDICTION.

- I. OF COURT OF CHANCERY.
- II. AS TO PENDING BUSINESS.
- III. OF SUPREME COURT OF JUDICATURE.
- IV. OF CHANCERY DIVISION.
- V. OF ADDITIONAL JUDGE (FRY, J.).
- VI. OF COMMISSIONERS OF ASSIZE, &c.
- VII. IN LUNACY.

I. OF COURT OF CHANCERY.

From and after the commencement of [the] Act the several jurisdictions which by [the] Act are transferred to and vested in the . . . High Court of Justice and the . . . Court of Appeal respectively shall cease to be exercised, except by the said High Court of Justice and the . . . Court of Appeal respectively, as provided by [the] Act; and no further or other appointment of any judge to any court whose jurisdiction is so transferred shall be made except as provided by [the] Act: (J. A. 1873, s. 22.)

II. AS TO PENDING BUSINESS.

In all causes, matters, and proceedings whatsoever which shall have been fully heard, and in which judgment shall not have been given, or having been given shall not have been signed, drawn up, passed, entered, or otherwise perfected at the time appointed for the commencement of [the] Act, such judgment, decree, rule, or order may be given or made, signed, drawn up, passed, entered, or perfected respectively, after the commencement of [the] Act, in the name of the same court, and by the same judges and officers, and generally in the same manner, in all respects

as if [the] Act had not passed; and the same shall take effect, to all intents and purposes, as if the same had been duly perfected before the commencement of [the] Act: (J. A. 1873, s. 22.)

Every judgment, decree, rule, or order of any court whose jurisdiction is . . . transferred to the . . . High Court of Justice or the . . . Court of Appeal, which shall have been duly perfected at any time before the commencement of [the] Act, may be executed and enforced, and, if necessary, amended or discharged by the . . . High Court of Justice and the . . . Court of Appeal respectively, in the same manner as if it had been a judgment, decree, rule, or order of the . . . High Court or of the . . . Court of Appeal: (J. A. 1873, s. 22.)

All causes, matters, and proceedings whatsoever, whether civil or criminal . . . pending in any of the courts whose jurisdiction is . . . transferred . . . at the commencement of [the] Act, shall be continued and concluded, as follows (that is to say), in the case of proceedings in error or on appeal, or of proceedings before the Court of Appeal in Chancery, in and before Her Majesty's Court of Appeal; and as to all other proceedings, in and before Her Majesty's High Court of Justice. The said courts respectively shall have the same jurisdiction in relation to all such causes, matters, and proceedings as if the same had been commenced in the said High Court of Justice, and continued therein (or in the said Court of Appeal, as the case may be) down to the point at which the transfer takes place: (J. A. 1873, s. 22.)

So far as relates to the form and manner of procedure, such causes, matters, and proceedings, or any of them, may be continued and concluded, in and before the said courts respectively, either in the same or the like manner as they would have been continued and concluded in the respective courts from which they shall have been transferred as aforesaid, or according to the ordinary course of the said High Court of Justice and the said Court of Appeal respectively (so far as the same may be applicable thereto), as the said courts respectively may think fit to direct: (J. A. 1873, s. 22.)

Subject to any special order which may be made in any cause, matter, or proceeding, pending in the Chancery Division, on the 1st of November, 1875, the following course of procedure shall be adopted:—

All causes, matters, and proceedings, except causes (not being short causes) in which neither notice of motion for a decree had been served, nor replication been filed, before the 1st of November, 1875, shall, so far as relates to the form and manner of procedure, be continued and concluded in the same manner as they would have been in the High Court of Chancery.

All such pending causes (not being short causes), in which, up to the 1st of November, 1875, no notice of motion for a decree had been served, or replication filed, shall be continued in the same manner as they would have been continued in the High Court of Chancery, up to the time at which such notice of motion or replication would have been served or filed, and shall from that period be continued according to the ordinary course of the High Court of Justice.

Any party to a pending cause may apply by summons at chambers that for special reasons a direction may be given for continuing such cause according to the ordinary course of the High Court of Justice: (O., 3rd Nov., 1875.)

For the decisions on this Order, see Wilson, 2nd edit., 19.

Every cause or matter which, at the commencement of [the] Act, [was] depending in the Court of Chancery . . . shall (subject to the power of transfer) be assigned to the same judge in or to whose court the same may

have been depending or attached at the commencement of [the] Act: (J. A., 1873, s. 42.)

III. OF SUPREME COURT OF JUDICATURE.

From and after the time appointed for the commencement of [the] Act, the several courts hereinafter mentioned (that is to say,) the High Court of Chancery of England, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, [and] the Court for Divorce and Matrimonial Causes, shall be united and consolidated together, and shall constitute, under and subject to the provisions of [the] Act, one Supreme Court of Judicature in England: (J. A., 1873, s. 3; as amended by J. A., 1875, Sched. 2.)

As to the Court of Appeal, see APPEAL; and *post*, IV.

Every additional judge, during the time that he attends the sittings of Her Majesty's Court of Appeal, shall have all the jurisdiction and powers of a judge of the said Court of Appeal, but he shall not otherwise be deemed to be a judge of the said court, or to have ceased to be a judge of the division of the High Court of Justice to which he belongs: (J. A., 1875, s. 4.)

IV. OF CHANCERY DIVISION.

An objection to the jurisdiction of the court cannot be waived by consent: (*Buse v. Roper*, 41 L. T. Rep. N. S. 457.)

For the more convenient despatch of business in the . . . High Court of Justice (but not so as to prevent any judge from sitting whenever required in any Divisional Court, or for any judge of a different division from his own), there shall be in the said High Court five divisions: (J. A., 1873, s. 31.)

[One of] the said divisions shall be called . . . the Chancery Division: (*Id.*)

The High Court of Justice shall be a Superior Court of Record, and, subject as in [the] Act mentioned, there shall be transferred to and vested in the said High Court of Justice the jurisdiction which, at the commencement of [the] Act, was vested in, or capable of being exercised by, all or any of the courts following; (that is to say,)

- (1.) The High Court of Chancery, as a common law court as well as a Court of Equity, including the jurisdiction of the Master of the Rolls, as a judge or master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a common law court;
- (2.) The Court of Queen's Bench;
- (3.) The Court of Common Pleas at Westminster;
- (4.) The Court of Exchequer, as a court of revenue, as well as a common law court;
- (5.) The High Court of Admiralty;
- (6.) The Court of Probate;
- (7.) The Court for Divorce and Matrimonial Causes;
- (8.) The Court of Common Pleas at Lancaster;
- (9.) The Court of Pleas at Durham;
- (10.) The Courts created by Commissions of Assize, of Oyer and Terminer, and of Gaol Delivery, or any of such Commissions.

The jurisdiction by [the] Act transferred to the High Court of Justice shall include (subject to the exceptions [thereinafter] contained) the jurisdiction which at the commencement of [the] Act, was vested in, or capable of being exercised by, all or any one or more of the judges of the

said courts, respectively, sitting in court or chambers, or elsewhere, when acting as judges or a judge, in pursuance of any statute, law, or custom, and all powers given to any such court, or to any such judges or judge, by any statute; and also all ministerial powers, duties, and authorities, incident to any and every part of the jurisdictions so transferred: (J. A. 1873, s. 16, as amended by J. A. 1875, Sched. 2.)

All jurisdiction whatever which was exercised by any of the courts transferred is transferred to the High Court, and may be exercised by the Chancery Division: (see *Beddow v. Beddow*, L. Rep. 9 Ch. Div. 89; 47 L. J. 588, Ch.; 26 W. R. 570.)

Thus, the Chancery Division has unlimited power to grant any injunction which any of the former courts might grant, except restraining proceedings in another division: (*Id.*; INJUNCTION.)

And the power to grant prohibitions is now conferred on every judge of the High Court: (*Hedley v. Bates*, L. Rep. 13 Ch. Div. 498; 42 L. T. Rep. N. S. 41; 49 L. J. 170, Ch.; 28 W. R. 365.)

But the Chancery Division can only grant a *mandamus* to direct the performance of some act, or something to be done, which is the result of an action where an action lies. It cannot grant a prerogative writ of *mandamus* to compel a corporation to perform a statutory duty: (*Glossop v. Heston and Isleworth Local Board*, L. Rep. 12 Ch. Div. 102; 40 L. T. Rep. N. S. 13.)

And no judge of the High Court has jurisdiction to re-hear an order, whether made by himself or any other judge: (*Re St. Nazaire Company*, L. Rep. 12 Ch. Div. 88; 41 L. T. Rep. N. S. 110; 27 W. R. 854.)

There shall not be transferred to or vested in the . . . High Court of Justice, by virtue of [the] Act,—

- (1.) Any appellate jurisdiction of the Court of Appeal in Chancery, or of the same court sitting as a Court of Appeal in Bankruptcy:
- (2.) Any jurisdiction of the Court of Appeal in Chancery of the County Palatine of Lancaster:
- (3.) Any jurisdiction usually vested in the Lord Chancellor or in the Lords Justices of Appeal in Chancery, or either of them, in relation to the custody of the persons and estates of idiots, lunatics, and persons of unsound mind [see *post*, VII.]:
- (4.) Any jurisdiction vested in the Lord Chancellor in relation to grants of letters patent, or the issue of commissions or other writings, to be passed under the Great Seal of the United Kingdom:
- (5.) Any jurisdiction exercised by the Lord Chancellor in right of or on behalf of Her Majesty as visitor of any college, or of any charitable or other foundation:
- (6.) Any jurisdiction of the Master of the Rolls in relation to records, in London or elsewhere in England: (J. A. 1873, s. 17.)

The jurisdiction over patents is now vested in the High Court of Justice (*Re Morgan's Patent*, W. N. 1876, p. 27); but the Master of the Rolls may, as keeper of the records direct the amendment of a clerical error in a specification filed in the Patent Office: (*Re Johnson's Patent*, L. Rep. 5 Ch. Div. 503; 46 L. J. 555, Ch.)

The jurisdiction by this Act transferred to the said High Court of Justice and the said Court of Appeal respectively shall be exercised (so far as regards procedure and practice) in the manner provided by [this] Act, or by . . . Rules and Orders of Court . . . made pursuant to [the] Act; and where no special provision is contained in [the] Act or in any such Rules or Orders of Court with reference thereto, it shall be exercised as nearly as may be in the same manner as the same might have

been exercised by the respective courts from which such jurisdiction shall have been transferred, or by any of such courts: (J. A., 1873, s. 23; and see FORMER PRACTICE.)

[The Chancery Division] shall consist of the following judges (that is to say)—The Lord Chancellor, who shall be president thereof, the Master of the Rolls, and the Vice-Chancellors of the Court of Chancery, or such of them as shall not be appointed ordinary judges of the Court of Appeal: (J. A., 1873, s. 31.)

An additional judge, attached to the Chancery Division, has since been appointed: (see *post*, V.)

This Act, except so far as herein is expressly directed, shall not affect the office or position of Lord Chancellor: (J. A. 1873, s. 94.)

The Lord Chancellor shall not be deemed to be a permanent judge of [the High Court of Justice]: (J. A., 1875, s. 3.)

[The High Court of Justice] shall be deemed to be duly constituted during and notwithstanding any vacancy in the office of any judge of . . . such court: (J. A., 1878, s. 7.)

Subject to any rules of court, and in the meantime until such rules shall be made, all business arising out of any cause or matter assigned to the Chancery . . . Division of the said High Court shall be transacted and disposed of in the first instance by one judge only, as has been heretofore accustomed in the Court of Chancery: (J. A., 1873, s. 42.)

Any judge of the said High Court of Justice may, subject to any rules of court, exercise in court or in chambers all or any part of the jurisdiction by [the] Act vested in the said High Court, in all such causes and matters, and in all such proceedings in any causes or matters, as before the passing of [the] Act might have been heard in court or in chambers respectively, by a single judge of any of the courts whose jurisdiction is hereby transferred to the said High Court, or as may be directed or authorised to be so heard by any rules of court to be hereafter made. In all such cases, any judge sitting in court shall be deemed to constitute a court: (J. A., 1873, s. 39.)

In all cases not . . . expressly provided for [by the Supreme Court of Judicature Act, 1873] in which, under any . . . Act [relating to the several courts and judges whose jurisdiction is transferred to the High Court of Justice and Court of Appeal] the concurrence or the advice or consent of the judge or any of the judges, or of any number of the judges, of any one or more of the courts whose jurisdiction is . . . transferred to the High Court of Justice is made necessary to the exercise of any power or authority [now] capable of being exercised . . . such power or authority may be exercised by and with the concurrence, advice, or consent of the same or a like number of judges of the said High Court of Justice: (J. A., 1873, s. 76.)

All Acts of Parliament relating to the several courts and judges, whose jurisdiction is . . . transferred to the . . . High Court of Justice and the . . . Court of Appeal respectively, or wherein any of such courts or judges are mentioned or referred to, shall be construed and take effect, so far as relates to anything done or to be done . . . as if the said High Court of Justice or the said Court of Appeal, and the judges thereof, respectively, as the case may be, had been named therein instead of such courts or judges whose jurisdiction is so transferred respectively: (J. A., 1873, s. 76.)

Every existing judge, who is by [the] Act made a Judge of the High Court of Justice or an ordinary Judge of the Court of Appeal, shall, as to tenure of office, rank, title, salary, pension, patronage, and powers of appointment or dismissal, and all other privileges and disqualifications,

remain in the same condition as if [the] Act had not passed; and, subject to the change effected in their jurisdiction and duties by or in pursuance of the provisions of [the] Act, each of the said existing judges shall be capable of performing and liable to perform all duties which he would have been capable of performing or liable to perform in pursuance of any Act of Parliament, law, or custom if [the] Act had not passed. No judge appointed before the passing of [the] Act shall be required to act under any Commission of Assize, Nisi Prius, Oyer and Terminer, or Gaol Delivery, unless he was so liable by usage or custom at the commencement of [the] Act: (J. A. 1873, s. 11.)

All the Judges of the [High Court of Justice] shall have in all respects, save as in [the] Act is otherwise expressly provided, equal power, authority, and jurisdiction: (J. A. 1873, s. 5.)

Subject to the [previous provisions in the Supreme Court of Judicature Act, 1873] any rights of patronage and other rights or powers incident to any court, or to the office of any judge of any court whose jurisdiction is transferred to the . . . High Court of Justice, or to the . . . Court of Appeal, in respect of which rights of patronage or other rights or powers no provision is or shall be otherwise made by or under the authority of [the] Act, shall be exercised as follows, that is to say: if incident to the office of any existing judge shall continue to be exercised by such existing judge during his continuance in office as a judge of the . . . High Court or of the Court of Appeal, and after the death, resignation, or removal from office of such existing judge shall be exercised in such manner as Her Majesty may by sign manual direct: (J. A. 1873, s. 86.)

Upon the request of the Lord Chancellor, it shall be lawful for any judge of the Court of Appeal, who may consent so to do, to sit and act as a judge of the . . . High Court or to perform any other official or ministerial acts for or on behalf of any judge absent from illness or any other cause, or in the place of any judge whose office has become vacant, or as an additional judge of any division; and while so sitting and acting any such judge of the Court of Appeal shall have all the power and authority of a judge of the . . . High Court: (J. A. 1873, s. 51.)

Where, by sect. 17 of the Appellate Jurisdiction Act, 1876, or by [the] rules, any application ought to be made to, or any jurisdiction exercised by the judge before whom an action has been tried, if such judge shall die or cease to be a Judge of the High Court, or if such judge shall be a Judge of the Court of Appeal, or if for any other reason it shall be impossible or inconvenient that such judge should act in the matter, the president of the division to which the action belongs may, either by a special order in any action or matter, or by a general order applicable to any class of actions or matters, nominate some other judge by whom such jurisdiction may be exercised: (O. LVIIa., r. 2, Dec. 1876.)

Every Vacation Judge shall have the same power and authority as heretofore: (O. I.VIIa., r. 3, Dec. 1876; VACATIONS.)

V. OF ADDITIONAL JUDGE (FRY, J.)

[Mr. Justice Fry] the judge appointed in pursuance of [40 Vict. c. 9, is] attached to the Chancery Division of the . . . High Court of Justice, subject to such power of transfer as is in the Supreme Court of Judicature Act, 1873, mentioned: (J. A. 1877, s. 3; TRANSFER.)

The judge [so] appointed [is] in the same position as if he had been appointed a puisne judge of the . . . High Court of Justice in pursuance of the [Acts of 1873 and 1875]; and all the provisions of [such Acts] for the time being in force in relation to the qualification and appointment of puisne judges of the . . . High Court, and to their

tenure of office, ... and all other provisions relating to such puisne judges, or any of them, with the exception of such provisions as apply to existing judges only, ... apply to the additional judge [so] appointed in the same manner as they apply to the other puisne judges of the said court respectively : (J. A. 1877, s. 3.)

A puisne judge of the High Court of Justice means for the purposes of [the] Act a judge of the High Court of Justice other than the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron, and their successors respectively : (J. A. 1877, s. 5.)

[Where] in the Chancery Division a transfer of a cause from one judge to another [is] ordered to be made or deemed to have been made for the purpose only of trial or of hearing, ... the original and any further hearing shall take place before the judge to whom the cause shall be so transferred; but all other proceedings therein, whether before or after the hearing or trial of the cause, shall be taken and prosecuted in the same manner as if such cause had not been transferred from the judge to whom it was assigned at the time of transfer, and as if such judge had made the decree or judgment, if any, made therein, unless the judge to whom the cause is transferred shall direct that any further proceedings therein, before or after the hearing or trial thereof, shall be taken and prosecuted before himself or before an official or special referee : (O. LI., r. 1a, June, 1877.)

No cause or matter shall, until further order, be assigned to Mr. Justice Fry by the same being marked by the plaintiff or petitioner with the name of the said Mr. Justice Fry : (Ld. Ch. Reg., 19th June, 1877.)

Each of the several causes which have been or shall be transferred to Mr. Justice Fry shall, until further order be deemed to have been transferred to him for the purpose only of trial or of hearing : (*Id.*; and see *Cave v. Cave*, 43 L. T. Rep. N. S. 158; 28 W. R. 798.; TRANSFER.)

VI. OF COMMISSIONERS OF ASSIZE, &c.

Her Majesty, by commission of assize or by any other commission, either general or special, may assign to any judge or judges of the High Court of Justice or other persons usually named in commissions of assize, the duty of trying and determining within any place or district specially fixed for that purpose by such commission, any causes or matters, or any questions or issues of fact or of law, or partly of fact and partly of law, in any cause or matter depending in the said High Court, or the exercise of any civil or criminal jurisdiction capable of being exercised by the said High Court; and any commission so granted by Her Majesty shall be of the same validity as if it were enacted in the body of [the] Act; and any commissioner or commissioners appointed in pursuance of this section shall, when engaged in the exercise of any jurisdiction assigned to him or them in pursuance of [the] Act, be deemed to constitute a court of the said High Court of Justice : (J. A. 1873, s. 29.)

[In] commissions of assize, Oyer and Terminer, and Gaol Delivery, ... it shall be lawful for Her Majesty, if she shall think fit, to include any ordinary judge of the Court of Appeal or any judge of the Chancery Division to be appointed after the commencement of [the] Act, or any serjeant-at-law, or any of Her Majesty's counsel learned in the law, who, for the purposes of such commission, shall have all the power, authority, and jurisdiction of a judge of the said High Court : (J. A. 1873, s. 37.)

All general and other commissions, issued under the Acts relating to

the Central Criminal Courts or otherwise, by virtue whereof any judges of any of the courts whose jurisdiction is so transferred may, at the commencement of [the] Act, be empowered to try, hear or determine any causes or matters, criminal or civil, shall remain and be in full force and effect, unless and until they shall respectively be in due course of law revoked or altered : (J. A., 1873, s. 76.)

VII. IN LUNACY.

Any jurisdiction usually vested in the Lords Justices of Appeal in Chancery, or either of them, in relation to the persons and estates of idiots, lunatics, and persons of unsound mind, shall be exercised by such judge or judges of the High Court of Justice or Court of Appeal as may be intrusted by the sign manual of Her Majesty or her successors with the care and commitment of the custody of such persons and estates; and all enactments referring to the Lords Justices as so intrusted shall be construed as if such judge or judges so intrusted had been named therein instead of such Lords Justices: Provided that each of the persons who may at the commencement of the principal Act be Lords Justices of Appeal in Chancery shall, during such time as he continues to be a judge of the Court of Appeal, and is intrusted as aforesaid, retain the jurisdiction vested in him in relation to such persons and estates as aforesaid : (J. A., 1875, s. 7.)

When the Lords Justices were appointed by the Lord Chancellor additional judges of the Chancery Division, they only acquired jurisdiction to deal with original petitions (such as petitions under the Trustee Acts) entitled in Chancery and in lunacy, but that they have no original jurisdiction, such as the Court of Appeal in Chancery formerly possessed, to make orders in a suit already attached to the Chancery Division : (*Re Oxenden*, 21 S. J. 707; and see *Re Lamotte*, L. Rep. 4 Ch. Div. 325; TRUSTEES.)

JURY.

[See TRIAL.]

KEEPER OF RECORDS.

[See JURISDICTION, IV.]

LANCASTER PALATINE COURT.

The jurisdiction as a court of first instance remains : (see J. A., 1873, ss. 16, 17.)

The appointment by the court of a guardian to an infant does not oust the jurisdiction of the Chancery Division to appoint guardians to such infant : (*Re Alison's Trusts*, L. Rep. 8 Ch. Div. 1; 38 L. T. Rep. N. S. 304; 47 L. J. 755, Ch.; 26 W. R. 450.)

All jurisdiction and powers of the Court of Appeal in Chancery of the County Palatine of Lancaster, and all jurisdiction and powers of the Chancellor of the Duchy and County Palatine of Lancaster when sitting

alone or apart from the Lords Justices of Appeal in Chancery as a judge of rehearing or appeal from decrees or orders of the Court of Chancery of the County Palatine of Lancaster [are transferred to and vested in] Her Majesty's Court of Appeal: (J. A., 1873, s. 18.)

Judgments and orders of the Lancaster Palatine Court, and on appeal therefrom, may be enforced by the Chancery Division: [see JUDGMENT.]

LAND.

[See RECOVERY OF LAND.]

LANDS CLAUSES ACT.

- I. INTERPRETATION OF TERMS.
- II. APPLICATION OF ACT TO FUTURE UNDERTAKINGS.
- III. PAYMENT IN AND APPLICATION OF SUMS AMOUNTING TO 200*l.* (ss. 69-70).
 1. IN WHAT CASES PAID IN.
 2. TO WHAT ACCOUNT PAID.
 3. MONEY TO REMAIN IN TILL APPLIED.
 4. INTERIM INVESTMENT AND PAYMENT OF DIVIDENDS.
 5. APPLICATION OF MONEY.
 - (a) *How Applied.*
 - (1) Discharge of Incumbrances.
 - (2) Investment in Land or Buildings.
 - (3) Payment to Party absolutely Entitled.
 - (b) *Petition.*
 - (1) Who may Present.
 - (2) To what Branch of Court Presented.
 - (3) Title.
 - (4) Service.
 - (c) *Evidence.*
 - (d) *Inquiries as to Title, &c.*
- IV. PAYMENT AND APPLICATION OF SUMS UNDER 200*l.*, BUT OVER 20*l.* (s. 71).
 1. PAYMENT.
 2. APPLICATION.
- V. PAYMENT AND APPLICATION OF SUMS NOT EXCEEDING 20*l.* (s. 72).
- VI. COMPENSATION TO PERSONS NOT ABSOLUTELY ENTITLED.
- VII. APPLICATION OF MONEYS ARISING FROM PARTIAL INTERESTS (s. 74).
- VIII. REFUSAL OR FAILURE TO CONVEY, &c. (s. 76).
 1. DEPOSIT OF PURCHASE-MONEY BY PROMOTERS.
 2. RECEIPT TO BE GIVEN.
 3. DEED POLL TO PASS ESTATE.
 4. APPLICATION OF MONEYS.
- IX. POSSESSORS DEEMED TO BE OWNERS (s. 79).
- X. ENTRY UPON LANDS BEFORE PURCHASE (ss. 85-87).
 1. DEPOSIT TO BE MADE AND BOND GIVEN.
 2. TO WHAT ACCOUNT DEPOSIT PAID.
 3. RECEIPT TO BE GIVEN.
 4. INVESTMENT OF DEPOSIT.
 5. APPLICATION OF DEPOSIT.

XI. DEPOSIT WHEN PAYMASTER-GENERAL'S OFFICE CLOSED.

XII. COSTS.

1. GENERAL RULES.

2. ENACTMENTS OF L. C. C. ACT, AND DECISIONS ON PARTICULAR MATTER.

XIII. TAXATION OF CONVEYANCING COSTS [See *sup.* XII., 2].

I. INTERPRETATION OF TERMS.

The expression "the special Act," used in [the] Act, shall be construed to mean any Act which . . . [thereafter] passed which shall authorise the taking of lands for the undertaking to which the same relates, and with which [the] Act shall be so incorporated as aforesaid; and the word "prescribed," used in [the] Act . . . shall be construed to refer to such matter as the same shall be prescribed or provided for in the special Act, and the sentence in which such word shall occur shall be construed as if, instead of the word "prescribed," the expression "prescribed for that purpose in the special Act" had been used; and the expression "the works" or "the undertaking" shall mean the works or undertaking, of whatever nature, which shall by the special Act be authorised to be executed; and the expression "the promoters of the undertaking" shall mean the parties, whether company, undertakers, commissioners, trustees, corporations, or private persons, by the special Act empowered to execute such works or undertaking: (L. C. C. A., 1845, s. 2.)

The following words and expressions, both in [the Lands Clauses Act] and the special Act, shall have the [following] meanings . . . unless there be something either in the subject or context repugnant to such construction (that is to say,)

Words importing the singular number only shall include the plural number, and words importing the plural number only shall include the singular number:

Words importing the masculine gender only shall include females:

The word "lands" shall extend to messuages, lands, tenements, and hereditaments of any tenure:

The word "lease" shall include an agreement for a lease:

The word "month" shall mean calendar month:

The word "oath" shall include affirmation in the case of Quakers, or other declaration lawfully substituted for an oath in the case of any other persons exempted by law from the necessity of taking an oath:

The word "county" shall include any riding or other like division of a county, and shall also include county of a city or county of a town: . . .

Where, under the provisions of [the Lands Clauses Act] or the special Act, or any Act incorporated therewith, any notice shall be required to be given to the owner of any lands, or where any act shall be authorised or required to be done with the consent of any such owner, the word "owner" shall be understood to mean any person or corporation who, under the provisions of [the Lands Clauses Act] or the special Act, would be enabled to sell and convey lands to the promoters of the undertaking.

The expression "the bank" shall mean the Bank of England where the same shall relate to moneys to be paid or deposited in respect of lands situate in England . . . (L. C. C. A., 1845, s. 3.)

. . . In citing [the] Act . . . in legal instruments, it [is] sufficient to use the expression "The Lands Clauses Consolidation Act, 1845:" (L. C. C. A., 1845, s. 4.)

II. APPLICATION OF ACT TO FUTURE UNDERTAKINGS.

The Act [applies] to every undertaking authorised by any Act [thereafter] . . . passed, and [authorising] the purchase or taking of lands for such undertaking, and [is] incorporated with such Act; and all the clauses and provisions of [the] Act, save so far as . . . expressly varied or excepted by any such Act . . . apply to the undertaking authorised thereby, so far as the same [are] applicable to such undertaking, and as well as the clauses and provisions of every other Act . . . incorporated with such Act, form part of such Act, and [are] construed together therewith as forming one Act: (L. C. C. A., 1845, s. 1.)

III. PAYMENT IN AND APPLICATION OF SUMS AMOUNTING TO 200*l.* (ss. 69, 70).

1. IN WHAT CASES PAID IN.

If the purchase money or compensation which shall be payable in respect of any lands or any interest therein, purchased or taken by the promoters of the undertaking from any corporation, tenant for life or in tail, married woman seised in her own right or entitled to dower, guardian, committee of lunatic or idiot, trustee, executor, or administrator, or person having a partial or qualified interest only in such lands, and not entitled to sell or convey the same except under the provisions of this or the special Act, or the compensation to be paid for any permanent damage to any such lands, amount to or exceed the sum of two hundred pounds, the same shall be paid into court: (L. C. C. A., 1845, s. 69.)

Where the purchase money of lands belonging to a corporation was paid by the company to the vendors, instead of being paid into court, it was, on motion, ordered to be paid into court for the purpose of interim protection: (Morg. & Ch. 36.)

Payment into court may be dispensed with, and the money directed to be paid to another account, *e.g.*, to a lunatic's account: (*Re Milnes*, L. Rep. 1 Ch. Div. 28; 34 L. T. Rep. N. S. 46; 24 W. R. 98.)

2. TO WHAT ACCOUNT PAID.

[The] money [so] paid into court . . . in respect of lands in England or Wales, shall be placed in the books at the Chancery Pay Office to the credit of *ex parte* the promoters of the undertaking, [describing them] in the matter of the special Act (citing it), as directed by the . . . Lands Clauses Consolidation Act, 1845, and some words shall be added in each case briefly expressive of the nature of the disability to sell and convey, by reason of which the money shall be so paid in, as stated in the request for the direction to receive the money: (Ch. F. R. 1874, r. 32.)

3. MONEY TO REMAIN IN TILL APPLIED.

Such moneys shall remain so deposited until the same be applied to some one or more of the following purposes [mentioned *post*, 5 (a)]: (L. C. C. A., 1845, s. 69.)

As soon as the money is paid in, interest ceases to be payable by the company, unless there is a special agreement: (Morg. & Ch. 36.)

4. INTERIM INVESTMENT AND PAYMENT OF INCOME.

Until the money can be . . . applied [as mentioned *post*,] it may, upon the order [of the court], be invested by the . . . Paymaster-General in the purchase of three per centum consolidated or three per centum reduced bank annuities, or in Government or real securities: (L. C. C. A., 1845, s. 70.)

The money is "cash under the control of the court" (*Re Wilkinson's Estate*, L. Rep. 9 Eq. 343; PAYMENT INTO AND OUT OF COURT.)

An interim investment on mortgage will be sanctioned by the court,

subject to an inquiry as to title, and as to the sufficiency of the security: (Morg. & Ch. 39; Dan. 1867.)

The money may be invested in East India Stock (*Re Southwold Railway Company's Bill*, L. Rep. 1 Ch. Div. 697; 34 L. T. Rep. N. S. 56; 24 W. R. 293), or Metropolitan Consolidated Stock: (*Re Redhead's Trusts*, 39 L. T. Rep. N. S. 60.)

. . . . The interest, dividends, and annual proceeds [of the interim investment may be] paid to the party who would for the time being have been entitled to the rents and profits of the lands: (L. C. C. A., 1845, s. 70.)

The order for payment, to the executors of a deceased tenant for life, of arrears of dividends and apportioned dividends, may be made on summons. But a petition is necessary for payment of the other part of the apportioned dividends, and of future dividends: (*Re Jolliffe's Estate*, L. Rep. 9 Eq. 668.)

In the case of trustees, the order has directed payment to any two for the time being, and to two trustees or either of them (Morg. & Ch. 40); and to the trustees for the time being of the will: (*Re Paddon's Trusts*, W. N. 1878, p. 65.)

When the company is in possession of the land, an order will be made for payment to the tenant for life before the conveyance is executed: (Morg. & Ch. 39.)

An order may be made for payment to a second tenant for life on the death of the first: (*Re Brent's Trusts*, 8 W. R. 270.)

As to payment to ecclesiastical persons, see *Ex parte Archbishop of Canterbury*, 2 De G. & Sm. 365; *Re Davenant's Charity*, 2 W. R. 344; *Re Pearce*, 24 Beav. 491; *Re Buckinghamshire Railways*, 5 Railway Cas. 702.

As to payments in case of charities, see *Re Collins's Charity*, 29 L. J. 168, Ch.; *Re Codrington*, L. Rep. 18 Eq. 658.

The income from money in respect of a burial ground will be paid to the person entitled to the burial fees: (*Ex parte Rector of St. Martin's*, L. Rep. 11 Eq. 23.)

The application must be made by petition; but where an order has been made on petition for investment of part of the fund, leave may be granted to apply in chambers as to the investment of the balance: (Morg. & Ch. 39; Dan. 1868.)

As to the title of the petition, see *post* 5 (b) (3).

One petition suffices both as to investment and as to payment of dividends.

The petition must not be served on persons having charges on the inheritance prior to the life estate, nor on trustees: (*Re Morris*, L. Rep. 20 Eq. 470.)

The petition must not be served on trustees (*Re Dowling*, 45 L. J. 568, Ch.); or on remaindermen, unless an extraordinary investment is asked for: (*Id.*)

The affidavit mentioned *post* 5 (c) is generally required (Morg. & Ch. 37); but a petition by a large public body, such as the president and scholars of a college for interim investment and payment of dividends, need not be supported by such an affidavit: (*Re Magdalen College, Oxford*, 42 L. T. Rep. N. S. 822; W. N. 1880, p. 150.)

5. APPLICATION OF MONEY.

(a) *How Applied.*

(1) Discharge of Incumbrances.

In the purchase or redemption of the land tax or the discharge of any debt or incumbrance affecting the land in respect of which such money

shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts, or purposes: (*Id.*)

A tenant for life who had redeemed the land tax was ordered to be reimbursed: (*Ex parte Northwick*, 1 Y. & Coll. Exch. Rep. 166.)

Both a leasehold interest and a quit-rent are incumbrances: (*Morg. & Ch. 36*; *Dan.* 1863.)

Money paid for the purchase of lands of a corporation may be applied in the redemption of an incumbrance on other lands of the same corporation (*Morg. & Ch. 36*; *Dan.* 1863); or in paying off a mortgage of tolls and bonds: (*Re Derby Municipal Estates*, L. Rep. 3 Ch. Div. 289; 24 W. R. 729.)

(2) Investment in Land or Buildings.

In the purchase of other lands, to be conveyed, limited, and settled upon the like uses, trusts, and purposes, and in the same manner, as the lands in respect of which such money shall have been paid stood settled; or

If such money shall be paid in respect of any buildings taken under the authority of this or the special Act, or injured by the proximity of the works, in removing or replacing such buildings, or substituting others in their stead, in such manner as the court . . . shall direct: (L. C. C. A., 1845, s. 69.)

"Settled" means simply "standing limited": (*Kelland v. Fulford*, L. Rep. 6 Ch. Div. 491; 25 W. R. 506.)

Even though the petitioner is absolutely entitled, the money may be invested in other lands: (*Dan.* 1864.)

An order may be made to reinvest part: (*Re Sowry*, L. Rep. 8 Ch. App. 736.)

Leave to apply in chambers as to the investment of the residue may be given: (*Re Lapworth Charity*, W. N. 1879, p. 37.)

The moneys deposited may be employed, together with other trust moneys, in the purchase of one estate: (*Morg. & Ch. 38.*)

As to investment in copyholds or leaseholds, see *Morg. & Ch. 38*; *Dan.* 1864.)

Ground rents may be purchased: (*Re Mason's Trust Estate*, W. N. 1872, p. 77.)

Land out of the jurisdiction—e.g., in the Isle of Man—may be purchased: (*Re Taylor*, 40 L. J. 454, Ch.)

New buildings may be erected on the estate, if it will be beneficial to the estate, and if the remaindermen do not object: (*Morg. & Ch. 36.*)

The court will not allow the money to be applied in repairs or in improvements which do not put new buildings on the ground: (*Drake v. Trefusis*, L. Rep. 10 Ch. App. 364.)

The fund directed to be applied in the erection of buildings will not be paid out until their completion, although it may be paid out on an undertaking to apply it as directed: (*Dan.* 1865.)

The money has been applied—in payment to a rector recouping part outlay in building a farmhouse on the glebe (*Ex parte Rector of Gamston*, L. Rep. 1 Ch. Div. 477; 33 L. T. Rep. N. S. 803; 24 W. R. 359); towards the cost of lateral additions to a house, part of the settled estate (*Re Speer's Trusts*, L. Rep. 3 Ch. Div. 262; 24 W. R. 880); converting stables into dwelling-houses (*Re Lymington Chapel*, W. N. 1877, p. 226); in improving the water supply (*Re Croker*, W. N. 1877, p. 38); where the bishop and patron consented, towards expenses of improving and adding to a rectory house and of past outlay on pigstyes: (*Ex parte*

Rector of Claypole, L. Rep. 16 Eq. 574; *Ex parte Rector of Holywell-cum-Needingworth*, 27 W. R. 707.)

Some of the above cases have been decided since the decision of the Court of Appeal in *Drake v. Trefusis*, *sup.*

Applications have been refused that the money might be applied—in repairs of the chancel, or in paying off a Queen Anne's Bounty loan (*Ex parte Rector of Grimoldby*, L. Rep. 2 Ch. Div. 225; 24 W. R. 723); in recouping past outlay in rebuilding a rectory (*Williams v. Aylesbury Railway Company*, L. Rep. 9 Ch. App. 684); in recouping the tenant for life expenditure incurred in permanent improvements before the compulsory taking without expectation of having it repaid: (*Re Stocks's Estates*, 42 L. T. Rep. N. S. 46; W. N. 1880, p. 11.)

(3) Payment to Party absolutely Entitled.

In payment to any party becoming absolutely entitled to such money: (L. C. C. A., 1845, s. 69.)

Trustees having a power of sale are persons absolutely entitled (*Re Hobson's Estate*, L. Rep. 7 Ch. Div. 708; 38 L. T. Rep. N. S. 365; 47 L. J. 310, Ch.; 26 W. R. 420); although there is no receipt clause: (*Re Gooch's Estate*, L. Rep. 3 Ch. Div. 742.)

If there is no power of sale, the beneficiaries must also apply: (*Re Lowry*, L. Rep. 8 Ch. App. 736.)

Charity trustees are persons absolutely entitled: (*Re Spurstowe's Charity*, L. Rep. 18 Eq. 279.)

The money may be paid out without consent of the Charity Commissioners: (*Re Lister's Hospital*, 6 D. M. & G. 184; and see *Holm v. Guy*, L. Rep. 5 Ch. Div. 901; 36 L. T. Rep. N. S. 600; 46 L. J. 648, Ch.; 25 W. R. 547; *Re Poplar and Blackwall School*, L. Rep. 8 Ch. Div. 543; 39 L. T. Rep. N. S. 88; 26 W. R. 827; *Hodgson v. Forster*, W. N. 1877, p. 74.)

Where lands settled in trust for a widow during her life or until her second marriage, and, after her death or second marriage, in trust for sale, were purchased from the widow, the purchase money was, on the petition of the widow, ordered to be paid out to the trustees of the settlement, they undertaking to hold the same upon the trusts of the settlement: (*Re Evans's Settlement*, L. Rep. 14 Ch. Div. 511; 43 L. T. Rep. N. S. 172.)

As to who are persons "absolutely entitled," see also Dan. 1866; *Re Curwen's Settlement*, W. N. 1880, p. 83.

As to consent of Ecclesiastical Commissioners, see Morg. & Ch. 38.

Where a good title to only part of the land taken is shown, a proportionate part of the purchase money will be paid out: (*Re Perkes*, 7 Railway Cas. 605.)

Dower must be valued, and the money paid out: (*Re Hall*, L. Rep. 9 Eq. 179.)

Compensation in respect of commonable rights will be divided between the copyhold and freehold tenants of the manor: (Morg. & Ch. 37; *Fox v. Amhurst*, L. Rep. 20 Eq. 403.)

Occupiers and freehold tenants of the copyholders and freeholders have no claim on the money: (*Austin v. Amhurst*, L. Rep. 7 Ch. Div. 689; 38 L. T. Rep. N. S. 217; 47 L. J. 467, Ch.; 26 W. R. 312.)

As to freemen of a borough, see *Nash v. Coombs*, L. Rep. 6 Eq. 51.

A tenant in tail must produce a properly executed disentailing deed before payment out to him, unless the fund is under 200l.: (Morg. & Ch. 38; Dan. 1866; *Re Broadwood*, L. Rep. 1 Ch. Div. 438; *Re Reynolds*, L. Rep. 3 Ch. Div. 61.)

Money belonging to a married woman will, on her electing, by examina-

tion in court, to take the money as personalty, be paid out to her, or her husband, without a deed of acknowledgment: (*Standerling v. Hall*, L. Rep. 11 Ch. Div. 652; *Re Robin*, W. N. 1879, p. 95.)

But the examination may also be dispensed with if the fund is of small amount: (Morg. & Ch. 38; Dan. 1866.)

Where the fund is the property of a lunatic, the Chancery Division may direct it to be carried over to the credit of the lunacy (*Re Milnes*, L. Rep. 1 Ch. Div. 28; 34 L. T. Rep. N. S. 46; 24 W. R. 98); or a Government annuity may be purchased, by an order in the Chancery Division and in Lunacy: (*Re Brewer*, L. Rep. 1 Ch. Div. 409; 34 L. T. Rep. N. S. 46; 24 W. R. 465.)

(b) *Petition.*

(1) Who may Present.

Such money may be so applied as aforesaid upon an order of the court . . . made on the petition of the party who would have been entitled to the rents and profits of the lands in respect of which such money shall have been deposited: (L. C. C. A., 1845, s. 70.)

A tenant for life may petition, though the land is subject to a mortgage, or charged with an annuity, but the incumbrancer or annuitant cannot petition. Nor can a remainderman: (Dan. 1867.)

A husband of a married woman petitioner should be made a co-petitioner: (*Re Osborne*, W. N. 1878, p. 179.)

When a petitioner dies after an order made on the petition, an order will be made that the petition shall be continued and carried on by the executors: (*Re Atkins' Estate*, L. Rep. 1 Ch. Div. 82; *Re Dynevor Duffryn Collieries Company*, W. N. 1878, p. 199.)

(2) To what Branch of Court Presented.

Where an order has been made by one branch of the court, subsequent applications should be made to the same branch: (See TRANSFER.)

Where an order has been made for investment of part, leave may be given to apply in chambers as to the investment of the balance: (*Re Lapworth Charity*, W. N. 1879, p. 37.)

(3) Title.

The petition should be entitled in the matter of the will or settlement affecting the lands, and of the Lands Clauses Consolidation Acts, 1845, and 1869, and of the special Act, by its short title: (Seton, 1424.)

(4) Service.

The petition should be served on the company, but not on remaindermen, when it is for investment in land: (Seton, 1422.) Where the application is for investment in improvements, or in respect of moneys arising from leases or reversions [see *post* VII.], then remaindermen should be served. The petition must be served upon all persons, or their trustees, interested in a fund standing to the credit of a cause, as well as the matter of the Act. Where trustees are served they will be allowed their costs only when the fund cannot be dealt with without their appearing before the court: (Morg. & Ch. 54; Dan. 1868.)

(c) *Evidence.*

In the case of petitions . . . authorising the sale of property for public purposes, where the purchase money is directed . . . to be paid into court, the petitioners claiming to be entitled to the money so paid in must make an affidavit, not only verifying their title, but also stating that they are not aware of any right in any other person, or of any claim made by any other person, to the sum of £. in the said petition mentioned, or to any part thereof, or if the petitioners are aware of any such

right or claim, they must in such affidavit state or refer to and except the same : (C. O. 34, r. 3.)

As to the necessity of the affidavit, see *Morg. & Ch. 37* ; *Dan. 1867*. The affidavit may be made by one of several petitioners ; or by executors, where the tenant for life is old or infirm ; or by his solicitor, where petitioner is too ill to make it himself ; or by their clerk, when the application is made by the trustees of a charity : (*Morg. & Ch. 37* ; *Dan. 1867*.) Payment has been ordered on an affidavit verifying the title by a surviving trustee : (*Re Batty*, W. N. 1877, p. 212.)

(d) *Inquiries as to Title, &c.*

The court will direct an inquiry as to the propriety of an investment in land, when not satisfied on the point ; but it will approve the investment at once when it is satisfied, and subject to the approval of the title, after inquiry, will direct the conveyance to be executed : (*Morg. & Ch. 38, 39* ; for form of order see 10 *Hare App. 36* ; *Seton, 1427*.)

Where the title has been approved by one of the conveyancing counsel, or where the fund invested is only 50*l.*, the inquiry as to title may be dispensed with : (*Re Lapworth Charity*, W. N. 1879, p. 37.)

Leave may be granted to apply in chambers that the investigation may be dispensed with : (*Re Blomfield*, 25 W. R. 37.)

IV. PAYMENT AND APPLICATION OF SUMS UNDER 200*l.* BUT OVER 20*l.* (s. 71.)

1. PAYMENT.

If the purchase money or compensation shall not amount to the sum of two hundred pounds and shall exceed the sum of twenty pounds, the same shall . . . be paid . . . (a) into the bank, or (b) to two trustees to be nominated by the parties entitled to the rents or profits of the lands in respect whereof the same shall be payable, such nomination to be signified by writing under the hands of the party so entitled ; and in case of the coverture, infancy, lunacy, or other incapacity of the parties entitled to such moneys, such nomination may lawfully be made by their respective husbands, guardians, committees, or trustees ; but such last-mentioned application of the moneys shall not be made unless the promoters of the undertaking approve thereof and of the trustees named for the purpose : (L. C. C. A., 1845, s. 71.)

The order for payment may be made to two trustees or either of them : (*Morg. & Ch. 40*.)

2. APPLICATION.

[If the money is paid into the bank it shall] be applied in the manner . . . mentioned with respect to sums amounting to 200*l.* (L. C. C. A. 1845, s. 71 ; see *sup. III.*)

The money so paid to such trustees and the produce arising therefrom, shall be by such trustees applied in the manner . . . directed with respect to money paid into the bank, but it shall not be necessary to obtain any order of the Court for that purpose : (L. C. C. A. 1845, s. 71.)

V. PAYMENT AND APPLICATION OF SUMS NOT EXCEEDING 20*l.* (s. 72).

If such money shall not exceed the sum of twenty pounds, the same shall be paid to the parties entitled to the rents and profits of the lands in respect whereof the same shall be payable, for their own use and benefit, or in case of the coverture, infancy, idiocy, lunacy, or other incapacity of any such parties, then such money shall be paid for their use to the

respective husbands, guardians, committees, or trustees of such persons : (L. C. C. A., 1845, s. 72.)

The court has ordered a balance remaining over after investment, and not exceeding 20l., to be paid to the tenant for life. So also a balance of 30l., on an undertaking by the tenant for life to expend it in lasting improvements : (Morg. & Ch. 41.)

A guardian, for the purpose of selling, or conveying, or nominating a trustee to receive the money, may be appointed on summons at chambers : (Dan. 1870.)

VI. COMPENSATION TO PERSONS NOT ABSOLUTELY ENTITLED (s. 73).

All sums of money exceeding twenty pounds which may be payable by the promoters of the undertaking in respect of the taking, using, or interfering with any lands, under a contract or agreement with any person who shall not be entitled to dispose of such lands or of the interest therein contracted to be sold by him absolutely for his own benefit, shall be paid into the bank or to trustees in manner aforesaid [see *sup.* III., IV.], and it shall not be lawful for any contracting party not entitled as aforesaid to retain to his own use any portion of the sums so agreed or contracted to be paid for or in respect of the taking, using, or interfering with any such lands, or in lieu of bridges, tunnels, or other accommodation works, or for assenting to or not opposing the passing of the bill authorising the taking of such lands, but all such moneys shall be deemed to have been contracted to be paid for and on account of the several parties interested in such lands, as well in possession as in remainder, reversion, or expectancy : (L. C. C. A. 1845, s. 73.)

The tenant for life is perfectly competent to contract whatever may be the grounds of his demands. The section applies as between him and the reversioner or remainderman. The money when paid to him becomes affected by a trust, he being the trustee and the other his *cestui que trust* : (*Taylor v. Chichester and Midhurst Railway Company*, L. Rep. 4 E. & I. App. 628.)

The directors may pay the money into court, and such payment is a fulfilment of their contract with the tenant for life : (*Id.*)

Where a tenant for life received a sum of money in consideration of his not opposing the application for the Act, he was declared a trustee of the same for the benefit of himself and the remaindermen, and ordered to pay it into court : (Dan. 1870.)

Provided always that it shall be in the discretion of the court . . . or the said trustees, as the case may be, to allot to any tenant for life or for any other partial or qualified estate, for his own use, a portion of the sum so paid into the bank or to such trustees as aforesaid, as compensation for any injury, inconvenience, or annoyance which he may be considered to sustain, independently of the actual value of the lands to be taken, and of the damage occasioned to the lands held therewith, by reason of the taking of such lands and the making of the works : (L. C. C. A. 1845, s. 73.)

The court has full power to allot to the tenant for life, or other person having a partial or qualified estate, a portion of the sum so paid in, as compensation for any damage or annoyance he may sustain : (*Taylor v. Chichester and Midhurst Railway Company, sup.*)

The tenant for life will be allowed costs, charges, and expenses properly incurred in dealing with the company subsequently to the passing of their Act, but not expenses incurred in opposing the Bill in Parliament : (*Re Earl of Berkeley's Will*, L. Rep. 10 Ch. App. 56.)

As to the costs of a trustee opposing the Bill, see *Re Nicoll's Estates*,

W. N. 1878, p. 154; see also Dan. 1870; *Rees v. Metropolitan Board of Works*, L. Rep. 14 Ch. Div. 372; 42 L. T. Rep. N. S. 685; 49 L. J. 620, Ch.; 28 W. R. 614.

VII. APPLICATION OF MONEYS ARISING FROM PARTIAL INTERESTS (s. 74).

Where any purchase money or compensation paid into the bank under the provisions of [the Lands Clauses Act] or the special Act shall have been paid in respect of any lease for a life or lives or years, or for a life or lives and years, or any estate in lands less than the whole fee simple thereof, or of any reversion dependent on any such lease or estate, it shall be lawful for the court . . . on the petition of any party interested in such money, to order that the same shall be laid out, invested, accumulated, and paid in such manner as the said court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate, or reversion in respect of which such money shall have been paid, or as near thereto as may be: (L. C. C. A., 1845, s. 74.)

An agreement for a lease is included in the word "lease" [see *sup.* I.] A remainderman is a "party interested": (Dan. 1871.)

Where the land was held in trust for the maintenance and repair of a church which had been taken, and was subject to a lease for years, dependent on a life, the court ordered the whole of the dividends to be paid to the trustees: (Dan. 1871.)

Where leaseholds were charged with an annuity, which the purchase money was insufficient to discharge, it was ordered to be kept down by the sale from time to time of a competent part of the fund: (Dan. 1871.)

In another case a Government annuity was ordered to be purchased: (*Re Pfleger*, L. Rep. 6 Eq. 250.)

The tenant for life of leaseholds specifically bequeathed was held entitled to the amount of his former income, to be made good from the corpus: (Dan. 1871.)

In another case the court directed that the fund, or so much as from time to time remained, and any interest thereon, should in each year be divided by the number of years which would have remained unexpired of the lease, and the quotient paid yearly to the tenant for life: (Dan. 1871; and see *Penny v. Penny*, L. Rep. 5 Eq. 227.)

Where settled renewable leaseholds had been taken, a similar order was made, although the settlement contained a direction to renew: (Dan. 1871.)

Where there is a trust for renewal, and renewal has become impossible, the tenant for life is only allowed the income of the purchase money: (*Re Wood's Estate*, L. Rep. 10 Eq. 572; *Hollier v. Burne*, L. Rep. 16 Eq. 163; *Maddy v. Hale*, L. Rep. 3 Ch. Div. 327; 35 L. T. Rep. N. S. 134; 24 W. R. 1005.)

Where leaseholds have been let at a rent below the present rack rental, the tenant for life generally gets only an income equal to the rent reserved, the remainder being accumulated, but at the end of the term he will be entitled to the income: (See *Re Mette's Estate*, L. Rep. 7 Eq. 72, and cases there cited.)

Where, under a joint contract with the lessor and lessee, one sum was paid for the interest of both, the court declined to apportion the fund between them: (Dan. 1872.)

The value of a lessor's interest may be ascertained in chambers: (*Brandon v. Brandon*, 2 Dr. & Sm. 305.)

Where a lease for lives was not renewed according to a direction in the will, the tenant for life was, on the death of the last *cestui que vie*, held

entitled to the whole sum; but without prejudice to the rights of the remainderman, in consequence of the non-renewal: (Dan. 1872.)

Where a tenant for life of leaseholds was entitled to the fund which had been invested in consols, the court held that the matter should be referred to an actuary to ascertain what yearly payment would exhaust the fund in the number of years which the leaseholds had to run, and that the tenant for life was entitled to have this yearly sum paid to him during the remainder of the term, if he should live so long: (*Askew v. Woodhead*, 42 L. T. Rep. N. S. 567; L. Rep. 14 Ch. Div. 27.)

VIII. REFUSAL OR FAILURE TO CONVEY, &c. (s. 77).

1. DEPOSIT OF PURCHASE MONEY BY PROMOTERS.

If the owner of any such lands purchased or taken by the promoters of the undertaking, or of any interest therein, on tender of the purchase money or compensation either agreed or awarded to be paid in respect thereof, refuse to accept the same, or neglect or fail to make out a title to such lands, or to the interest therein claimed by him, to the satisfaction of the promoters of the undertaking, or if he refuse to convey or release such lands as directed by the promoters of the undertaking, or if any such owner be absent from the kingdom, or cannot after diligent inquiry be found, or fail to appear on the inquiry before a jury . . . it shall be lawful for the promoters of the undertaking to deposit the purchase money or compensation payable in respect of such lands, or any interest therein, in the bank, in the name and with the privity of the [Paymaster] General . . . to be placed, except in the cases [by the Act] otherwise provided for, to his account there, to the credit of the parties interested in such lands (describing them, so far as the promoters of the undertaking can do), subject to the control and disposition of the said court: (L. C. C. A., 1845, s. 76.)

A person in possession, but showing a bad title, is not an owner within this section: (See *Douglas v. London and North-Western Railway Company*, 3 K. & J. 173, and other cases cited Morg. & Ch. 45; see also *Ex parte Winder*, cited *post*.)

2. RECEIPT TO BE GIVEN.

Upon any such deposit of money as last aforesaid being made, the cashier of the bank shall give to the promoters of the undertaking, or to the party paying in such money by their direction, a receipt for such money, specifying therein for what and for whose use (described as aforesaid) the same shall have been received, and in respect of what purchase the same shall have been paid in: (L. C. C. A., 1845, s. 77.)

3. DEED POLL TO PASS ESTATE.

It shall be lawful for the promoters of the undertaking, if they think fit, to execute a deed poll, under their common seal, if they be a corporation, or if they be not a corporation under the hands and seals of the said promoters or any two of them, containing a description of the lands in respect whereof such deposit shall have been made, and declaring the circumstances under which and the names of the parties to whose credit such deposit shall have been made, and such deed poll shall be stamped with the stamp duty which would have been payable upon a conveyance to the promoters of the undertaking of the lands described therein; and thereupon all the estate and interest in such lands of the parties for whose use and in respect whereof such purchase money or compensation shall have been deposited shall vest absolutely in the promoters of the undertaking, and as against such parties they shall be entitled to immediate possession of such lands: (L. C. C. A., 1845, s. 77.)

4. APPLICATION OF MONEYS.

Upon the application by petition of any party making claim to the money so deposited as last aforesaid, or any part thereof, or to the lands in respect whereof the same shall have been deposited, or any part of such lands, or any interest in the same, the court . . . may, in a summary way, as to such court shall seem fit, order such money to be laid out or invested in the public funds, or may order distribution thereof, or payment of the dividends thereof according to the respective estates, titles, or interests of the parties making claim to such money or lands, or any part thereof, and may make such other order in the premises as to [the] court shall seem fit: (L. C. C. A., 1845, s. 78.)

An incumbrancer may apply for payment, but can only claim six years arrears of interest: (*Re Stead*, L. Rep. 2 Ch. Div. 713; 45 L. J. 634, Ch.; 24 W. R. 698.)

The petition must be supported by the usual affidavit of title: [see *sup.* III.]

Where the money has been paid in, the court is bound to decide the question of right, and if it turns out that the claimant has not the interest he claimed, but some other interest, the court will ascertain the value of the interest; and after paying the amount of such value to the claimant, order the residue of the money paid in to be repaid to the company: (Dan. 1874.)

Where a company agreed to purchase the fee simple of land of which W. was the true owner, from H., who was in possession, and afterwards, finding that H. had only a possessory title of nineteen years and a half, paid the money into court to the account of "the party interested" therein, took possession, and executed a deed poll reciting their desire that the land should vest in them for all the estate of H., and purporting to vest in themselves the fee simple of the lands, and no claim was made on behalf of W. either to the land or the purchase money until after the expiration of twenty years from the time when H. had taken possession, on petition by persons claiming under H. for payment out; it was held that they were so entitled as against the representative of W.: (*Ex parte Winder*, L. Rep. 6 Ch. Div. 696; 46 L. J. Ch. 572; 25 W. R. 768.)

IX. POSSESSORS DEEMED TO BE OWNERS (s. 79).

If any question arise respecting the title to the lands in respect whereof such moneys shall have been so paid or deposited as aforesaid, the parties respectively in possession of such lands, as being the owners thereof, or in receipt of the rents of such lands, as being entitled thereto at the time of such lands being purchased or taken, shall be deemed to have been lawfully entitled to such lands until the contrary be shown to the satisfaction of the court; and unless the contrary be shown as aforesaid, the parties so in possession, and all parties claiming under them, or consistently with their possession, shall be deemed entitled to the money so deposited, and to the dividends or interest of the annuities or securities purchased therewith, and the same shall be paid and applied accordingly: (L. C. C. A. 1845, s. 79.)

Where questions arise as to title, the petition need only be served on the company: (*Re Sterry*, 3 W. R. 561.)

It is the duty of the company to state any difficulties of title which may exist: (Dan. 1874.)

The court will not, on application for payment of the purchase money, deal with the property in any way which can affect the title, unless it is clearly shown that there must be litigation on the question of title: (*Re St. Pancras Burial Ground*, L. Rep. 3 Eq. 173.)

On petition by the ostensible owner for payment out to him of the purchase money, it was held that he was entitled to have the purchase money paid out to him at once, as being the owner in possession, and nothing being shown to the contrary to the satisfaction of the court: (*Ex parte Chamberlain*, 42 L. T. Rep. N. S. 358; L. Rep. 14 Ch. Div. 323; 49 L. J. 354, Ch.; 28 W. R. 565; and see *Ex parte Winder*, *sup.*, VIII.)

X. ENTRY UPON LANDS BEFORE PURCHASE (ss. 85-87).

1. DEPOSIT TO BE MADE AND BOND GIVEN.

If the promoters of the undertaking shall be desirous of entering upon and using any . . . lands before an agreement shall have been come to or an award made, or verdict given for the purchase money or compensation to be paid by them in respect of such lands [they may do so upon depositing in the bank, by way of security, the amount claimed or the value of the lands, and upon giving a bond to the non-consenting parties interested] in a penal sum equal to the sum so . . . deposited conditioned for payment to such party, or for deposit in the bank for the benefit of the parties interested in such lands, as the case may require, under the provisions [of the Act] of all such purchase money or compensation as may in manner [thereinbefore] provided be determined to be payable by the promoters of the undertaking in respect of the lands so entered upon, together with interest thereon, at the rate of 5*l.* per cent. per annum from the time of entering on such lands, until such purchase money or compensation shall be paid to any such party or deposited in the bank for the benefit of the parties interested in such land under the provisions of the Act: (L. C. C. A., 1845, s. 85.)

The entry does not deprive the vendor of his lien on the land; but he has no lien on the deposit for his costs of negotiation or conveyance: (Dan. 1885; Morg. & Ch. 49, 59.)

2. TO WHAT ACCOUNT DEPOSIT PAID.

The money . . . to be deposited . . . shall be paid into the bank in the name and with the privity of the [Paymaster] General of the court . . . to be placed to his account there to the credit of the parties interested in or entitled to sell and convey the lands so to be entered and who shall not have consented to such entry, subject to the control and disposition of the said court: (L. C. C. A., 1845, s. 86.)

3. RECEIPT TO BE GIVEN.

Upon such deposit being made the cashier of the bank shall give to the promoters of the undertaking, or to the party paying in such money by their direction, a receipt for such money, specifying therein for what purpose, and to whose credit, the same shall have been paid in: (L. C. C. A., 1845, s. 86.)

4. INVESTMENT OF DEPOSIT.

The money . . . deposited . . . shall remain in the bank by way of security to the parties whose lands shall so have been entered upon, for the performance of the condition of the bond to be given by the promoters of the undertaking . . . and the same may, on the application by petition of the promoters of the undertaking, be ordered to be invested in bank annuities or Government securities, and accumulated: (L. C. C. A., 1845, s. 87.)

Interest at 5*l.* per cent. per annum, according to the bond, will be payable by the company from the date of entry, although the deposit may not have been invested: (Dan. 1885.)

5. APPLICATION OF DEPOSIT.

And upon the condition of [the] bond [see *sup.*] being fully performed

it shall be lawful for the court [on application by petition of the promoters of the undertaking] to order the money so deposited in the funds in which the same shall have been invested, together with the accumulation thereof to be repaid or transferred to the promoters or if such conditions shall not be fully performed, it shall be lawful for the court to order the same to be applied in such manner as it shall think fit for the benefit of the parties, for whose security the same shall so have been deposited: (L. C. C. A., 1845, s. 87.)

It is sufficient if the petition is stamped with the seal of the company, which need not be verified: (Morg. & Ch. 61.)

A petition for investment need not be served on the landowner; but if it is for repayment of the deposit it should be so served: (Morg. & Ch. 60; Dan., 1885.)

And he is entitled to his costs of appearing: (*Id.*)

If the bond has been fully performed, or the landowner consents to the application, he should be made a co-petitioner: (*Re Holman's Settlement*, W. N. 1877, p. 272.)

If he refuse he should be made a respondent: (*Id.*)

If he appear he will not be entitled to costs (*Id.*); at any rate beyond the 42s. tendered under Add. Rules, Aug., 1875; Sp. All., r. 17: (see *Costs*, *sup.*, 230.)

Payment may be ordered to be made to the secretary of the company: (Morg. & Ch. 61.)

The deposit may be paid out without the costs payable by the company to the vendor being deducted, although such costs remain unpaid.

The deposit may also be paid, although the landowner has taken proceedings to set aside the award (Dan. 1885.); although the company has not paid or deposited the compensation awarded in respect of minerals: (*Ex parte Neath and Brecon Railway Company*, L. Rep. 2 Ch. Div. 201; 45 L. J. 196, Ch.; 24 W. R. 357.)

Where a railway company, prior to entering upon lands, has made a deposit in the bank and given a bond, the court has jurisdiction, in the event of the non-performance of the condition of the bond, to order payment out of the deposit to the landowner on a petition presented by him for that purpose adversely to the company: (*Re Mutlow's Estate*, L. Rep. 10 Ch. Div. 131; 27 W. R. 245.)

As to the rights of the landowner's mortgagees, see *Martin v. London, Chatham, &c., Railway Company*, L. Rep. 1 Ch. App. 501.

XI. DEPOSIT WHEN PAYMASTER-GENERAL'S OFFICE IS CLOSED.

If at any time the company be unable, by reason of the closing of the office of the [Paymaster] General of the court to obtain his authority in respect of the payment of any sum of money so authorised to be deposited in the bank by way of security it shall be lawful for the company to pay into the bank to the credit of such party or matter, as the case may require such sum of money as the promoters of the undertaking shall, by some writing signed by their secretary or solicitors for the time being, addressed to the governor and company of the bank in that behalf, request and in every such case, within ten days after the reopening of the said [Paymaster] General's office, the solicitor for the promoters of the undertaking shall there bespeak the direction for the payment of such sum into the name of the [Paymaster] General, and upon the production of such direction at the Bank of England the money so previously paid in shall be placed

to the credit of the said [Paymaster] General accordingly, and the receipt for the said payment be given: (L. C. C. A., 1845, s. 88.)

XII. COSTS.

1. GENERAL RULES.

See O. L.V., cited COSTS III., 1.

The effect of the order and of the Judicature Acts is, with the exceptions mentioned in the order, to repeal former enactments as to costs: (*Garnett v. Bradley*, L. Rep. 3 App. Cas. 944; 39 L. T. Rep. N. S. 261; 48 L. J. 186, Ex.; 26 W. R. 698; *Ex parte Mercers' Company*, L. Rep. 10 Ch. Div. 481.)

But the old law may be looked at as a guide, and ought to be followed wherever practicable: (per Bramwell, L.J., *Myers v. Defries*, L. Rep. 5 Ex. Div. 180; 42 L. T. Rep. N. S. 137; 49 L. J. 266, Ex.; 28 W. R. 406.)

In doubtful cases regarding costs the court will decide in favour of the landowner: (Dan. 1875.)

Costs may be refused to a petitioner.

Where the money is not standing to the credit of the matter of the Act, the petitioners may be ordered to pay the company's costs: (Dan. 1876; *Nock v. Nock*, W. N. 1879, p. 125.)

Where money has been paid in to another account than the Act, by consent, and where the purchase money, though paid in under the Act, has been carried to another account, the company ought not to be served with a petition, and an order as to costs cannot be made against them: (*Nock v. Nock*, *sup.*; *Fisher v. Fisher*, L. Rep. 17 Eq. 340.)

2. ENACTMENTS OF L. C. C. ACT, AND DECISIONS ON PARTICULAR MATTERS.

General Enactment.

In all cases of moneys deposited in the bank under the provisions of [the Lands Clauses Act] or the special Act, or an Act incorporated therewith, except where such moneys shall have been so deposited by reason of the wilful refusal of any party entitled thereto to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required [see *sup.* VIII.] it shall be lawful for the court . . . to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking; (that is to say,)

- (1) The costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, other than such costs as [therein] otherwise provided for;
- (2) The costs of the investments of such moneys in Government or real securities, and of the reinvestments thereof in the purchase of other lands;
- (3) The costs of obtaining the proper orders for the payment of the dividends and interest of the securities upon which such moneys shall be invested;
- (4) The costs for the payment out of court of the principal of such moneys or of the securities whereon the same shall be invested;
- (5) The costs of all proceedings relating thereto except such as are occasioned by litigation between adverse claimants: (L. C. C. A., 1845, s. 80.)

Several Companies.

The costs on payment out, where the money has been deposited by

several companies, will be borne by the companies equally, as will costs of re-investment, except stamps on the conveyance, and a surveyor's fee will be contributed rateably, according to the shares of purchase money; but the costs may be ordered to be paid rateably according to the amounts paid in, where it would otherwise be unjust or oppressive: (Morg. & Ch. 50; Dan. 1878.)

When portions of the estate are taken by different companies, some of which afterwards amalgamate, the costs must be borne in equal shares by the existing companies: (*Ex parte Corpus Christi College*, L. Rep. 13 Eq. 334; *Ex parte Gaskell*, L. Rep. 2 Ch. Div. 360; 45 L. J. 368, Ch.; 24 W. R. 752; but see *Ex parte Bishop of London*, 32 Beav. 397.)

When after an order to pay costs the company becomes insolvent, leaving part of the costs unpaid, part of the fund in court may be sold to pay the balance: (*Re Great Yeldham Glebe Lands*, L. Rep. 9 Eq. 68.)

Refusal to Convey.

A reasonable objection to convey, although ultimately overruled, is not regarded as a "wilful refusal." Nor is the inability of a landowner to pay off incumbrances of greater value than the land taken. But if a vendor insists upon payment of his costs, as well as of the purchase money, before giving up possession, it is a wilful refusal: (Dan. 1876; Morg. & Ch. 49, 50.)

Purchase and Taking—Compulsory.

The 80th section relates to compulsory purchases, and to matters under any section of the Act, s. 82 [see *post*], relating to purchases by agreement: (*Re Liverpool Improvement Act*, L. Rep. 5 Eq. 282; Morg. & Ch. 57; *Ex parte Flower*, L. Rep. 1 Ch. App. 599.)

The costs mentioned in the 80th section include those of ascertaining value (*Ex parte Flower, sup.*); of a power of attorney from persons abroad; and costs of conveyance generally: (Morg. & Ch. 50.)

Costs of Conveyances—Voluntary.

The costs of all . . . conveyances [of lands purchased] shall be borne by the promoters of the undertaking, and such costs shall include all charges and expenses incurred, on the part as well of the seller as of the purchaser, of all conveyances and assurances of any . . . lands, and of any outstanding terms or interest therein, and of deducing, evidencing, and verifying the title to such lands, terms, or interests, and of making out and furnishing such abstracts and attested copies as the promoters of the undertaking may require, and all other reasonable expenses incident to the investigation, deduction, and verification of such title: (L. C. C. A. 1845, s. 82.)

Taxation of Conveyancing Costs.

If the promoters of the undertaking and the party entitled to any such costs shall not agree as to the amount thereof, such costs shall be taxed by one of the taxing masters of the court . . . upon an order of the same court, to be obtained upon petition in a summary way by either of the parties; and the promoters of the undertaking shall pay what the said master shall certify to be due in respect of such costs to the party entitled thereto, or in default thereof, the same may be recovered in the same way as any other costs payable under an order of the said court, or the same may be recovered by distress in the manner . . . provided in other cases of costs; and the expense of taxing such costs shall be borne by the promoters of the undertaking, unless upon such taxation one-sixth part of the amount of such costs shall be disallowed, in which case the costs of such taxation shall be borne by the party whose costs

shall be so taxed, and the amount thereof shall be ascertained by the said master and deducted by him accordingly in his certificate of such taxation : (L. C. C. A. 1845, s. 83.)

The promoters must bear the expense of getting in any outstanding legal estates (Dan. 1883); of taking out administration on death of leaseholder (*Id.*); of proceedings necessary for the completion of the contract through vendor's dying before completion (Dan. 1883); or through the heir-at-law of a transferee of a deceased mortgagee not being found: (Dan. 1883.)

The vendor is entitled to his costs of a conveyance which has been prepared but not made use of, if he has not been guilty of wilful neglect or refusal to convey (Dan. 1884), and to costs of apportioning ground rent payable to vendor in respect of several houses including the one taken: (*Id.*)

Upon a petition praying for the approval of the investment of a sum in court, whereby the contract costs usually borne by the vendor were thrown upon the purchasers, the taxing master was directed to distinguish such of the costs as were properly vendors' costs, and such costs were directed to be borne by the petitioners: (*Re Temple Church Lands*, 47 L. J. 160, Ch.; 26 W. R. 259.)

Interim Investment.

The costs include broker's commission: (Morg. & Ch. 50.)

But the practice is for the whole purchase money paid in to be laid out in stock, without deducting brokerage, or to sell stock without charging brokerage, the petitioner by his counsel undertaking to pay it; and the petitioner charges the company for the brokerage in his costs without any special direction respecting it: (Seton, 1419.)

The costs of several interim investments in stock must be paid by the company: (Dan. 1880; Morg. & Ch. 50.) The rule is sometimes different where there is an investment on mortgage: (*Re Wilkinson*, 16 W. R. 637; *Re Flemon*, L. Rep. 10 Eq. 612, cited Morg. & Ch. 50.)

The court does not impose any condition as to the permanency of the investment: (*Re Blyth*, L. Rep. 16 Eq. 468; *Re Sewart*, L. Rep. 18 Eq. 278.)

The costs do not include those of remaindermen, except in case of an extraordinary investment (*Re Dowling*, 24 W. R. 729; 45 L. J. 568, Ch.); or of incumbrancers prior to the life interest: (*Re Morris*, L. Rep. 20 Eq. 470.)

Payment of Dividends.

Costs of and incident to the payment of dividends must be borne by the company: (Morg. & Ch. 51.)

They include costs of yearly sales of stock where necessary to make up a tenant for life's income (*Re Long's Estate*, 20 L. T. Rep. O. S. 305; W. R. 226; *Re London, Chatham, and Dover Railway Company*, 14 L. T. Rep. N. S. 243; 14 W. R. 507); of a petition for payment to a person in remainder after the tenant for life, caused by the death of the latter (*Ex parte Jolliffe*, L. Rep. 9 Eq. 668); of a second petition for payment to trustees, where necessary, as through reconstitution of a charity (*Re Shakespeare Walk School*, L. Rep. 12 Ch. Div. 178); but costs have not always been allowed where new trustees have been appointed under a power in the settlement or by the court: (compare *Re Pryor*, W. N. 1876, p. 141; and *Re Metropolitan Company and Maire*, W. N. 1876, p. 245.)

Mortgagees of the inheritance ought to be served with the petition: (*Re Morris*, L. Rep. 20 Eq. 470.)

Re-investments—Generally.

Where the money is invested in any of the modes mentioned in the 69th section [see *sup.* III., 5 (a),] other than land, the Act does not provide that the company is to pay any costs other than those of the petition: (*Morg. & Ch. 51.*)

Land Tax.

Costs of redemption of land tax will be ordered to be paid (*Re Bethlem Hospital*, L. Rep. 19 Eq. 457; Dan. 1877); even where there is a second application: (*Re London, Brighton, and South Coast Railway Company*, 18 Beav. 608.)

Other Incumbrances.

In the majority of cases these costs have not been ordered to be paid by the company: (see cases *Morg. & Ch. 51*; and *Re Mark's Trusts*, W. N. 1877, p. 63.)

Re-investment in Land.

The costs of re-investment in land include those of enrolling a purchase deed (*Morg. & Ch. 51*); reference to conveyancing counsel of the court (*Id.*); petition for a vesting order under Trustee Act (*Re Lowry*, L. Rep. 15 Eq. 78); litigation through the new property being the subject of a suit: (*Carpmael v. Proffit*, 23 L. J. 165, Ch.)

But the costs do not include those of a vendor's appearance on the petition (*Re Dyer*, 1 Jur. N. S. 975); of another counsel (*Re Jones' Settled Estates*, 31 L. T. Rep. O. S. 291; 6 W. R. 762); of a fine on purchase of copyhold (*Ex parte Rector of Sawston*, 31 L. T. Rep. O. S. 129; 6 W. R. 492); of a certificate of completion of buildings: (*Ex parte Rector of Shipton-under-Wychwood*, 19 W. R. 549.)

The costs which the company may be liable to pay will not be increased where a larger sum is invested than has been deposited in court: (*Morg. & Ch. 55*; Dan. 1878; *Re Power's Settlement*, W. N. 1876, p. 205.)

The costs are payable, though re-investment is asked for by a person absolutely entitled (*Morg. & Ch. 51*); and where such a person has died, of re-investment in land to be settled to the uses of his will: (*Id.*)

As to the costs payable when the purchaser is, under the contract, to bear costs of purchase, see *Ex parte Governors of Christ's Hospital* (L. Rep. 20 Eq. 605).

Successive Re-investments in Land.

The costs of one application only for re-investment in land shall be allowed, unless it shall appear to the court . . . that it is for the benefit of the parties interested in the said moneys that the same should be invested in the purchase of lands in different sums and at different times, in which case it shall be lawful for the court, if it think fit, to order the costs of any such investments to be paid by the promoters of the undertaking: (L. C. C. A., 1845, s. 80.)

The costs of several and successive investments (sometimes as many as three) must be paid by the company, where not unreasonable or vexatious: (*Morg. & Ch. 52*; *Re Paddon's Trusts*, W. N. 1878, p. 65.)

Leave may be given to apply in chambers as to investments of the balance: (*Re Dunraven's Estates*, 10 W. R. 56; *Re Lapworth's Charity*, W. N. 1879, p. 37.)

Abortive Purchases.

The costs of *bonâ fide* negotiations for a purchase, when the court has approved, which cannot be completed, are payable by the company, but not when the court has not authorised the purchase: (*Morg. & Ch. 52*; Dan. 1880.)

Improvements.

Remaindermen should be served : (*Re Leigh*, L. Rep. 9 Ch. App. 684.)

Payment out.

Transfer to the credit of another account is payment out : (*Re Bristol School*, 47 L. J. 317, Ch.)

The costs of payment out are payable by the company; and include the costs of two or more petitions presented by the several parties interested, though when they appear by the same solicitor only one set of costs is allowed between them : (Morg. & Ch. 52.)

The costs of two petitions for payment out will not be allowed against the company where presented by the same petitioner claiming under different instruments : (Morg. & Ch. 52; and see *Re Patterson's Devised Estates*, L. Rep. 4 Ch. Div. 207.)

The additional costs incurred in consequence of the land taken being subject to an administration suit, or belonging to a lunatic, are payable by the company : (Morg. & Ch. 53; Dan. 1876, 1880.)

Where a disentailing deed is required, the company must pay the costs : (Morg. & Ch. 55; Dan. 1878.)

Where the settlement of the land directed advances to children, costs of payment out of a sum for that purpose were allowed against the company : (*Re Curwen's Settlement*, W. N. 1880, p. 83.)

As to what costs the company is liable to pay in respect of appearances on a petition to transfer to the credit of a cause, and other appearances, see cases cited Morg. & Ch. 53; and *Re Adams*, W. N. 1871, p. 159.

On a petition for payment out either to or with the consent of incumbrancers, the only costs which the company or local authority (as the case may be) can be required to pay, in addition to the petitioner's costs, are the sum of 42s. for the incumbrancers' costs, and a further sum sufficient to cover the costs of an affidavit of service of the petition upon the incumbrancers : (*Re Halstead United Charities*, L. Rep. 20 Eq. 48; *Re Artisans' and Labourers' Dwellings Improvement Act*, 1875, *Ex parte Jones*, L. Rep. 14 Ch. Div. 624; 43 L. T. Rep. N. S. 84; and see further as to incumbrancers, Morg. & Ch. 53; Dan. 1879.)

Remaindermen should not, generally, be served : (*Re Marner*, L. Rep. 3 Eq. 432.)

Service and Appearance.

The costs of appearance of all parties to the suit are payable by the company : (Morg. & Ch. 53; Dan. 1879.)

Parties may appear separately, and have their costs from the company, unless they do so vexatiously, and thereby increase the costs : (Morg. & Ch. 53; Dan. 1880.)

The company must pay the costs of trustees who have been properly served and appear, except on an application for interim investment, unless they represent the immediate freehold : (Morg. & Ch. 53, 54; Dan. 1879.)

In the case of petitions under sect. 74 [see *sup.*, VII.] remaindermen should be served, and their costs of appearance must be paid by the company : (*Re Crane's Estate*, L. Rep. 7 Eq. 322.)

The costs of appearance are allowed, of the ordinary (*Ex parte Vicar of Creech St. Michael*, 21 L. J. 677, Ch.); of the Attorney-General on a petition under Romilly's Act (*Re London, Brighton, and South Coast Railway Company*, 18 Beav. 608); of city freemen when corporation lands taken : (*Ex parte Lincoln Corporation*, 6 Rway. Cas. 738.)

In the case of Ecclesiastical Commissioners, their consent in writing is

sufficient, and the costs of their appearance will not be allowed: (Morg. & Ch. 54.)

The costs of appearance of the Governors of Queen Anne's Bounty are not allowed: (Dan. 1880.)

The vendor of the lands proposed to be bought should not be served with the petition, and, if served, the company will not be liable to pay his costs: (Dan. 1880.)

The husband of a married woman petitioner should be made a co-petitioner where he has no adverse interest. His costs of appearance as respondent are not allowed: (*Re Osborne's Estate*, W. N. 1878, p. 179.)

When the purchase money was for the convenience of the parties laid out in the purchase of lands in a special manner, under a private Act, the company was held not liable to pay the costs of trustees and remaindermen served according to the provisions of that Act: (Dan. 1880, citing *Re Bowes*, 10 Jur. N. S. 817.)

Several Petitions.

Although the money has been dealt with by two different branches of the court, and been paid in by different companies, the costs of two petitions will not be allowed against the company: (Morg. & Ch. 50.) But where the titles under the two petitions were different the company were ordered to pay the petitioner's costs of the first petition, and five guineas towards the costs of the second petition, and three guineas towards the costs of the trustees in each petition, any surplus costs of the respective trustees to be paid out of the respective funds: (*Re Pattison's Devised Estates*, L. Rep. 4 Ch. Div. 207.)

Litigation.

The words of section 80, "except such as are occasioned," &c., refer to costs, not proceedings: (Morg. & Ch. 55.)

The order is as follows: "Except such costs, if any, as are occasioned by litigation between adverse claimants:" (Seton, 1441.)

The company is not liable to bear the costs occasioned by actual litigation, or where, from adverse claims to the fund in court, there has been a *litis contestatio*, and the costs have been increased by the necessity of serving the persons so claiming, or of presenting a second petition; but if the rights of the parties have to be ascertained, as in the case of the construction of a doubtful devise, or in a pending administration suit, and no extra expense has been incurred in the contention, the costs of all parties are payable by the company: (Seton, 1447; and see Morg. & Ch. 55; Dan. 1881-2.)

According to Jessel, M.R., in the Court of Appeal, adverse litigation arises where different parties set up adverse titles to the estate; and, where the title is not in dispute, costs arising in the course of administering the purchase money ought to be paid by the company. In the same case Bacon, V.C. had held that where there was an application by a tenant for life of leaseholds for payment of income in a certain way, which was opposed by the remaindermen, there was adverse litigation; but the Court of Appeal were unable, in the absence of the company, to interfere with their part of the order: (*Askew v. Woodhead*, 41 L. T. Rep. N. S. 670; L. Rep. 14 Ch. Div. 27; 42 L. T. Rep. N. S. 567.)

XIII. TAXATION OF CONVEYANCING COSTS.

[See *sup.* XII., 2.]

LAND TAX REDEMPTION ACT.

I. REDEMPTION OF TAX.

1. CUTTING TIMBER.
2. SALE OF PART OF INCUMBERED ESTATE.
3. APPLYING SURPLUS STOCK.
4. SUSPENDING SALE OR MORTGAGE.
5. APPEALS FROM COMMISSIONERS.

II. DIFFICULTIES ON SETTLING REVERSIONS.

III. ENFRANCHISEMENT.

I. REDEMPTION OF TAX.

1. CUTTING TIMBER.

For the purpose of raising money to redeem the land tax charged on any manors, messuages, lands, tenements, or hereditaments, subject to any restriction in the power of the person or persons entitled beneficially to the rents and profits thereof, to cut down timber standing thereon, it shall be lawful for such person or persons, with the approbation of the [Chancery Division] to cut down such quantity of timber as the [court] shall, upon application made by petition in a summary way, direct, and to apply the produce thereof, and the surplus of such produce (if any) under the direction of such [court], in the same manner as [thereinafter] directed with respect to moneys produced by sale of estates for the redemption of land tax: (42 Geo. 3, c. 116, s. 67.)

When all the instalments to be transferred or paid upon the contract for the redemption [are] completed [the tax sinks] and [becomes] merged in the manors [&c.] whereon the same was charged, for the benefit of the person or persons for the time being beneficially entitled thereto, unless such [court] shall make any order or direction respecting the manner in which the income to be derived from the redemption of any such land tax . . . shall be applied, during so long time as the manors [&c.] on which such timber shall have been growing shall be in the possession of any person or persons having a limited interest . . . which order and direction such [court is] authorised and empowered to make, having regard to the state and condition of the timber, and to the rights of all persons interested in such manors, &c.: (*Id.*)

[The court may] order and direct that the costs and expenses incurred in the surveying, valuing, and felling such timber, or otherwise on account of the sale thereof, shall be paid and satisfied out of the purchase moneys for the same: (*Id.*; and see 16 & 17 Vict. c. 117.)

2. SALE OF PART OF INCUMBERED ESTATE.

Where any trusts, mortgages, charges, liens, or incumbrances . . . equally affect or [are] a charge upon divers manors, messuages, lands, tenements, or other hereditaments, part whereof [are] proposed to be sold for the purpose of redeeming the land tax chargeable on the manors, messuages [&c.] so equally subject and liable to such trusts, mortgages, liens, or incumbrances, the [Chancery Division may, if] satisfied that such of the said manors [&c.] as [are] not proposed to be sold for the purposes aforesaid [are] a sufficient security for the object of such trusts, or for the payment of such mortgages, liens, or other incumbrances . . . order and direct that such of the said manors, [&c.] as [are] sold shall be conveyed . . . freed and discharged from such trusts [&c.]: (*Id.*, s. 58.)

3. APPLYING SURPLUS STOCK.

Whenever . . . there shall be any surplus of stock transferred as the consideration for or purchased with the money arising by any sale, mort-

gage, or grant to be made by virtue thereof, after reserving so much of such stock as shall be agreed to be transferred as the consideration for the land tax redeemed, the said surplus stock shall be placed in the books of the Bank of England in the name and with the privy of the [Paymaster-General] to the intent that such surplus stock may at a convenient time be sold, and the money arising therefrom applied, under the direction and with the approbation of the [Chancery Division] (to be signified by an order made upon a petition to be preferred in a summary way), in the discharge of any debt or debts, or parts thereof, affecting the manors [&c.], the land tax charged whereon shall have been so redeemed, or where the same shall not be so applied, then the same shall be laid out and invested under the like direction and approbation, in the purchase of other manors [&c.], which shall be conveyed and settled to, for, and upon such and the like uses, trusts, intents, and purposes, and in the same manner, as the manors, messuages, lands, tenements, and hereditaments which shall be so sold, mortgaged, or charged as aforesaid, stood settled and limited, or such of them as, at the time of making such conveyance and settlement, shall be existing, undetermined, and capable of taking effect, and in the mean time the dividends and annual produce of such surplus stock shall from time to time go and belong to the person or persons who would for the time being have been entitled to the rents and profits of the said manors, &c., in case such last-mentioned purchase and settlement were made: (42 Geo. 3, c. 116, s. 100.)

4. SUSPENDING SALE OR MORTGAGE.

Persons interested in remainder, reversion, or expectancy, in any estate . . . of which any part shall be proposed to be . . . sold or mortgaged by virtue of [the] Act, or for [the guardians, committees, or trustees] of such person or persons, who shall be aggrieved by such intended sale or mortgage, or conceive themselves so to be, at any time before such estate shall have actually been conveyed by way of sale or mortgage [may] present a petition to the [Chancery Division], which court shall have power, in a summary way, to make such order respecting the suspension of or proceeding in such sale or mortgage, or for the sale or mortgage of any other part of the estate in question, as well as for the payment of any costs occasioned by such petition, as such court shall think fit: (42 Geo. 3, s. 97.)

5. APPEALS FROM COMMISSIONERS.

If any person or persons shall think himself, herself, or themselves aggrieved by any determination of the commissioners with relation to any right or benefit of preference in, or any right of redemption of any land tax to be sold by virtue of [the] Act, or with relation to the sale or mortgage of any messuage [&c.], or the grant of any rentcharge thereout, for any of the purposes of [the] Act, with relation to the redemption or purchase of any land tax . . . and the capital stock which would be requisite to be transferred for the redemption or purchase of any land tax respectively, about which any such dispute as aforesaid may arise, would in the whole exceed 500*l.* in . . . public annuities, the person or persons so thinking himself, herself, or themselves aggrieved as aforesaid, shall and may apply to the [Chancery Division] by petition to be preferred in a summary way, which [court] may thereupon grant such relief, and make such order therein as the said [court] shall deem meet: (s. 197.)

II. DIFFICULTIES ON SETTLING REVERSIONS.

Where the reversion of any manors [&c.] holden [under charitable and public bodies], or by virtue of any lease for one or more life or lives, or for

years absolute or determinable on the dropping of one or more life or lives, or by copy of court roll or customary tenure for life or lives [is] purchased under the powers of [the] Act, by or with the proper moneys of the person or persons for the time being beneficially entitled to the rents and profits thereof, the . . . commissioners [may] direct an application to be made to the [Chancery Division] in a summary way, for obtaining direction as to the mode of settling any such reversion, or the equity of redemption thereof, where the case shall appear to them to be attended with difficulty : (42 Geo. 3, c. 116, s. 85.)

III. ENFRANCHISEMENT.

Any person or persons not being respectively bodies politic or corporate, or companies, or feoffees, or trustees for charitable or other public purposes, and not holding under any grant from the Crown, or any Act of Parliament [under which an interest is reserved to the Crown], who are or shall be seised of or beneficially entitled to any manors in England, of which any copyhold or customary estates shall be holden, [may] with the approbation of the [Chancery Division] to be signified by order upon a petition to be preferred in a summary way, enfranchise any such copyhold or customary estates : (42 Geo. 3, c. 116, s. 60.)

LAND TRANSFER ACT, 1875.

I. INTERPRETATION.

II. ORIGINAL APPLICATIONS.

1. SANCTION TO REGISTER GOOD HOLDING TITLE.
2. SANCTION TO REGISTER NOTICE OF LEASE.
3. INHIBITIONS [see *post*, III., 5].
4. SETTLING ASIDE RESTRICTIONS ON TRANSFER.
5. ENFORCING ORDER FOR PRODUCTION OF DEEDS.
6. ENFORCING ORDER AS TO COSTS.
7. CASE FOR OPINION OF COURT.
8. ALTERING REGISTERED DESCRIPTION OF LAND.
9. MODIFYING AND DISCHARGING CONDITIONS.
10. RECTIFYING REGISTER.
11. APPOINTING NEXT FRIEND OF MARRIED WOMAN.
12. APPOINTING GUARDIAN OF INFANT OR LUNATIC.
13. ORDERING INSPECTION OF REGISTER, &c.
14. ORDERING APPEARANCE IN ACTION FOR SPECIFIC PERFORMANCE.

III. APPEALS FROM REGISTRAR.

1. ON OBJECTIONS TO TITLE.
2. FROM ORDER ON DEATH OF REGISTERED OWNER
3. FROM ORDER AS TO SOLE PROPRIETOR OR CO-PROPRIETOR WITH HUSBAND.
4. AS TO CAUTIONS.
5. FROM INHIBITIONS.
6. FROM ORDER AS TO PRODUCTION OF DEEDS.
7. FROM ORDER AS TO COSTS.
8. FROM ENTRY, OMISSION TO ENTER, &c. [see *sup.*, II., 10].

IV. APPEALS FROM COURT.

1. WHEN ORDER MADE.
2. WHERE OPINION GIVEN [see *sup.*, II., 7].

V. MODE OF APPLYING OR APPEALING.

1. TO WHAT COURT.
2. TIME FOR APPEALING.

3. SUMMONS.
4. SERVICE.
5. STATEMENT.
6. NOTICE OF APPEAL.

VI. TAXATION OF COSTS.

I. INTERPRETATION.

In [the] Act, unless there is something inconsistent in the context :—

“Person” includes a corporation and any body of persons unincorporate :
 “Register,” “court,” and “general rules,” mean such “register,”
 “court,” and “general rules,” as are in [the] Act . . . mentioned :
 “Prescribed” means prescribed by any general rules made in pursuance
 of [the] Act :

“The Court of Chancery,” and “the Court of Appeal in Chancery,”
 and “Her Majesty’s Superior Courts,” include any courts in which
 the powers of the court so referred to by name may be for the time
 vested : (Land Transfer Act, 1875 ; 38 & 39 Vict. c. 87, s. 4.)

In the rules and forms, unless there is something inconsistent in the
 context :—

“The court” shall mean “the Supreme Court of Judicature :” (Gen.
 R. 63.)

II. ORIGINAL APPLICATIONS.

1. SANCTION TO REGISTER GOOD HOLDING TITLE.

If the registrar, upon the examination of any title, is of opinion that
 the title is open to objection, but is nevertheless a title the holding under
 which will not be disturbed, he may approve of such title, or may require
 the applicant to apply to the court, upon a statement signed by the
 registrar, for its sanction to the registration : (s. 17.)

2. SANCTION TO REGISTER NOTICE OF LEASE.

In order to register notice of a lease or agreement for a lease, if the
 registered proprietor of the land does not concur in such registry, the
 applicant shall obtain an order of the court authorising the registration of
 notice of such lease or agreement, and shall deliver such order to the
 registrar, accompanied with the original lease or agreement or a copy
 thereof, and thereupon the registrar shall make a note in the register
 identifying the lease or agreement or copy so deposited, and the lease or
 copy so deposited shall be deemed to be the instrument of which notice is
 given ; but, if the registered proprietor concurs in such registry, notice
 may be entered in such manner as may be agreed upon : (s. 51.)

Every application to register notice of a lease or agreement under the
 50th and 51st sections of the Act shall contain a concise statement of the
 terms of the lease or agreement for a lease to be noticed. If the registered
 proprietor of the land does not concur, and a copy only of the original
 lease or agreement is deposited with the registrar with the order of the
 court authorising the registration of the notice, the lease or agreement
 shall be produced for comparison with the copy. If the registered
 proprietor concurs, he shall be a party to and sign the application, and
 his signature shall be attested by a solicitor and duly verified, and the
 application shall state the terms of the notice proposed to be entered,
 but such terms shall be subject to the approval of the registrar :
 (G. R. 28.)

The lease or agreement shall be left with the application, and shall be
 stamped to show that a notice of it has been entered upon the register :
 (G. R. 28.)

3. INHIBITIONS.

[See *post*, III., 5.]

4. SETTING ASIDE RESTRICTIONS ON TRANSFER.

Any . . . directions [entered by the registrar on the register as to restricting the transferring or charging of registered land is] subject to be set aside by the order of the court : (ss. 58, 59.)

As to the application to the registrar, see G. R. 18.

5. ENFORCING ORDER FOR PRODUCTION OF DEEDS.

If any person disobeys any order of the registrar [as to production of deeds] made in pursuance of sect. 71, the registrar may certify such disobedience to the court, and thereupon such person, subject to . . . appeal as [mentioned *post*, III., 6] may be punished by the court in the same manner in all respects as if the order made by the registrar were the order of the court : (s. 71.)

6. ENFORCING ORDER AS TO COSTS.

If any person disobeys any order of the registrar [as to costs] made in pursuance of sect. [73] the registrar may certify such disobedience to the court, and thereupon such person, subject to . . . appeal as [mentioned *post*, III., 7] may be punished by the court in the same manner in all respects as if the order made by the registrar were the order of the court : (s. 73.)

7. CASE FOR OPINION OF COURT.

Whenever, upon the examination of the title to any land the registrar entertains a doubt as to any matter of law or fact arising upon such title, he may, upon the application of any party interested in such land, refer a case for the opinion of any of Her Majesty's Superior Courts, with power for the court to direct an issue to be tried before any jury for the purpose of determining any fact; the registrar may also name the parties to such case and the manner in which the proceedings in relation thereto are to be brought before the court to which such case is referred : (s. 74.)

Where any infants, married women, idiots, lunatics, persons of unsound mind, persons absent beyond seas, or persons yet unborn, are interested in the land in respect of the title to which any question arises as aforesaid, any other persons interested in such land may apply to the court . . . for a direction that the opinion of the court to whom the case is referred under [the] Act shall be conclusively binding on such infants, married women, idiots, lunatics, persons of unsound mind, persons beyond the seas, or unborn persons : (s. 76.)

The court . . . shall hear the allegation of all parties appearing before it, and may disapprove altogether, or may approve, either with or without modification, of the direction of the registrar in respect to any case referred as to the title of land : (s. 77.)

The court . . . may also, if necessary, appoint a guardian or other person to appear on behalf of any infants, married women, idiots, lunatics, persons of unsound mind, persons absent beyond seas, or unborn persons, and if such court is satisfied that the interests of the persons labouring under disability, absent, or unborn, will be sufficiently represented in any case, it shall make an order declaring that all persons, with the exceptions (if any) named in the order, are to be conclusively bound, and thereupon all persons, with such exceptions (if any) as aforesaid, shall be conclusively bound by any decision of the court having cognisance of the case in which such persons are concerned : (s. 77.)

The opinion of any court to whom such case is referred by the registrar

shall be conclusive on all the parties to such case, unless the court, before whom such case is heard, permit an appeal to be had : (s. 75.)

8. ALTERING REGISTERED DESCRIPTION OF LAND.

No alteration shall be made in the registered description of land, except under the order of the court or by way of explanation; but this provision shall not be construed to extend to registered dealings with registered land in separate parcels by the registered description, although such land was originally registered as one estate : (s. 83, sub-s. 6.)

If the registered proprietor of any land is desirous that a revised description and map shall be substituted for the then registered description, the registrar shall, upon an order of the court being obtained under the 83rd section of the Act, cause a revised description and map to be substituted accordingly, and in that case such substituted description shall thenceforth be the registered description of the land, but without prejudice to the description existing at the time of substitution, so far as relates to estates previously registered : (G. R. 49.)

9. MODIFYING AND DISCHARGING CONDITIONS.

[When, on registration or transfer, any condition that such land or any specified portion thereof is not to be built on, or is to be or not to be used in a particular manner, or any other condition running with or capable of being legally annexed to land, is annexed] any such condition may be modified or discharged by order of the court, on proof to the satisfaction of the court that such modification will be beneficial to the persons principally interested in the enforcement of such condition : (s. 84.)

10. RECTIFYING REGISTER.

Subject to any estates or rights acquired by registration in pursuance of [the] Act, where any court of competent jurisdiction has decided that any person is entitled to any estate, right, or interest in or to any registered land or charge, and as a consequence of such decision such court is of opinion that a rectification of the register is required, such court may make an order directing the register to be rectified in such manner as it thinks just : (s. 95.)

Subject to any estates or rights acquired by registration, if any person is aggrieved by any entry made, or by the omission of any entry from the register under this Act, or if default is made, or unnecessary delay take place in making an entry in the register, any person aggrieved by such entry, omission, default, or delay may apply to the court in the prescribed manner for an order that the register may be rectified, and the court may either refuse such application with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register : (s. 96.)

The registrar shall obey the order of any competent court in relation to any registered land, on being served with such order or an official copy thereof : (s. 97.)

11. APPOINTING NEXT FRIEND OF MARRIED WOMAN.

Where a married woman entitled for her separate use, and not restrained from anticipation, is desirous of giving any consent, or becoming party to any proceeding under [the] Act, she shall be deemed to be an unmarried woman, but any other married woman [must] be examined in the prescribed manner, and it shall be ascertained that she is acting freely and voluntarily, and the court may, where it sees fit, appoint a person to act as the next friend of a married woman for the purpose of any proceeding under [the] Act, and may from time to time remove or change such next friend : (s. 87.)

12. APPOINTING GUARDIAN OF INFANT OR LUNATIC.

Where any person who (if not under disability) might have made any application, given any consent, done any act, or been party to any proceeding in relation to any land or charge under [the] Act, is an infant, idiot, or lunatic, the guardian or committee of the estate respectively of such person may make such applications, give such consents, do such acts, and be party to such proceedings as such person respectively, if free from disability, might have made, given, done, or been party to, and shall otherwise represent such person for the purposes of [the] Act; where there is no guardian or committee of the estate of any such person as aforesaid, being infant, idiot, or lunatic, or where any person is of unsound mind or incapable of managing his affairs, but has not been found lunatic under an inquisition, it shall be lawful for the court to appoint a guardian of such person for the purpose of any proceeding under [the] Act, and from time to time to change such guardian: (s. 88.)

13. ORDERING INSPECTION OF REGISTER, &C.

Subject [to the rules] any person registered as proprietor of any land or charge, and any person authorised by any such proprietor, or by an order of court . . . may inspect and make copies of and extracts from any register or document in the custody of the registrar relating to such land or charge: (s. 104.)

14. ORDERING APPEARANCE IN ACTION FOR SPECIFIC PERFORMANCE.

Where a suit is instituted for the specific performance of a contract relating to registered land, or a registered charge, the court having cognisance of such suit may by summons, or by such other mode as it deems expedient, cause all or any parties who have registered estates or rights in such land or charge, or have entered up notices, cautions, or inhibitions against the same, to appear in such suit, and show cause why such contract should not be specifically performed, and the court may direct that any order made by the court in such suit shall be binding on such parties or any of them: (s. 93.)

All costs incurred by any parties so appearing in a suit to enforce against a vendor specific performance of his contract to sell registered land, or a registered charge, shall be taxed as between solicitor and client, and, unless the court otherwise orders, be paid to the vendor: (s. 94.)

III. APPEALS FROM REGISTRAR.

1. ON OBJECTIONS TO TITLE.

The examination by the registrar of any title . . . shall be conducted in the prescribed manner, [and] due notice shall be given, where . . . prescribed, and sufficient opportunity afforded to any persons desirous of objecting, to come in and state their objections to the registrar; [who has] jurisdiction to hear and determine any such objections, subject to an appeal to the court: (s. 17.)

2. FROM ORDER ON DEATH OF REGISTERED OWNER.

[Where] on the death of the sole registered proprietor, or of the survivor of several joint registered proprietors of any freehold land, [any] person [is appointed by the registrar to be registered as proprietor] an appeal [lies] to the court . . . by any person aggrieved by [the] order: (s. 41.)

As to the application and evidence before the registrar, see G. R. 26.

3. FROM ORDER AS TO SOLE PROPRIETOR, OR CO-PROPRIETOR WITH HUSBAND.

Any person aggrieved by any order of the registrar, [made where] the

husband survives the wife [who is a female registered proprietor of freehold land, appointing any person] as co-proprietor with him if he is entitled as tenant by the curtesy, [or] as sole proprietor in place of himself and his deceased wife if he is not entitled as tenant by the curtesy [may appeal to the court] : (s. 44.)

As to the application and evidence before the registrar, see G. R. 26.

4. AS TO CAUTIONS.

Any person aggrieved by any act done by the registrar in relation to cautions may appeal to the court : (s. 56.)

5. FROM INHIBITIONS.

The court or, subject to an appeal to the court, the registrar, upon the application of any person interested in relation to any registered land or charge, may, after directing such inquiries (if any) to be made and notices to be given and hearing such persons as the court or registrar thinks expedient, issue an order or make an entry inhibiting for a time, or until the occurrence of an event to be named in such order or entry, or generally until further order or entry, any dealing with any registered land or registered charge : (s. 57.)

As to applications to the registrar under this section, see G. R. 17.

The court or registrar may make or refuse to make any such order or entry, and annex thereto any terms or conditions the court or registrar may think fit, and discharge such order or cancel such entry when granted with or without costs, and generally act in the premises in such manner as the justice of the case requires : (s. 57.)

Any person aggrieved by any act done by the registrar in pursuance of this section may appeal to the court : (s. 57.)

6. FROM ORDER AS TO PRODUCTION OF DEEDS.

Any person aggrieved by any order of the registrar [as to production of deeds] under sect. [71] may appeal to the court, which may annul or confirm the order of the registrar with or without modification : (s. 71.)

7. FROM ORDER AS TO COSTS.

Any party aggrieved by any order [as to costs made by] the registrar under this section may appeal to the court, which may annul or confirm the order of the registrar, with or without modification : (s. 73.)

8. FROM ENTRY, OMISSION TO ENTER, &c.

[See *sup.* II., 10.]

IV. APPEALS FROM COURT.

1. WHERE ORDER MADE.

Any person aggrieved by an order made under [the] Act by the court may appeal within the prescribed time, in the same manner and with the same incidents in and with which orders made by the [Chancery Division] on cases within the ordinary jurisdiction of such court may be appealed from : (38 & 39 Vict. c. 87, s. 117.)

As to the time for appealing, see *post*, V.

2. WHERE OPINION GIVEN.

[See *sup.* II., 7.]

V. MODE OF APPLYING OR APPEALING.

1. TO WHAT COURT.

The Court means the Chancery Division (see s. 114; G. R. 63), or any judge thereof sitting in court or at chambers : (s. 114.)

2. TIME FOR APPEALING.

No appeal shall be brought from a decision or order of the registrar, or of the court, after twenty-eight days from the date of such decision or order, without leave of the court: (G. R. 59.)

The time for appealing from . . . any order or decision made in . . . any matter not being an action shall be [twenty-one days]: (O. LVIII., rr. 9, 15.)

3. SUMMONS.

All applications to the court and appeals from the registrar shall be by summons: (G. R. 59.)

Every application to be made under these rules shall be signed by the applicant or his solicitor: (G. R. 38.)

All notices and summonses required to be given or served for any purpose shall be prepared by the applicant on the official forms and under the stamp of the office: (G. R. 53.)

4. SERVICE.

If the service of the notices or summonses be personal, it shall be proved by declaration; if the service be through the post, it shall be made by registered letter, and in such case open official envelopes, duly stamped and addressed, and marked outside "Office of Land Registry," and with the word "Registered," and containing the notice stamped, shall be left at the office for postage: (G. R. 53.)

Every notice required to be given shall, if sent through the post, unless returned, be deemed to have been received by the person addressed within seven days, exclusive of the day of posting. On the return of any letter containing any notice, the registrar shall act in the matter requiring such notice to be given in such manner as he shall think fit: (G. R. 53.)

Substituted service on the solicitor or agent of any person shall be deemed good service on such person if the registrar shall so direct: (G. R. 54.)

5. STATEMENT.

Upon any application to the court being made on the requirement of or appeal from the registrar, or for the rectification of the register, under the 96th section [see *sup.*, II., 10], a statement shall be prepared by the applicant and settled and signed by the registrar, and forwarded to the court through the office before the hearing: (G. R. 59.)

6. NOTICE OF APPEAL.

No appeal from a decision or order of the registrar, or of the court, shall affect any dealing for valuable consideration duly registered before a notice in writing of such appeal has been lodged in the office on the part of the appellant, and a note thereof made, on his application, in the register: (G. R. 59.)

VI. TAXATION OF COSTS.

All costs, charges, and expenses that are incurred by any parties in or about any proceeding for registration of land, shall, unless the parties otherwise agree, be taxed by the taxing officer of the court . . . as between solicitor and client: (s. 73.)

LAW AND EQUITY.

[See EQUITABLE RULES.]

LEASES.**I. SANCTION TO RENEWALS WHEN LESSOR OUT OF JURISDICTION.**

Where any person who, in pursuance of any covenant or agreement in writing, might if within the jurisdiction and amenable to the process of the court . . . be compelled to execute any lease by way of renewal shall not be within the jurisdiction or [so] amenable [the court may] upon the petition of any person or any of the persons entitled to such renewal (whether such person be or be not under any disability), direct such person as the said court shall think proper to appoint for that purpose to accept a surrender of the subsisting lease, and make and execute a new lease in the name of the person who ought to have renewed the same : (11 Geo. 4 & 1 Will. 4, c. 65, s. 18.)

Such deed executed by the person . . . appointed [is] as valid as if the person in whose name the same [is] made had executed the same, and had been alive, and not under disability : (s. 18.)

No renewed lease shall be executed by virtue of [the] Act, in pursuance of any covenant or agreement, unless the fine (if any) or such other sum or sums of money (if any) as ought to be paid on such renewal, and such things (if any) as ought to be performed in pursuance of such covenant or agreement by the lessee or tenant be first paid and performed : (s. 20.)

Counterparts of every renewed lease . . . shall be duly executed by the lessee : (s. 20.)

In every such case it shall be in the discretion of the court . . . if under the circumstances it shall seem requisite, to direct [an action to be instituted] to establish the right of the party seeking the renewal, and not to make the order for such new lease, unless by the [judgment] to be made in such cases, or until after such judgment shall have been made : (s. 18.)

All fines, premiums, and sums of money, which shall be had, received, or paid for or on account of the renewal of any lease, after a deduction of all necessary incidental charges and expenses, shall be paid . . . if such renewal shall be made in the name of any person out of the jurisdiction or not amenable as aforesaid, to such person, or in such manner, or into . . . court, to such account, and to be applied and disposed of as the said court shall direct : (s. 21.)

II. ON BEHALF OF PERSONS UNDER DISABILITY

[see INFANTS ; MARRIED WOMEN].

III. OF SETTLED ESTATES [see SETTLED ESTATES ACT].**IV. OF PROPERTY SUBJECT TO PROCEEDINGS**

[see PROPERTY].

LEAVE TO ATTEND PROCEEDINGS.

[See JUDGMENT, XVI.]

LEAVE TO DEFEND.

IN LAND ACTIONS.

[See APPEARANCE, IX.]

WHERE WRIT SPECIALLY INDORSED.

[See JUDGMENT, III.]

LEGACY DUTY ACT.

- I. PAYMENT IN.
- II. INVESTMENT.
- III. APPLICATION OF MONEY.
- IV. ORDER WHERE MONEY IMPROPERLY PAID IN.

I. PAYMENT IN.

Where by reason of the infancy, or absence beyond the seas, of any person entitled to any legacy, or to the residue of any personal estate, or any part thereof, chargeable with duty by virtue of [the] Act, the person or persons having or taking the burden of any will or testamentary instrument, or the administration of such personal estate, cannot pay such legacy or some part thereof, although he, she, or they may have effects for that purpose, or cannot pay such residue, or some part thereof, although he, she, or they may have the same, or some part thereof, in his, her, or their hands, it shall be lawful for such person or persons to pay such legacy, or residue, or any parts or part thereof respectively, or any sum or sums of money on account thereof, after deducting the duty chargeable thereon, into [court] to the account of the person or persons for whose benefit the same shall be so paid : (36 Geo. 3, c. 52, s. 32.)

Such payment into the bank shall be a sufficient discharge for the money so paid in, provided the duty be also paid thereon : (*Id.*)

When the money is in cash no order is necessary : (Dan. 1912.)

Where the money is in stock an order for payment in must be obtained on *ex parte* motion, *ex parte* petition, or *ex parte* original summons, of which summons a duplicate must be filed in the Central Office : (Dan. 1912 ; CHAMBERS.)

The motion paper, petition, or summons, and all the orders and affidavits are intituled in the Act, and of the infant or person beyond seas : (Dan. 1912.)

II. INVESTMENT.

The dividends accruing on [3*l.* per Cent. Consols purchased with moneys paid in under the Legacy Duty Acts] previously to the commencement of the Chancery Funds Rules, 1872, may, when or so soon as they amount to or exceed 10*l.*, be invested (with their accumulations), without any formal request, in the purchase of like stock in trust in the same matter and account to which the original sum of stock stands : (Ch. F. R., 1874, r. 65 ; C. O. 1, r. 11.)

A sum of money amounting to or exceeding 40*l.* paid into court after the commencement of [the] rules in pursuance of . . . 36 Geo. 3, c. 52, s. 82, will be invested (without an order) in Consolidated 3*l.* per Cent. Annuities : (Ch. F. R. 1874, r. 65.)

[The investment is made] upon a written request of the person paying it in, or of his solicitor, or upon a written request made by or on behalf of a person claiming to be entitled thereto or interested therein : (*Id.*)

The dividends accruing in respect [of a sum amounting to or exceeding 40*l.* paid into court after the rules under the Legacy Duty Act and invested in 3*l.* per Cent. Consols] when or so soon as they shall amount to or exceed 10*l.*, shall be from time to time invested in like annuities, if so requested either in the original request or in a subsequent request : (Ch. F. R. 1874, r. 65.)

If such money [has] been placed on deposit, before such request [is] left at the Chancery Pay Office, such money and interest to be credited in respect thereof, if amounting to 40*l.*, [will] upon a like request be withdrawn from deposit and invested : (*Id.*)

III. APPLICATION OF MONEY.

Such money [paid in] with the dividends thereon, shall be transferred and paid to the person or persons entitled thereto, or otherwise applied for his or their benefit, on application to the court . . . by petition or motion, in a summary way (36 Geo. 3, c. 52, s. 32); [or by summons] when the sums paid into the bank or the stock transferred . . . does not exceed 300*l.* cash or 300*l.* stock as the case may be: (C. O. 35, r. 1.)

When a fund of stock has been paid in under an order, or an order in the matter has been made since a fund of cash was paid in, the summons is an ordinary one (Dan. 1913; CHAMBERS, XIII.); otherwise the application is by original summons: (*Id.*)

The application must be supported by an affidavit of the applicant's identity, and if the fund was paid in on account of his infancy, it must be shown that he is of full age: (Dan. 46.)

An office copy of the Chancery Paymaster's certificate will be evidence of the payment or transfer in: (see Ch. F. R. 1874, r. 30.)

If the duty paid to the said commissioners shall appear to be less than the duty which ought to have been paid, it shall be lawful for the person or persons who paid such money into the bank as aforesaid, upon payment of the full duty to the said commissioners, in such manner as the same ought to be paid, with such penalties, if any, as ought to be paid in respect thereof, to apply to the court . . . in a summary way, for the repayment of the further sum paid to the said commissioners for such duty out of the money in the bank so paid in by such person or persons, or the produce thereof, which payment the said court is authorised to order: (36 Geo. 3, c. 52, s. 32.)

IV. ORDER WHEN MONEY IMPROPERLY PAID IN.

If it shall afterwards appear that such money, or any part thereof, has been improperly paid into the bank as aforesaid, it shall also be lawful for the . . . court . . . upon petition, in a summary way to dispose thereof, and of the annuities purchased therewith, and the dividends received thereon, in such manner as justice shall require: (36 Geo. 3, c. 52, s. 32.)

LETTERS PATENT.

[See JURISDICTION.]

LIBERTY TO APPLY.

[See JUDGMENT, XVII.]

LIEN.

All causes and matters for the purpose of the sale and distribution of the proceeds of property subject to any lien are assigned to the Chancery Division: (J. A. 1873, s. 34.)

As to delivering property subject to a lien, see GOODS, I., 3.

As to lien for costs, see SOLICITOR.

LIFE ASSURANCE COMPANY.

As to deposit of funds, amalgamation, and transfer, see COMPANIES, X.

As to winding-up, see WINDING-UP.

As to procedure in case of disputed assignment of policy or conflicting claims to money assured, see INTERPLEADER; TRUSTEES.

LIS PENDENS.

I. REGISTERING.

No *lis pendens* shall bind a purchaser or mortgagee without express notice thereof, unless and until a memorandum or minute containing the name and the usual or last-known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the court . . . and the title of the cause and the day when the [action was commenced] shall be left with the [proper] master [at the Central Office], who shall forthwith enter the same particulars in a book . . . in alphabetical order by the name of the person whose estate is intended to be affected by such *lis pendens*: (2 Vict. c. 11, s. 7.)

The memorandum or minute must be on parchment, and a separate memorandum is required for every defendant or other person in whose name the registry is proposed to be made. The plaintiff's solicitor, or other person leaving this memorandum with the master, is required to sign an admission of having left it, and to take a receipt for it: (Dan. 327.)

As to re-registering, see Dan. 328.

II. SATISFACTION OF.

The master may, upon the filing with him of an acknowledgment in the form or to the effect [in the Act] be at liberty to enter a satisfaction or discharge as to any registered *lis pendens*, and may issue certificates of the entry of any satisfaction or discharge: (23 & 24 Vict. c. 115, s. 2.)

III. VACATING.

The court before whom the property sought to be bound is in litigation may, upon the determination of the *lis pendens*, or during the pendency thereof, where the court shall be satisfied that the litigation is not prosecuted *bonâ fide*, make an order, if it shall see fit, for the vacating of the registration without the consent of the party who registered it, and may in the discretion of the court direct the party on whose behalf the registration was made to pay all the costs and expenses occasioned by the registration or the vacating thereof: (30 & 31 Vict. c. 47, s. 2.)

The application to the court pending the litigation may be in a summary way by petition or motion in court, or by summons at chambers: (30 & 31 Vict. c. 47, s. 2.)

The application is entitled in the matter of the Act and of the former suit: (*Clutton v. Lee*, 45 L. J. 684, Ch.; 24 W. R. 607.)

The motion may be made *ex parte* or on notice, but in the former case an order *nisi* only will be made: (*Pooley v. Bosanquet*, L. Rep. 7 Ch. Div. 541. 26 W. R. 587.)

If an order shall be made for vacating any such registration, the [master] shall, upon the filing with him of an office copy of such order, enter a discharge of such *lis pendens* on the register [and] may issue certificates of such entry: (30 & 31 Vict. c. 47, s. 2.)

LOCAL LOANS ACT.

I. ENFORCING PAYMENT OF LOAN.

If default is made in payment of any sum [for the time being due or authorised to be raised on or in respect of any security issued under the Act] such sum shall be deemed to be a specialty debt due to the person entitled thereto from the local authority, of such a nature that a *mandamus* will be granted to enforce the payment thereof, and an action may be brought accordingly, in which a *mandamus* may be claimed: (38 & 39 Vict. c. 83, s. 11.)

When default is made for twenty-one days in payment of a sum not less than 500*l.* an application may be made to a County Court for a receiver instead of or in addition to bringing an action: (s. 12.)

II. RECTIFICATION OF REGISTER.

If the name of any person is without sufficient cause entered in or omitted from the register, or if default is made or unnecessary delay takes place in making any entry in such register, the person aggrieved or the local authority may apply to the court for an order that the register may be rectified: (s. 25.)

The court may either refuse the application with or without costs to be paid by the applicant, or may, if satisfied of the justice of the case, whether there has or has not been any default on the part of the registrar, make an order for the rectification of the register, and make such order as to the payment of the costs of the application or of damages to the person aggrieved as to the court may seem just: (*Id.*)

The court may, in any proceeding under this section, decide any questions relating to the title of any party to such proceeding, to have his name entered in or omitted from the register, and generally any question which it may be necessary or expedient to decide for the rectification of the register: (*Id.*)

The court for the purposes of this section means [the Supreme Court of Judicature], and where the value of any security or securities to which the application relates does not exceed 50*l.* shall include a County Court, and the jurisdiction by [the] Act given to [the High Court] may be exercised in a summary manner by any judge or judges of such court sitting in chambers or otherwise: (s. 25.)

LORD MAYOR'S COURT.

[See MAYOR'S COURT.]

LORD ST. LEONARDS' ACT.

[See CONFIRMATION OF SALES, &C., II.; TRUSTEES.]

LUNATICS:

I. SO FOUND BY INQUISITION.

1. JURISDICTION [see JURISDICTION, VII.]
2. AS PARTIES [see PARTIES].
3. SERVICE OF WRIT ON [see WRIT OF SUMMONS].
4. APPEARANCE [see APPEARANCE, IV.]

It seems necessary, if the lunatic has no committee, that a person apply-

ing to be appointed guardian *ad litem* should first enter an appearance on behalf of the lunatic.

An appearance entered by the plaintiff on the lunatic's behalf is irregular: (C. O. 10, r. 5.)

5. ADMISSIONS IN PLEADING.

Allegations of fact in pleading, though not denied specifically or by necessary implication, or stated to be not admitted by a lunatic's pleading, are not thereby admitted as in ordinary cases: (see O. XIX., r. 17; PLEADING.)

II. NOT SO FOUND BY INQUISITION.

1. AS PARTIES [see PARTIES].

2. SERVICE OF WRIT ON [see WRIT OF SUMMONS].

3. APPEARANCE [see APPEARANCE, V.]

4. ADMISSIONS IN PLEADING.

Allegations of fact in pleadings, though not denied specifically, or by necessary implication, or stated to be not admitted by the pleading of a lunatic not so found, are not thereby admitted, as in ordinary cases: (O. XIX., r. 17; PLEADING.)

5. CARE OF PROPERTY, AND MAINTENANCE.

It is not by reason of, but notwithstanding, the incompetency, that the court entertains proceedings, and every proceeding, or step in a proceeding, after an inquisition in lunacy has been instituted, is irregular and void: (*Beall v. Smith*, L. Rep. 9 Ch. App. 85.)

But even where there is no proceeding in lunacy, the Chancery Division has no jurisdiction over the person of the lunatic: (*Re Bligh*, L. Rep. 12 Ch. Div. 364; 41 L. T. Rep. N. S. 570; 49 L. J. 56, Ch.; 27 W. R. 876; *Re Brandon's Trust*, L. Rep. 13 Ch. Div. 773; 41 L. T. Rep. N. S. 755; correcting *Vane v. Vane*, L. Rep. 2 Ch. Div. 522; 34 L. T. Rep. N. S. 613; 45 L. J. 381, Ch.; 24 W. R. 602.)

But the jurisdiction of the Chancery Division over its wards remains notwithstanding they become lunatic during their infancy, and may be exercised by entertaining applications as to their custody and education, although the question of lunacy is the principal point in dispute: (*Re Edwards*, L. Rep. 10 Ch. Div. 605; 40 L. T. Rep. N. S. 119; 48 L. J. 233, Ch.; 27 W. R. 611.)

The court may

- (1) Appoint a guardian of the estate of the lunatic;
- (2) Order the income of his property to be applied for his maintenance;
- (3) Order the corpus of his property to be applied in repaying part advances for maintenance: (Dan. 1214.)

Payments may be ordered out of a fund in court, in discharge of past outlay by private persons in maintaining a lunatic: (*Peters v. Grote*, 7 Sim. 238.)

Where a married woman was entitled under the trusts of a will to a fund in court, and her husband was of unsound mind, not so found by inquisition, the fund was ordered to be paid to her on her separate receipt, she undertaking to apply the same towards the maintenance of her husband and herself: (*Re Dixon's Trusts*, 40 L. T. Rep. N. S. 208.)

A somewhat similar order was made on the petition of the lunatic's uncle: (*Re Hoskins' Legacies*, W. N. 1880, p. 62.)

And see *Bligh v. O'Connell* (26 W. R. 311).

The application is by petition, or more usually by summons (*Id.*) of the lunatic by his next friend: (*Beall v. Smith*, L. Rep. 9 Ch. App. 91.)

The evidence is by affidavit, and as to the same particulars as in the

case of maintenance, &c., of infants [see INFANTS], and must also show the lunatic's state, his inability to manage his property, and that he has not been found lunatic by proceedings in lunacy: (*Id.*)

The claim in respect of the maintenance of a lunatic in an asylum is merely a debt of the lunatic, and the court has no jurisdiction, on the death of the lunatic, to interfere with the right of his legal personal representatives by ordering payment of the expenses of his maintenance out of a fund in court to which the lunatic had become entitled: (*Re Marmon's Trusts*, L. Rep. 8 Ch. Div. 256; 38 L. T. Rep. N. S. 797; 47 L. J. 312, Ch.; 26 W. R. 621.)

Under the Acts relating to pauper lunatics (as to which see Seton, 1517) the court will on petition direct payment of the income or capital of a fund in court to which the lunatic is entitled, to guardians, or overseers of the poor, to recoup payments for part maintenance, or to be applied in future maintenance: (Dan. 1215; Seton, 1516-8; *Re Coleman's Trusts*, W. N. 1866, p. 209.)

MAINTENANCE.

[See INFANTS; LUNATICS; MARRIED WOMEN.]

MANAGEMENT OF PROPERTY.

[See INFANTS; PROPERTY; TRUSTEES.]

MANDAMUS.

- I. JURISDICTION.
- II. WRIT OF SUMMONS.
- III. INTERLOCUTORY MANDAMUS.
- IV. PRÆCIPUE.
- V. WRIT OF MANDAMUS.
 1. FORM AND RETURN.
 2. HOW ENFORCED.

I. JURISDICTION.

A mandamus may be granted . . . by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made: (J. A. 1873, s. 25, sub-s. 8.)

A mandamus which can be granted by interlocutory order can, *à fortiori*, be granted at the trial: (*Beddow v. Beddow*, L. Rep. 9 Ch. Div. 89; 47 L. J. 588, Ch.; 26 W. R. 570.)

As to the meaning of "just or convenient," see INJUNCTION, II.

The Chancery Division can only grant a mandamus directing the performance of some act, or something to be done, which is the result of an action where an action lies. It cannot grant a prerogative writ of mandamus: (*Glossop v. Heston Local Board*, L. Rep. 12 Ch. Div. 102; 40 L. T. Rep. N. S. 13; and see Selw. N. P. 13th ed., 1016.)

Where a cause or matter is pending, the Chancery Division has jurisdiction to issue the writ in every other case: (*Re Paris Skating Rink*

Company, L. Rep. 6 Ch. Div. 731; 46 L. J. 831, Ch.; 25 W. R. 767; and see J. A. 1873, s. 16, cited JURISDICTION, IV.)

Any writ may be issued which might have been issued by a Common Law Court (*Id.*)

The plaintiff in any action except replevin and ejectment might indorse on his writ a notice that the plaintiff intended to claim a writ of mandamus, and might thereupon claim in his declaration, either together with any other demand which might be enforced in an action, or separately, a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff was personally interested: (C. L. P. A. 1854, s. 68.)

The plaintiff had also to show by his pleading sufficient grounds upon which such claim was founded, and set forth that the plaintiff was personally interested therein, and that he sustained or might sustain damage by the non-performance of such duty, and that performance thereof had been demanded by him, and refused or neglected: (*Id.*, s. 60.)

The duty must have been one of a public or *quasi* public nature; the writ would not lie to compel performance of a merely personal contract; and the courts used their discretion as to granting the writ, though the plaintiff had a good cause of action in respect of the breach of duty: (Day, 3rd edit., 270-1.)

It was not necessary to show that actual damage had been sustained: (*Fotherby v. Metropolitan Railway Company*, L. Rep. 2 C. P. 188.)

The writ lay to compel a railway company to issue a warrant to the sheriff to summon a jury to assess the value of land which they had given notice that they would require for the purposes of their Act: (*Id.*)

As to issuing a mandamus against the treasury: (see *Re Edmunds*, 20 W. R. 206; see also C. L. P. A. 1854, ss. 70-74.)

The jurisdiction conferred of granting a mandamus is a reason for granting an injunction instead, which is at least as short and cheap a process: (see *Hedley v. Bates*, L. Rep. 13 Ch. Div. 498; 42 L. T. Rep. N. S. 41; 49 L. J. 170, Ch.; 28 W. R. 365.)

II. WRIT OF SUMMONS.

The writ must be indorsed with a claim as follows:—"And for a mandamus": (App. A. p. 2, s. 5, Rules of 1875; and see INJUNCTION, III.)

III. INTERLOCUTORY MANDAMUS.

An application for an order under sect. 25, sub-s. 8, of the Act . . . may be made to the court or a judge by any party. If the application be by the plaintiff for an order under the said sub-s. 8, it may be made either *ex parte* or with notice, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application: (O. LII., r. 4; and see *sup.*, I; INJUNCTION, IV.; INTERLOCUTORY PROCEEDINGS.)

IV. PRÆCIPE.

A form of præcipe for the writ is given in Sched. E. 14 to the Rules of April, 1880.

V. WRIT OF MANDAMUS.

1. FORM AND RETURN.

The writ . . . shall simply command the performance of the duty, and in other respects shall be in the form of an ordinary writ of execution, except that it shall be directed to the party and not to the sheriff, and may

be issued in term or vacation, and returnable forthwith; and no return thereto, except that of compliance, shall be allowed, but time to return it may, upon sufficient grounds, be allowed by the court or a judge, either with or without terms: (C. L. P. A. 1854, s. 72.)

2. HOW ENFORCED.

The writ of *mandamus* so issued as aforesaid . . . in case of disobedience, may be enforced by attachment: (C. L. P. A. 1854, s. 73; and see EXECUTION XII., 5.)

MARRIAGE.

OF PARTIES [see PARTIES.]

OF GUARDIAN [see INFANTS, II., 5.]

OF INFANTS, [see INFANTS, II.; V.]

SETTLEMENTS [see INFANTS, II.; VI., 7.]

MARRIED WOMEN.

I. THEIR POSITION IN AN ACTION.

1. AS PARTIES [see PARTIES.]
2. CLAIMS AGAINST [see WRIT OF SUMMONS.]
3. SERVICE OF WRIT ON [see WRIT OF SUMMONS.]
4. APPEARANCE BY [see APPEARANCE.]
5. NOTICE OF JUDGMENT.
6. ORDERS ON FURTHER CONSIDERATION [see EVIDENCE, III., 3.]
7. HOW SEPARATE ESTATE REACHED [see PARTIES.]

II. SEPARATE EXAMINATION.

1. WHERE NECESSARY.
 - (a) *Purchase Money of Realty in Court.*
 - (b) *Equity to Settlement.*
 - (c) *Under Settled Estates Act* [see SETTLED ESTATES ACT.]
 - (d) *Under Lands Clauses Act* [see LANDS CLAUSES ACT.]
2. HOW TAKEN.
 - (a) *Within Jurisdiction.*
 - (1) Before Judge.
 - (2) Before Commissioners.
 - (b) *Out of Jurisdiction.*
3. ASCERTAINING AMOUNT TO BE DEALT WITH.

III. APPLICATIONS UNDER MARRIED WOMEN'S PROPERTY ACT.

1. IMPROPER DEPOSITS, ANNUITIES, AND INVESTMENTS.
2. QUESTIONS BETWEEN HUSBAND AND WIFE.
3. APPOINTING TRUSTEE OF POLICY MONEY.

IV. SANCTION TO RENEW LEASES.

1. BY LESSEES.
2. BY LESSORS.

I. THEIR POSITION IN AN ACTION.

1. AS PARTIES.
[See PARTIES.]
2. CLAIMS AGAINST.
[See WRIT OF SUMMONS.]
3. SERVICE OF WRIT ON.
[See WRIT OF SUMMONS.]

4. APPEARANCE BY.
[See APPEARANCE.]

5. NOTICE OF JUDGMENT.

The notice must be served personally on both husband and wife, although the suit does not relate to the wife's separate estate, and they are residing together : (Dan. 359.)

6. ORDERS ON FURTHER CONSIDERATION.
[See EVIDENCE, III., 3.]

7. HOW SEPARATE ESTATE REACHED.
[See PARTIES.]

II. SEPARATE EXAMINATION.

1. WHERE NECESSARY.

(a) *Purchase Money of Real Estate.*

Generally a married woman's interest in real estate to which she is not entitled for her separate use can only be validly passed by a deed acknowledged under the Fines and Recoveries Act : (Seton, 669; *Franks v. Bollam*, L. Rep. 3 Ch. App. 717; 18 L. T. Rep. N. S. 623; 37 L. J. 664, Ch.; 16 W. R. 1158.)

An examination by the court or commissioners is necessary when an application is made to deal with the purchase money of real estate, whether an estate in fee simple, fee tail, or for life, belonging to a married woman, and prevents the necessity of having a deed acknowledged : (*Re Worthington*, Seton, 668; *Re Hayes*, 9 W. R. 769; Shelford R. P. Stat. 370; Dan. 94; *Standerling v. Hall*, L. Rep. 11 Ch. Div. 652; 27 W. R. 749.)

In some cases where the amount was small, both examination and deed acknowledged have been dispensed with (*Re Clarke's Estate*, 11 L. T. Rep. N. S. 663; 13 W. R. 401; *Knapping v. Tomlinson*, 18 W. R. 684); but Bacon, V.C., recently refused to dispense with examination where the amount was under 200*l.* : (*Topham v. Burgoyne*, 41 L. T. Rep. N. S. 670; 49 L. J. 213, Ch.)

(b) *Equity to a Settlement.*

An examination is necessary where the court makes a decree or order directing payment, transfer, or application of property in respect of which a married woman has an equity to a settlement : (Dan. 87.)

The examination will not be made or ordered unless the married woman is of full age (Dan. 91); or where she is a ward married without sanction : (Wms. Pet. 22.)

Sums below 200*l.* or 10*l.* a year, or a sum likely to be reduced below that amount by costs, will be paid out without examination (Dan. 92; Seton, 668); and the examination was dispensed with where the amount was under 50*l.* a year : (Seton, 668.)

With the husband's consent, sums under 500*l.* may be paid to the wife on her separate receipt, without examination : (*Re Morton's Estate*, 31 L. T. Rep. N. S. 82; W. N. 1874, p. 181; *Re Webb*, *Re Shelton*, Seton, 668.)

Where there are special circumstances examination will be ordered : (*White v. Herrick*, L. Rep. 4 Ch. App. 345; 20 L. T. Rep. N. S. 386; 38 L. J. 679, Ch.; 17 W. R. 522.)

(c) *Under Settled Estates Act.*
[See SETTLED ESTATES ACT.]

(d) *Under Lands Clauses Act.*
[See LANDS CLAUSES ACT.]

2. HOW TAKEN.

(a) *Within Jurisdiction.*

(1) Before Judge.

When the married woman is in London, or willing to attend, the judge examines her apart from her husband, at the time of pronouncing the judgment or order disposing of the fund, to ascertain whether she waives her right, and a note of the examination is made by the registrar and embodied in the judgment or order: (Dan. 87.)

If the application for payment out is by summons, the examination may be taken before the judge at chambers: (Dan. 88-9; Seton, 661.)

(2) Before Commissioners.

When a married woman is unable or unwilling to attend before the court, an order is made appointing commissioners for the purpose of taking her examination: (Dan. 86, 87.)

Sometimes, to save expense, the court, on making the order, dealing with a fund, orders the fund to be carried over to the wife's separate account, and at the same time appoints commissioners: (Dan. 88.)

Sometimes the court suspends the drawing up of the judgment or order to allow an examination to be made, in which case the order appointing the commissioners is obtained on *ex parte* summons, the result of the examination being embodied in the order made when the matter is again mentioned to the court: (Dan. 88.)

Where a fund has been carried over to a married woman's separate account, a summons is taken out, after the petition to deal with it has been answered, or a summons for the like purpose has been adjourned for an order to appoint commissioners, and the examination is taken before the petition is heard, or the summons is again brought on: (Dan. 88.)

Three or four professional persons (who must not be concerned for the husband in the particular matter), are usually appointed commissioners, two of whom may act without the rest: (Dan. 89.)

The examination of the married woman, which is taken apart from the husband, is as to when, in what manner, and for what purpose she is willing and desirous that the fund should be disposed of, the commissioners reading and explaining to her the order for examination, the examination being taken in writing, and signed by her, and the certificate being signed by the commissioners: (Dan. 89.)

The examination, certificate, and affidavit verifying all the signatures, must be filed in the Central Office: (Dan. 89.)

(2) Out of the Jurisdiction.

When the married woman is abroad the court orders commissioners abroad to be appointed: (Dan. 89; Seton, 662.)

3. ASCERTAINING AMOUNT TO BE DEALT WITH.

The rule requiring a married woman to be perfectly acquainted with the amount of interest to be parted with is imperative (per Wood, V.C., *Moss v. Dunlop*, 8 W. R. 39; and the examination will not generally be taken or ordered until the amount of the fund is clearly ascertained, *Sperling v. Rochfort*, 8 Ves. 164; *Woollands v. Crowther*, 12 Ves. 174; Dan. 91; Seton, 668); except where it is subject only to a deduction for costs: (Dan. 91.)

Consent may be taken as to the parts ascertained from time to time: (*Powell v. Merrett*, Seton, 668.)

III. APPLICATIONS UNDER MARRIED WOMEN'S PROPERTY ACT.

1. IMPROPER DEPOSITS, ANNUITIES, AND INVESTMENT.

Where any deposit or annuity under sect. 2, or any investment in the

funds, or joint-stock company, or a society under sects. 3-5 is made by a married woman by means of moneys of her husband, without his consent, the court may, on summons or motion in a summary way, as under sect. 9 of the Act [see *post*], order payment or transfer to the husband: (33 & 34 Vict. c. 93, ss. 2-5.)

2. QUESTIONS BETWEEN HUSBAND AND WIFE.

In any question between husband and wife as to property declared by [the] Act to be the separate property of the wife, either party may apply by summons or motion in a summary way either to the [Chancery Division] or (irrespective of the value of the property) the judge of the County Court of the district in which either party resides, and thereupon the judge may make such order, direct such inquiry, and award such costs as he shall think fit.

The judge may, if either party so require, hear the application in his private room (s. 9).

Any order made by such judge shall be subject to appeal in the same manner as the order of the same judge made in a pending suit or on an equitable plaint would have been.

3. APPOINTING TRUSTEE OF POLICY MONEY.

When a policy of insurance is effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, when the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the [Chancery Division] or by the judge of the County Court of the district, and the receipt of such trustee shall be a good discharge to the office (s. 10).

The application is by petition: (*Re Mellor's Policy*, L. Rep. 6 Ch. Div. 127; 47 L. J. 246, Ch.; 26 W. R. 70.)

On the hearing of the petition the court will declare the rights and interests of the children in the fund: (*Id.*, and see L. Rep. 7 Ch. Div. 200; 47 L. J. 247, Ch.; 26 W. R. 309.)

As to what policies are within the Act, see *Holt v. Everall* (L. Rep. 2 Ch. Div. 266; 34 L. T. Rep. N. S. 599; 45 L. J. 433, Ch.; 24 W. R. 471.)

IV. SANCTION TO RENEW LEASES.

1. BY LESSEES.

Where a *feme covert* is or shall become entitled to any lease or leases made or granted, or to be made or granted, for the life or lives of one or more person or persons, or for any term of years, either absolute or determinable upon the death of one or more person or persons, or otherwise, it shall be lawful . . . for such *feme covert*, or any person on her behalf, to apply to the court . . . by petition or motion in a summary way, and by the order and direction of the court . . . such *feme covert* or any person appointed in the place of such *feme covert*, shall and may be enabled from time to time, by deed or deeds, to surrender such lease or leases, and accept and take, in the place and for the benefit of such *feme covert*, one or more new lease or leases of the premises comprised in such lease surrendered for and during such number of lives, or for such term or terms of years determinable upon such number of lives, or for such term or terms of years absolute, as was or were mentioned or contained in the lease or leases so surrendered at the making thereof respectively or otherwise as the court directs: (11 Geo. 4 & 1 Will. 4, c. 65, s. 12.)

Unless the time or consideration of such lease and the reasonable charges shall be otherwise paid or secured, the same, together with interest, shall

be a charge upon such leasehold premises, for the benefit of the person who shall advance the same : (11 Geo. 4 & 1 Will. 4, c. 65, s. 14.)

Every lease to be renewed as aforesaid shall operate, and be to the same uses, and be liable to the same trusts, charges, incumbrances, dispositions, devises, and conditions, as the lease to be from time to time surrendered as aforesaid was or would have been subject to in case such surrender had not been made : (11 Geo. 4 & 1 Will. 4, c. 65, s. 15.)

As to payment of fines and execution of counterparts, see *post*, 2.

2. BY LESSORS.

Where any . . . *feme covert*, might, in pursuance of any covenant or agreement, if not under disability be compelled to renew any lease made or to be made for the life or lives of one or more person or persons, or for any term or number of years absolute or determinable on the death of one or more person or persons [she may] by the direction of the court . . . signified by an order to be made in a summary way upon [her] petition or [that] of any person entitled to such renewal from time to time . . . accept of a surrender of such lease, and . . . make and execute a new lease of the premises comprised in such lease, for and during such number of lives, or for such term or terms determinable upon such number of lives, or for such term or terms of years absolute, as was or were mentioned in the lease so surrendered at the making thereof. or otherwise, as the court by such order shall direct : (11 Geo. 4 & 1 Will. 4, c. 65, s. 16.)

No renewed lease shall be executed by virtue of [the] Act, in pursuance of any covenant or agreement, unless the fine (if any), or such other sum or sums of money (if any), as ought to be paid on such renewal, and such things (if any) as ought to be performed in pursuance of such covenant or agreement by the lessee or tenant, be first paid and performed, and counterparts of every renewed lease to be executed by virtue of [the] Act shall be duly executed by the lessee : (11 Geo. 4 & 1 Will. 4, c. 65, s. 20.)

All fines, premiums, and sums of money, which shall be had, received, or paid for or on account of the renewal of any lease, after a deduction of all necessary incidental charges and expenses, shall be paid . . . if such renewal shall be made by a *feme covert*, to such person or in such manner as the court shall direct for her benefit : (11 Geo. 4 & 1 Will. 4, c. 65, s. 21.)

MASTER.

[See CENTRAL OFFICE.]

MAYOR'S COURT.

- I. ENFORCING EXECUTION IN HIGH COURT.
 - II. REMOVAL OF CAUSE.
 - III. PROHIBITION TO.
 - IV. APPEALS FROM [see PART II.]
-

I. ENFORCING EXECUTION IN HIGH COURT.

In every case where final judgment shall have been obtained in the Mayor's Court, and also in every case where any rule or order shall have been made by the court, whereby any sum of money, or any costs, charges, or expenses shall be payable to any person, any writ of execution upon such judgment, or any rule or order so made by the court, shall be

sealed by the sealer of writs of any Division of the [High Court of Justice] upon a præcipe of the same being lodged with him, together with an affidavit verifying the judgment or order, and that the same remains unreversed and unsatisfied, and immediately thereupon such writ of execution and such judgment, rule, or order shall become and be of the same force, charge, and effect as a writ of execution or judgment recovered in or a rule or order made by [the High] Court, and all the reasonable costs and charges attendant upon such sealing shall be recovered in like manner as if the same were part of such judgment, or rule or order: (20 & 21 Vict. c. clvii. s. 48.)

II. REMOVAL OF CAUSE.

No cause [is] removable from the court otherwise than by a writ of *certiorari* or on the order of a judge [of the High Court of Justice]: (20 & 21 Vict. c. clvii. s. 52; and see CERTIORARI.)

No foreign attachment shall be removed from the Mayor's Court at any time after the same shall be set down for trial except by the express order of one of the judges of the [High Court], and then upon such terms as to costs, bail, or payment of money into court as such judge, on summons, shall think fit, provided that a summons only, without any order of the judge thereon, shall not stay the trial of the attachment in the Mayor's Court: (*Id.*, s. 18.)

No cause depending in the [Mayor's] court shall, before judgment be recovered, be removable into [the High Court] (after plea pleaded), unless by leave of a judge of [the High Court] in cases which shall appear to such judge fit to be tried in [the High Court], and upon such terms, if any, as to payment of costs, giving security for debts and costs, or damages, or such other terms as he shall think fit, upon summons: (*Id.*, s. 19.)

No suit commenced on the equity side of the Mayor's Court shall be removed from out of the said court into [the Chancery Division] without the special order of [a judge of the Chancery Division] upon application for that purpose made, and no cause shall be so removed from out of the said equity side of the Mayor's Court if the judge to whom such application shall be made shall consider that the matter in question in the said suit is fit to be tried in the Mayor's Court: (*Id.*, s. 20.)

It is more convenient, instead of moving *ex parte* for a writ of *certiorari*, to move at once, on notice, for an order for the removal of the cause, and to ask besides that after removal the cause shall be prosecuted and the judgment therein carried into effect in the Chancery Division, as if the same had been originally made by the Chancery Division: (Seton, 330, 327.)

III. PROHIBITION TO.

The Mayor's Court is a local court of limited jurisdiction, and subject, as such, to the controlling jurisdiction of the High Court of Justice: (Candy, 6.)

As to when a prohibition may be granted, see *Hawes v. Paveley*, L. Rep. 1 C. P. Div. 418; 34 L. T. Rep. N. S. 836; 46 L. J. 18, C. P.; 24 W. R. 895; Candy, 10-25.)

The Mayor's Court has jurisdiction to entertain a counter-claim, though in respect of matter arising beyond its local jurisdiction, but its power to give relief is limited to the amount claimed by the plaintiff: (*Davis v. Flagstaff Silver Mining Company of Utah*, L. Rep. 3 C. P. Div. 228; 38 L. T. Rep. N. S. 769; 47 L. J. 503, C. P.; 26 W. R. 431.) [And see PROHIBITION.]

IV. APPEALS FROM.

[See PART II.]

MEMBER OF PARLIAMENT.

[See ARREST, III.]

MERCHANT SHIPPING ACTS.

- I. SALE OF SHARE OF UNQUALIFIED OWNER.
- II. PROHIBITING TRANSFER.
- III. LIMITING OWNER'S LIABILITY.

I. SALE OF SHARE OF UNQUALIFIED OWNER.

Whenever any property in a ship or share in a ship becomes vested by transmission on the death of any owner or on the marriage of any female owner in any person not qualified to be the owner of British ships, it shall be lawful, if such ship is registered in England for the [Chancery Division] upon an application made by or on behalf of such unqualified person, to order a sale to be made of the property so transmitted, and to direct the proceeds of such sale, after deducting the expenses thereof, to be paid to the person entitled under such transmission, or otherwise as the court may direct: (17 & 18 Vict. c. 104, s. 62.)

Every such application . . . for sale shall be made within four weeks after the occurrence of the event on which such transmission has taken place, or within such further time as such court as aforesaid may allow, such time not in any case to exceed the space of one year from the date of such occurrence as aforesaid; and in the event of no such application being made within such period as aforesaid, or of such court refusing to accede thereto, the ship or share so transmitted shall thereupon be forfeited in manner [by the Act] directed with respect to interests acquired by unqualified owners in ships using a British flag and assuming the British character: (*Id.*, s. 64.)

It shall be in the discretion of . . . such court . . . to make or refuse any such order for sale, and to annex thereto any terms or conditions, and to require any evidence in support of such application it may think fit, and generally to act in the premises in such manner as the justice of the case requires: (s. 62.)

Every order for a sale . . . shall contain a declaration vesting the right to transfer the ship or share so to be sold in some person or persons named by the court, and such nominee or nominees shall thereupon be entitled to transfer such ship or share in the same manner, and to the same extent, as if he or they were the registered owner or owners of the same; and every registrar shall obey the requisition of such nominee or nominees as aforesaid in respect of any transfer to the same extent as he would be compellable to obey the requisition of any registered owner or owners of such ship or share: (s. 63.)

II. PROHIBITING TRANSFER.

It shall be lawful for . . . the [Chancery Division] without prejudice to the exercise of any other power such court may possess, upon the summary application of any interested person made either by petition or

otherwise, and either *ex parte*, or upon service of notice on any other person, as the court may direct, to issue an order prohibiting for a time to be named in such order any dealing with such ship or share; and it shall be in the discretion of such court to make or refuse any such order, and to annex thereto any terms or conditions it may think fit, and to discharge such order when granted with or without costs, and generally to act in the premises in such manner as the justice of the case requires; and every registrar, without being made a party to the proceedings, upon being served with such order, or an official copy thereof, shall obey the same: (s. 65.)

The Probate Division has concurrent jurisdiction: (*Nicholas v. Dracachis*, L. Rep. 1 P. Div. 72.)

III. LIMITING OWNER'S LIABILITY.

In cases where any liability has been or is alleged to have been incurred by any owner in respect of loss of life, personal injury or loss of or damage to ships, boats or goods, and several claims are made or apprehended in respect of such liability, then subject to the right [of] the Board of Trade, &c., to recover damages in the United Kingdom in respect of loss of life or personal injury, it shall be lawful . . . for the [Chancery Division] to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability subject as aforesaid, and for the distribution of such amount rateably amongst the several claimants: (s. 514; Seton, 281.)

Any proceeding entertained by such court may be conducted in such manner and subject to such regulations as to making any persons interested parties to the same, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs as the court thinks just: (s. 514.)

The plaintiff must pay into court the amount for which he is liable, with interest from the date of the event which has occasioned the liability: (Dan. 1941.)

For the form of order, see Seton, 277-8.

The court cannot grant an injunction to restrain actions in other divisions (see INJUNCTION, I.); but, as under the section the court was enabled to restrain such actions, there is good ground for applying to the divisions in which the other actions are pending for an order to stay them: (see J. A. 1873, s. 24, sub-s. 5; STAYING PROCEEDINGS.) Either the action in the Chancery Division, or any action pending against the owner, may be transferred so as to enable all the claims to be dealt with together (see TRANSFER.)

MESNE PROFITS.

[See RECOVERY OF LAND.]

METROPOLITAN BOARD OF WORKS LOANS.

Any person or body corporate entitled to any consolidated stock or to any security granted by the [Metropolitan Board of Works], may, if default be made, for a period of not less than two months after demand in writing, in the payment of dividend on such stock or of interest on any such security, apply to the [Chancery Division] in a summary way for the appointment of a receiver, and the [Chancery Division] may, if the

court think fit, on such application, appoint a receiver on such terms and conditions, and with such powers as the court thinks fit: (32 & 33 Vict. c. 102, s. 40.)

Such person shall have the same power of collecting and receiving and applying all moneys liable to be carried under [the] Act to the consolidated loans fund, and of assessing and raising the metropolitan consolidated rate for the purpose of obtaining such moneys as the board or any officer thereof may have, and shall apply all such moneys, after payment of expenses and costs, under the direction of the court, for the purposes of and in conformity with the Act: (*Id.*)

The court may at any time discharge such receiver, and shall have full jurisdiction over such receiver, and the applicant and all persons and bodies interested in the acts of the receiver, in the same manner and to the same extent as if a suit had been duly instituted for the administration of the affairs of the board and a receiver had been appointed in such suit: (*Id.*)

The borrowing powers have been extended by 41 & 42 Vict. c. 37, and the statutes there referred to.

MILITARY FORCES LOCALIZATION.

With a view to the purchase of lands for the purposes of the Act, the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, referred to as "The Lands Clauses Consolidation Acts," are incorporated with certain exceptions, the present Act being deemed "the special Act," and the Secretary of State for War "the promoters of the undertaking:" (35 & 36 Vict. c. 68, s. 3.)

The bond required by sect. 85 of the Lands Clauses Consolidation Act, 1845, shall be under the seal of the Secretary of State, and shall be sufficient without the addition of the sureties: (*Id.*)

"Lands" shall include any easement in lands: (*Id.*)

When compensation has been paid to any person in respect of any estate or interest in lands taken under the Act, such land shall vest in the Secretary of State for War, for all the estate and interest of such person, including any estate or interest therein held in trust by such person capable of being conveyed by him in pursuance of any power. Nevertheless, the said Secretary of State may require such person to execute any conveyance which he might have been required to execute if the Act had not been passed, and nothing in this section contained shall in any manner invalidate such conveyance when executed: (*Id.*)

MINERALS.

[See CONFIRMATION OF SALES; INFANTS, VI., 6; SETTLED ESTATES ACT.]

MONEY.

[See JUDGMENT; PAYMENT INTO AND OUT OF COURT; WRIT OF SUMMONS.]

MORTGAGE.

A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person: (J. A. 1873, s. 25, sub-s. 5.)

The section only applies when the mortgagor could not formerly either in his own name or in conjunction with the mortgagee, have brought an action: (*Fairclough v. Marshall*, L. Rep. 4 Ex. Div. 37; 39 L. T. Rep. N. S. 389; 48 L. J. 146, Ex.; 27 W. R. 145.)

[And see FORECLOSURE; PROPERTY; REDEMPTION.]

MORTGAGE DEBENTURE ACTS.

I. APPOINTMENT OF RECEIVER.

1. WHO MAY APPLY.
2. WHEN APPLICATION MADE.
3. HOW APPLICATION MADE.
4. POWERS, DUTIES, AND REMOVAL.
5. STAYING ORDER.

II. DISCHARGE OF SECURITY FROM DEBENTURE.

1. SUMMONS TO SHOW CAUSE.
2. ORDER AND PAYMENT INTO COURT.
3. DISCHARGING SECURITY.
4. PAYMENT OUT TO COMPANY.

I. APPOINTMENT OF RECEIVER.

1. WHO MAY APPLY.

Any person for the time being entitled to any mortgage debenture of the company shall be empowered from time to time to enforce the payment of any arrear of interest or principal (as the case may be) due on [a] mortgage debenture by procuring the appointment of a receiver: (28 & 29 Vict. c. 78, s. 41.)

2. WHEN APPLICATION MADE.

If within seven days after the interest accruing upon any mortgage debenture has become payable, and after demand thereof in writing made upon the company by the person entitled thereunto, such interest be not paid, or if within three weeks after the principal money secured by any mortgage debenture has become payable, and after demand thereof in writing made as aforesaid, such principal money be not paid, the person at the time entitled to the receipt of such interest or principal respectively may apply for the appointment of a receiver, as hereinafter provided: (s. 42.)

No such application shall in any way prejudice or affect the right of any person entitled to any such mortgage debentures to sue for any such interest or principal money, as the case may be, in any court: (s. 43.)

3. HOW APPLICATION MADE.

Every application for receiver in the cases aforesaid may be made to the [Chancery Division] by petition or by summons at chambers, and on any such application the court . . . may appoint a receiver to act on

behalf of the applicant and the other persons entitled to the company's mortgage debentures : (s. 44.)

4. POWERS, DUTIES, AND REMOVAL.

The court may also remove the receiver, and appoint another in his stead, and so from time to time, and may make such orders and give such directions as to the powers and duties of the receiver, and otherwise as to the disposal of the moneys received by him, as may be thought fit : (s. 45.)

Subject to any such orders and directions, the receiver shall be entitled to receive or recover the whole or a competent part of the principal moneys, instalments, annuities, interest, and other moneys from time to time payable to the company upon or in respect of their registered securities, and also any moneys standing to the account of the company's mortgage debentures under [33 & 34 Vict. c. 20, s. 9, see *post*, II., 2], until the principal and interest due on all the debentures issued by the company, together with all costs including the reasonable and proper charges of such receiver, shall have been fully paid : (s. 46.)

Upon such appointment being made, and notice thereof to the several persons liable upon such registered securities, all such moneys from time to time payable upon or in respect of such registered securities shall be paid to and received or recovered by such receiver : (*Id.*)

The receiver shall apply the same, as from time to time received or recovered by him, first to the payment of all such costs, and afterwards to the discharge and payment of all interest, or principal and interest, as the case may be, due upon such mortgage debentures; and after such costs, and such interest, or principal and interest, shall have been fully paid, the power of such receiver shall cease : (*Id.*)

The court may order, as to any of the above-mentioned powers and duties that the receiver shall not exercise the same without the sanction or further direction of the court : (s. 47.)

5. STAYING ORDER.

The court may at any time after an order for the appointment of a receiver has been made, make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as it may deem fit : (s. 47.)

II. DISCHARGE OF SECURITY FROM DEBENTURE.

1. SUMMONS TO SHOW CAUSE.

Whenever any person for the time being entitled to redeem a security which has been registered under [33 & 34 Vict. c. 20, or 28 & 29 Vict. c. 78] has given notice to the company of his intention so to do (33 & 34 Vict. c. 20, s. 8) [and] the company shall have made default in procuring the discharge on or before the day appointed for redemption, the persons entitled to redeem . . . may apply to the [Chancery Division], by summons, calling upon the company to show cause why such security is not so discharged : (*Id.* s. 9.)

2. ORDER AND PAYMENT INTO COURT.

Upon hearing such summons the judge shall appoint a day by which the discharge shall be obtained, and in default thereof shall order that the amount of principal and interest money due upon such security, shall, by a day to be named in the order, be paid into the bank, to the credit of the [Chancery paymaster] to the account of the company's mortgage debentures; and shall make such order as to the costs of and incidental to the application as [it] may deem just : (*Id.*)

3. DISCHARGING SECURITY.

Upon production to, and deposit with, the land registrar of such order [as mentioned *sup.* 2], together with the [Paymaster-General's] certificate of such payment into court, the registrar is to make an entry of discharge and deliver out the deeds, &c., to which the security relates : (*Id.*)

4. PAYMENT OUT TO COMPANY.

Upon the company proving to the satisfaction of the court, by the production of a certificate of the registrar, either that a security, at least equal in value to the amount [paid in] has been registered . . . or that an equivalent amount of the company's mortgage debentures has been cancelled, the court shall direct the payment out of court to the company of the amount so paid in, together with any dividends that may have accrued due thereon in the meantime : (*Id.*)

MOTION.

- I. WHERE PROPER MODE OF APPLYING.
- II. TO DISMISS ACTION [see DISMISSING ACTION].
- III. FOR JUDGMENT [see JUDGMENT XII.]
- IV. ON APPEAL [see APPEAL].
- V. FOR NEW TRIAL [see NEW TRIAL].
- VI. OF COURSE.
- VII. EX PARTE.
- VIII. ORDINARY [ON NOTICE].
 1. WHERE MADE.
 2. BY WHOM MADE.
 3. AGAINST WHOM MADE.
 4. NOTICE OF MOTION.
 - (a) *Where necessary.*
 - (b) *Form and Requisites.*
 - (c) *When given.*
 - (d) *Service.*
 - (1) By Order before Time for Appearance.
 - (2) On Default in Appearance.
 - (3) After Appearance.
 - (4) On Plaintiff.
 - (5) On Person not a Party.
 - (6) How Effected Generally.
 - (7) Substituted Service.
 - (8) Service out of Jurisdiction.
 - (9) Omission to Serve Necessary Persons [see *post*, 8.]
 5. AFFIDAVIT OF SERVICE.
 6. EVIDENCE ON MOTION.
 7. HEARING.
 8. ADJOURNMENT.
- IX. ORDER ON MOTION.
 1. DRAWING UP, &c.
 2. DISCHARGING, AMENDING, &c.
 3. ENFORCING [see EXECUTION; ARREST.]
- X. COSTS.

I. WHERE PROPER MODE OF APPLYING.

Where by [the] Rules any application is authorised to be made to the

court or a judge in an action, such application, if made to a divisional court or to a judge in court, shall be made by motion : (O. LIII., r. 1.)

II. TO DISMISS ACTION.

[See DISMISSING ACTION.]

III. FOR JUDGMENT.

[See JUDGMENT, XII.]

IV. ON APPEAL.

[See APPEAL.]

V. FOR NEW TRIAL.

[See NEW TRIAL.]

VI. OF COURSE.

A motion of course requires no notice : (Dan. 1438.)

It may be made on any day, whether a seal day or not : (*Id.*)

It is granted without the court being called upon to investigate the truth of any allegation or suggestion upon which it is founded, and is not mentioned in court : (*Id.*)

It is the practice for counsel to sign the brief, and to hand it to the registrar in court; who enters it in his book, marks the brief with his initials, and then returns it to counsel : (*Id.*)

The brief, thus signed, is then taken to the order of course seat in the registrar's office, and the order will be drawn up by one of the registrar's clerks : (*Id.*)

It is passed by the registrar, and entered in the usual manner; but no notice to attend the passing is given to the other side : (*Id.*, see JUDGMENT, XV.)

As to the court in which the motion is made, see *post*, VIII.

VII. EX PARTE.

No rule or order to show cause shall be granted in any action, except in the cases in which an application for such rule or order is expressly authorised by [the] rules : (O. LIII., r. 2.)

The rule only applies to a proceeding in an action (*In the Goods of Mary Cartwright*, W. N., 1876, p. 21; *Re Phillips and Gill*, L. Rep. 1 Q. B. Div. 78); so a rule to pay money awarded under an agreement of reference which has been made a rule of court, is a rule to show cause : (*Re Phillips and Gill*, *sup.*)

The rule applies whether the person to be moved against is a party to the action or not : (*Delmar v. Freemantle*, L. Rep. 3 Ex. Div. 237; 26 W. R. 683; 47 L. J. 767, Ex.)

Except where by the practice existing at the time of the passing of the [Judicature Act, 1873] any order or rule has heretofore been made *ex parte* absolute in the first instance, and except where by [the] rules it is otherwise provided, and except where the motion is for a rule to show cause only, no motion shall be made without previous notice to the parties affected thereby : (O. LIII., r. 3.)

But the court or judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order *ex parte* upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the court or judge may think just : (O. LIII., r. 3.)

A motion for leave to effect substituted service of a notice of motion is *ex parte* : (Dan. 1442; *Hamilton v. Davies*, W. N., 1880, p. 82.)

A motion to add a person as a party should be made *ex parte*: (*Ashley v. Taylor*, L. Rep. 10 Ch. Div. 768; 39 L. T. Rep. N. S. 573; 48 L. J. 406, Ch.; 27 W. R. 228.)

Ex parte motions are not limited to the ordinary motion days; but may be made to the court at any time during its sittings; or, if the court be not sitting, they may be made to one of the judges, at his private house; (Dan. 1438.)

They must be made before the judge who has properly the cognisance of the cause, unless in vacation: (*Id.*)

As to where the motion is made and the evidence in support, see *post*, VIII.

As to the Order, see *post*, IX.

Any party affected by such [*ex parte*] order may move to set it aside: (O. LIII., r. 3.)

VIII. ORDINARY (ON NOTICE).

1. WHERE MADE.

As to where motion is the proper mode of proceeding, see *sup.*, I.

All interlocutory and other steps and proceedings in or before the said High Court in any cause or matter subsequent to the commencement thereof, shall be taken (subject to any Rules of Court and to the power of transfer) in the division of the said High Court to which such cause or matter is for the time being attached: (J. A., 1875, s. 11, sub-s. 1.)

Every action and proceeding in the High Court of Justice, and all business arising out of the same, except as . . . provided, shall, so far as is practicable and convenient, be heard, determined and disposed of before a single judge; and all proceedings in an action subsequent to the hearing or trial, and down to and including final judgment or order, except as aforesaid, and always excepting any proceedings on appeal in the Court of Appeal, shall so far as is practicable and convenient, be had and taken before the judge before whom the trial or hearing of the cause took place: (A. J. A., 1876, s. 17.)

The excepting proviso only applies to Divisional Courts.

Where . . . any application ought to be made to, or any jurisdiction exercised by, the judge before whom an action has been tried, if such judge shall die or cease to be a judge of the High Court, or if such judge shall be a judge of the Court of Appeal, or if for any other reason it shall be impossible or inconvenient that such judge should act in the matter, the president of the division to which the action belongs may, either by special order in any action or matter, or by a general order applicable to any class of actions or matters, nominate some other judge to whom such application may be made, and by whom such jurisdiction may be exercised: (O. LVIIA., r. 2, Dec., 1876.)

Every vacation judge shall have the same power and authority as heretofore: (*Id.*, r. 3.)

2. BY WHOM MADE.

No person ought to join in a notice of motion who is not interested in the result: (Dan. 1441.)

Where the applicant is an infant, or a married woman without her husband, or any other person under disability, the motion is made by the infant, married woman, or other person, by a next friend: (Dan. 1441.)

Where a person, already acting as next friend, refuses to join in the motion, a next friend must be named for the purpose of the application; and if no next friend is named in the notice, the solicitor giving the notice of motion may be ordered personally to pay the costs: (*Id.*)

3. AGAINST WHOM MADE.

A motion may be sometimes made against a person who is not a party to the proceedings, as a sheriff (*Delmar v. Freemantle*, L. Rep. 3 Ex. Div. 237; 47 L. J. 767, Ex.; 26 W. R. 683); a solicitor (*Newbiggin-by-the-Sea Gas Company v. Armstrong*, L. Rep. 13 Ch. Div. 310; 41 L. T. Rep. N. S. 637; 49 L. J. 231, Ch.; 28 W. R. 217) a person to be added as a party: (PARTIES; *Ashley v. Taylor*, L. Rep. 10 Ch. Div. 768; 39 L. T. Rep. N. S. 573; 48 L. J. 406, Ch.; 27 W. R. 228.)

4. NOTICE OF MOTION.

(a) *Where Necessary.*

A notice of motion is generally necessary, even where the party moved against is not a party to the action: (*Delmar v. Freemantle*, *sup.*)

(b) *Form and Requisites.*

The notice is a statement in writing of the terms of the motion intended to be made: (Dan. 1439.)

The following is the form:

In the High Court of Justice.		
Between	Division.	18 No.
		Plaintiff,
	and	Defendant.
Take notice, that the court will be moved on the day of		
18 . at	o'clock in the forenoon, or so soon thereafter as counsel	
can be heard, by		
Dated the	day of	18 .
	(Signed)	
	of	
	agent for	
	solicitor for the	

To

(Sched. B. 17, Rules of April, 1880.)

Every notice of motion intended to be made before any judge, shall express that the same is intended to be made before that judge: (C. O. 33, r. 1.)

The notice, if made in a cause, ought to state the names of the parties fully and correctly: (*Davis v. Barrett*, 7 Beav. 171.)

Whenever a motion is to be made by leave of the court, the notice ought to mention that it is so made, otherwise the party against whom it is to be made may disregard it: (*Hill v. Rimell*, 2 M. & Cr. 641.)

It must state the day on which the motion is to be made, which must be one of the appointed motion days, unless special leave has been given to move on another day: (Dan. 1440.)

The day mentioned in the notice as the day on which the motion will be made must be a day on which the court sits, and a notice to appear on the 22nd December is bad, as the last day of the Michaelmas Sittings is the 21st, and the court cannot amend the notice by altering the day named in it for appearances: (*Daubney v. Shuttleworth*, L. Rep. 1 Ex. Div. 53; 34 L. T. Rep. N. S. 357; 45 L. J., 177, Ex.; 24 W. R. 321.)

The notice may include several objects, such as the appointment of a receiver, an injunction, and the payment of money into court: (Dan. 1441; *Ashley v. Taylor*, *sup.*)

The notice must be correctly addressed to the solicitor of the party or parties intended to be affected by it, or to the party himself where he acts in person or personal service is intended, and must be signed by, or in the

name of, the solicitor, or firm of solicitors, of the party moving, or the party himself where he acts in person: (Dan. 1440.)

Notices of motion on behalf of a pauper must be signed by his solicitor: (see C. O. 7, r. 11, PARTIES.)

(c) *When given.*

Unless the court or judge give special leave to the contrary there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion: (O. LIII. r. 4.)

A notice to appear on the 22nd December served on the 20th December is bad: (*Daubney v. Shuttleworth, sup.*)

The rule applies in the case of motion for judgment, and motion for an order on admission in pleadings: (*Roupell v. Parsons*, W. N. 1876, p. 61; *Attorney-General v. London and North-Western Railway* there cited; and see TIME.)

(d) *Service.*

(1) By Order before Time for Appearance.

The plaintiff may, by leave of the court or a judge, to be obtained *ex parte*, serve any notice of motion upon any defendant along with the writ of summons, or at any time after service of the writ of summons and before the time limited for the appearance of such defendant: (O. LIII., r. 8.)

(2) On Default in Appearance.

The plaintiff shall, without any special leave, be at liberty to serve any notice of motion or other notice, or any petition or summons upon any defendant, who, having been duly served with a writ of summons to appear in the action, has not appeared within the time limited for that purpose: (O. LIII., r. 7.)

C. O. 3, r. 8, which was in similar terms, did not apply where the defendant was out of the jurisdiction: (*Green v. Pledger*, 3 Hare, 165.)

Where the defendant does not appear, the notice of motion is sufficiently served by being filed with the proper officer (*Morton v. Miller*, L. R. 3 Ch. Div. 516; 45 L. J. 613, Ch.; 24 W. R. 723; *Shepherd v. Beane*, W. N. 1876, p. 61; *Dymond v. Croft*, L. Rep. 3 Ch. Div. 512; 34 L. T. Rep. N. S. 786; 45 L. J. 604, Ch.; 24 W. R. 842); where the notice has actually been served on the defendant, it need not be filed: (*Whitaker v. Thurston*, W. N. 1876, p. 232; and see *Williams v. Cardwell*, W. N. 1877, p. 140; 25 W. R. 646.)

(3) After Appearance.

Where the motion is made by a plaintiff after defendant's appearance in person, the notice of motion may be served by being left at the defendant's address for service, which will be found in the memorandum of appearance: (See O. XII., rr. 8, 9; Appearance I. 3; C. O. 3, r. 5; *Re a Solicitor*, L. Rep. 14 Ch. Div. 152; 42 L. T. Rep. N. S. 310; 49 L. J. 295, Ch.)

Where a motion is made by a plaintiff after a defendant's appearance by a solicitor, the notice of motion, not requiring to be personally served shall be deemed sufficiently served upon such party if served upon his solicitor at his place of business if that, and not an address for service, is given in the memorandum of appearance; and if an address for service of such solicitor shall have been given in such memorandum, all notices shall be deemed sufficiently served upon such party if left for his solicitor at such address for service: (C. O. 3, r. 4; O. XII., r. 13; APPEARANCE I. 3; *Re a Solicitor, sup.*)

(4) On Plaintiff.

Where the motion is made by a defendant against a plaintiff who sues

in person, the notice of motion may be served by being left at the plaintiff's place of residence or address for service, which residence or address will be found indorsed on the writ of summons: (C. O. 3, r. 5; and see O. IV., rr. 1 and 2, as to London writs; and O. IV., r. 3, Feb. 1876, as to district registry writs; WRIT OF SUMMONS; *Re a Solicitor, sup.*)

[Where a motion is made against a plaintiff who] sues . . . by a solicitor, and no address for service of such solicitor shall have been [given] all . . . notices . . . not requiring personal service upon the party to be affected thereby, shall, unless the court shall otherwise direct, be deemed sufficiently served upon such party if served upon his solicitor at his place of business. But if an address for service of such solicitor shall have been [given], then all such notices . . . shall be deemed sufficiently served upon such party, if left for his solicitor at such address for service: (C. O. 3, r. 4; O. IV., r. 1; O. IV., r. 3, Feb. 1876; WRIT OF SUMMONS; *Re a Solicitor, sup.*)

(5) On Person not a Party.

Where a person who is not a party appears in any proceeding, either before the court or in chambers, service upon the solicitor in London, by whom such party appears, whether such solicitor act as principal or agent, shall be deemed good service, except in matters of contempt requiring personal service: (C. O. 3, r. 7; *Re a Solicitor, sup.*)

(6) How Effected Generally.

The service is effected by delivery of a true copy (Dan. 1443), when not otherwise specially provided, to the person to be affected, or with some member of his household at his place of residence: (*Id.* 1442; *Re a Solicitor, sup.*)

If the noticee's appearance is deemed unnecessary, intimation to that effect should be given, when service is effected, and a tender of 40s. costs made to him: (*Campbell v. Holyland*, L. Rep. 7 Ch. Div. 166; 47 L. J. 145, Ch.; 26 W. R. 109.)

(7) Substituted Service.

Substituted service of a notice of motion may be ordered on an *ex parte* motion, supported by an affidavit: (Dan. 1442; *Cook v. Dey*, W. N. 1876, p. 122; *Hamilton v. Davies*, W. N. 1880, p. 82.)

In the last two cases substituted service by advertisement was ordered of a notice of motion for judgment. But in *Lechmere v. Clamp* (29 Beav. 260) it was held that notice of motion for decree could not be served by substituted service, although in the same case substituted service of a replication having been filed and of a subpoena to hear judgment was ordered: (30 Beav. 218.)

(8) Service out of Jurisdiction.

There is no provision under the new rules for service out of the jurisdiction of anything but a writ of summons or notice of such writ (O. XI., r. 1); and there was no provision under the former rules of the Court of Chancery except as to a bill or "other process" (O. O. 10, r. 6.)

But such service was ordered by the Court of Chancery, even of notice of motion for decree (*Meek v. Ward*, 10 Hare, App. 55); and Hall, V.C. has ordered such service of an order for an interim injunction: (*Young v. Brassey*, L. Rep. 1 Ch. Div. 277.)

The application is by *ex parte* motion, supported by an affidavit: (Dan. 1442.)

(9) Omission to Serve Necessary Persons.

[See *post*, 8.]

5. AFFIDAVIT OF SERVICE.

The affidavit must show when and to whom, and by whom, notice was given; and must say "notice in writing or words to that effect": (Dan. 1443.)

It may be filed any time before the court rises: (*Id.*)

There is nothing to prevent the court from allowing the service to be proved *viva voce*: (see O. XXXVII., r. 2, and cited *post*; and *Cusden v. Clapham*, W. N., 1877, p. 90.)

6. EVIDENCE ON MOTION.

Upon any motion . . . evidence may be given by affidavit; but the court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit: (O. XXXVII., r. 2.)

As to taking the evidence before an examiner or other persons, see EVIDENCE, II., 2, 3.

Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted: (O. XXXVII., r. 3.)

But if the motion, although interlocutory in form, finally decides the rights of the parties, evidence on information and belief is not admissible: (*Gilbert v. Gilbert*, L. Rep. 9 Ch. Div. 259; 39 L. T. Rep. N. S. 404; 27 W. R. 252.)

The affidavit book at the Central Office should be searched, all from the date of the notice of motion up to the morning of the day on which the motion is to be made, for affidavits in opposition: (Dan. 1444.)

If the motion is not made on the day named, notice to the opponent must be given of any further affidavits having been filed: (Dan. 1445.)

Notice must be also given of the intention to read affidavits filed before the date of the notice of motion: (Dan. 1444.)

Except under very special circumstances the court will not allow affidavits filed since the motion was opened to be read, but on a motion for an injunction any affidavits filed before a counsel addresses the court may be read by him: (Dan. 1445.)

If a party has given notice of his intention to read an affidavit, and afterwards declines to do so, the other party may read it: (*Id.*)

7. HEARING.

When the notice of motion is clearly bad on the face of it, the parties served are not bound to appear, and if they do will not get their costs: (*Daubney v. Shuttleworth*, L. Rep. 1 Ex. Div. 53; 34 L. T. Rep. N. S. 357; 45 L. J. 177, Ex.; *Brown v. Shaw*, L. Rep. 1 Ex. Div. 425; 24 W. R. 321.)

But if there is no jurisdiction the respondent may attend to inform the court of the absence of jurisdiction: (*Great Northern Committee v. Inett*, L. Rep. 2 Q. B. Div. 284; 46 L. J. 237, M. C.; 25 W. R. 584.)

Unless the motion has been set down the court calls upon counsel, in their order of seniority, to move: (Dan. 1444. If two counsel were called the same term, the one is senior who first entered his name as a student of an inn of court.)

Each counsel has the right to make two opposed motions before the next is called on.

If the court goes through the bar without exhausting the motions, the bar is again and again gone through till all motions are exhausted: (Dan. 1444.)

Counsel moving are heard in support, those opposing are then heard, and the senior moving counsel replies : (Dan. 1444, 1446.)

If an affidavit has been filed so recently that there is no time to answer it, the party if moving, should save his motion to another day; if opposing, should ask for leave that the motion stand over : (Dan. 1445.)

8. ADJOURNMENT.

The hearing of any motion or application may from time to time be adjourned upon such terms, if any, as the court or judge shall think fit : (O. LIII., r. 6.)

If on the hearing of a motion or other application the court or judge shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the court or judge may either dismiss the motion or application, or adjourn the hearing thereof, in order that such notice may be given, upon such terms, if any, as the court or judge may think fit to impose : (O. LIII., r. 5; *Purnell v. Great Western Railway Company*, L. Rep. 1 Q. B. Div. 636.)

IX. ORDER ON MOTION.

1. DRAWING UP, &c.

As to orders of course, see *sup.*, VI.

An order on another motion is drawn up, passed, and entered like a judgment : [see JUDGMENT.]

There must be left with the registrar, counsel's brief, with his indorsement of the order made; the notice of motion, if any, annexed, and office copies of any affidavits, and any exhibits or other evidence used at the hearing of the motion : (Ch. Reg. March 15th, 1860, r. 31.)

2. DISCHARGING, AMENDING, &c.

As to setting aside an order made *ex parte*, see *sup.*, VII.

The court has jurisdiction to discharge an order made on an interlocutory application by consent when it is proved to have been made under a mistake, though that mistake was on one side only : (*Mullins v. Howell*, L. Rep. 11 Ch. Div. 763; 48 L. J. 679, Ch.)

Where on motion for a mandatory injunction an order was made by consent pursuant to the terms of a previous agreement by which the defendant gave an undertaking to remove certain obstructions, and it appeared that the defendant had by mistake consented to a more extensive undertaking than he intended to do, the court refused to enforce that part of the undertaking which had been given by mistake : (*Id.*)

As to amendment of orders, see AMENDMENT; JUDGMENT, XVII.

3. ENFORCING.

[See EXECUTION; ARREST.]

X. COSTS.

Where the notice of motion is bad, parties appearing will not get their costs : (*Daubney v. Shuttleworth*, L. Rep. 1 Ex. Div. 53; 34 L. T. Rep. N. S. 357; 45 L. J. 177, Ex.; 24 W. R. 321.)

A person served with notice ought not to appear simply to ask for his costs, but in one case, where no intimation not to attend or tender of 40s. costs had been made, Jessel, M.R. ordered the person appearing to be paid 40s. for his costs : (*Campbell v. Holyland*, L. Rep. 7 Ch. Div. 166; 47 L. J. 146, Ch.; 26 W. R. 109.)

When notice of motion is given before the wrong court, that court has jurisdiction to award costs : (*Yearsley v. Yearsley*, 19 Beav. 1, frequently approved by Fry, J.; and see *sup.* VIII., 7.)

Where a party gives a notice of motion, and does not move accordingly,

he shall pay to the other side, costs to be taxed by the taxing master, unless the court itself shall direct, upon production of the notice of motion, what sum shall be paid for costs: (C. O. 40, r. 23.)

The above rule, though repealed, must still be looked to as a guide: (See observations of Bramwell, L.J. in *Myers v. Defries*, L. Rep. 5 Ex. Div. 180; 42 L. T. Rep. N. S. 137; 49 L. J. 266, Ex.; 28 W. R. 406.)

Where a notice of motion has been given, and the parties giving the notice do not appear, the court will, as a general rule, order them to pay the costs of the parties appearing to show cause: (*Berry v. Exchange Trading Company*, L. Rep. 1 Q. B. Div. 77; 45 L. J. 224, Q.B.)

See also COSTS, *sup.* 226, 227; Seton, 58.

When the motion is ordered to stand over to the hearing of the cause, and the order omits to provide for the costs, costs should be specially asked for at the hearing. But if this is not done the court may by a subsequent order provide for the costs: (*Fritz v. Hobson*, L. Rep. 14 Ch. Div. 542; 42 L. T. Rep. N. S. 677; 28 W. R. 722.)

MULTIPLICITY.

[See EQUITABLE RULES.]

MUNICIPAL CORPORATIONS ACT.

[See CHARITIES.]

NATIONAL DEBT ACT.

I. FIRST CLAIMANT'S APPLICATION FOR TRANSFER.

1. PETITION.
2. SERVICE.
3. EVIDENCE.
4. ORDER.
5. COSTS.
6. NOTICE OF TRANSFER.

II. SUBSEQUENT CLAIMS.

III. RESCINDING ORDERS.

I. FIRST CLAIMANT'S APPLICATION FOR TRANSFER.

1. PETITION.

In case the governor or deputy governor [of the Bank of England] is not satisfied of the right of any person claiming to be entitled to any stock or dividends [transferred to the National Debt Commissioners] the claimant may, by petition in a summary way, state and verify his claim to the [Chancery Division] (33 & 34 Vict. c. 71, s. 55.)

As to ascertaining the amount of the stock, see *Re Stapleton*, W. N. 1872, p. 185.

The same procedure applies in the case of dividends unclaimed for ten years, certificates in respect of which no coupon has been presented for ten years, unclaimed terminable annuities, stocks and dividends transferred or paid to the commissioners under former Acts: (ss. 61, 62, 67, 68.)

But interest by accumulation of dividends does not belong to the claimant: (*Re Ashmead's Trusts*, L. Rep. 8 Ch. App. 113.)

2. SERVICE.

The petition shall be served on Her Majesty's Attorney-General and on the National Debt Commissioners: (*Id.*)

When the stock is standing in the name of the trustees, they, or their legal personal representatives, and also the beneficiaries are necessary parties: (*Re Ashmead's Trusts, sup.*)

3. EVIDENCE.

Ordinarily it is sufficient for the claimant to make out his legal title, but if the dividends have not been claimed for many years, an inquiry will be directed as to the person entitled to the stock: (Dan. 1916.)

4. ORDER.

The court shall make such order thereon (either for transfer of the stock to which the petition relates, and payment of the dividends accrued thereon, or otherwise), and touching the costs of the application, as to the court seems just: (s. 55.)

All costs and expenses incurred by or on behalf of the Attorney-General, or the National Debt Commissioners, in resisting or appearing on any such petition, if not ordered by the court to be paid out of the stock and dividends thereby claimed, shall be paid by the National Debt Commissioners out of unclaimed dividends: (*Id.*)

When the title is quite clear, the order is at once made without directing a previous inquiry, but when there are contending claimants no order will be made on petition: (Dan. 1916.)

When it is to be dealt with in a cause, the order directs the fund to be transferred to the petitioner, he undertaking to transfer it to the credit of the cause: (*Rushworth v. Walden*, 18 W. R. 204, cited Dan. 1916.)

5. COSTS.

The practice is now to direct payment of the costs of the Attorney-General and commissioners as between party and party, and upon such payment the retransfer to be made: (Seton, 1514.)

6. NOTICE OF TRANSFER.

Where any retransfer or payment is made to any such claimant, either with or without the authority of the court, the Bank of England . . . shall give notice thereof to the National Debt Commissioners within three days after making the same: (s. 55.)

Stock exceeding the sum of 20*l.* shall not be retransferred from the National Debt Commissioners under this part of [the] Act, nor shall dividends exceeding 20*l.* in the whole be paid to a claimant under this part of [the] Act, until three months after application made for the same, nor until public notice has been given thereof: (s. 56.)

The Bank of England . . . shall require the applicant to give such public notice as they think fit by advertisements . . . in one or more newspapers circulating in London and elsewhere: (s. 57.)

Every such notice shall state the name, residence, and description of the person in whose name the stock stood when transferred to the National Debt Commissioners, the amount thereof, the name of the claimant, and the time at which the retransfer thereof and payment of dividends will be made if no other claimant sooner appears and makes out his claim: (s. 57.)

Where any such retransfer or payment is ordered by the [Chancery Division] the notice shall also state the purport of the order: (s. 57.)

II. SUBSEQUENT CLAIMS.

Where any stock or dividends having been retransferred or paid as aforesaid to a claimant by [the] bank is or are afterwards claimed by

another person, the bank and their officers shall not be responsible for the same to such other claimant, but he may have recourse against the person to whom the retransfer or payment was made: (s. 59.)

Provided, that if in any case a new claimant establishes his title to any stock or dividends retransferred or paid to a former claimant, and is unable to obtain transfer or payment thereof from the former claimant, the [Chancery Division] shall, on application by petition by the new claimant, verified as the court requires, order the National Debt Commissioners to transfer to him such sum in stock, and to pay to him such sum in money for dividend as the court thinks just: (s. 60.)

Such transfer shall be made from stock transferred to the National Debt Commissioners under this part of [the] Act; and such money for dividend shall be paid from dividends received by those Commissioners on stock so transferred, or the accumulations thereof, or from the sale of stock purchased with such dividends or accumulations, or from other money at their disposal: (s. 60s)

III. RESCINDING ORDERS.

At any time before retransfer of stock or payment of dividend as aforesaid to a claimant, any person may apply to the [Chancery Division] by motion or petition, to rescind or vary any order made for re-transfer or payment thereof: (s. 50.)

NE EXEAT REGNO.

[See ARREST, II., 2.]

NEW TRIAL.

I. GROUNDS FOR GRANTING.

II. IN WHAT COURT ORDER OBTAINED.

1. ACTION TRIED IN THE CHANCERY DIVISION.
2. ACTION TRIED BEFORE JUDGE ONLY OF ANOTHER DIVISION.
3. ACTION TRIED BEFORE JUDGE AND JURY.
4. ISSUE TRIED BEFORE JUDGE AND JURY.
5. ACTION REMITTED FOR TRIAL IN COUNTY COURT.

III. APPLICATION,

1. HOW MADE.
2. WHEN MADE.
 - (a) *After Trial before Judge and Jury.*
 - (b) *After Trial before Judge alone.*
 - (c) *After Trial in County Court (19 & 20 Vict. c. 103, s. 26).*

IV. ORDER TO SHOW CAUSE.

1. SERVICE.
2. EFFECT.

V. POWERS OF COURT.

VI. APPEAL.

1. FROM GRANTING OR REFUSING NEW TRIAL.
2. GRANTING NEW TRIAL ON ORDINARY APPEAL.

VII. COSTS.

I. GROUNDS FOR GRANTING.

The grounds are:

1. Admission, by the judge at the trial, of improper evidence;

2. Rejection, by the judge at the trial, of evidence which ought to have been admitted;
3. The improper nonsuiting of the plaintiff;
4. Misdirection of the jury;
5. Perverse verdict or verdict against the weight of evidence;
6. Verdict for too small or too great damages;
7. Surprise: (Ch. Arch., 13th edit., 1210, *et seq.*)

A new trial will not be granted for evidence prematurely admitted, but which became admissible in the course of a trial: (*Faund v. Wallace*, 35 L. T. Rep. N. S. 361.)

A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such court that such wrong or miscarriage affects part only of the matter in controversy, the court may give final judgment as to part thereof, and direct a new trial as to the other part only: (O. XXXIX., r. 3.)

It is for the party showing cause against a rule for a new trial to show that there has been no failure of justice, and he must show it on authentic evidence: (*Anthony v. Halstead*, 37 L. T. Rep. N. S. 433.)

As to what amounts to a substantial wrong, &c., see *Pickup v. Thames Insurance Company*, L. Rep. 3 Q. B. Div. 594; 26 W. R. 477; *Swift v. Nunn*, W. N., 1878, p. 217.

A new trial will not be granted on the ground that the verdict is against the weight of evidence, when the damages are under 20*l.*: (*Booth v. Briscoe*, L. Rep. 2 Q. B. Div. 496; 25 W. R. 838.)

If it appear that a jury must have omitted to take into account any proper head of damages, and that the verdict is, under the circumstances, unreasonably small, it is competent to a court to order a new trial at the instance of the plaintiff, although there be no misdirection by the judge, nor mistake or misconduct on the part of the jury: (*Phillips v. The South-Western Railway Company*, L. Rep. 5 Q. B. Div. 78; 41 L. T. Rep. N. S. 211; L. Rep. 5 C. P. Div. 280; 42 L. T. Rep. N. S. 6; 49 L. J. 233, C. P.)

II. IN WHAT COURT ORDER OBTAINED.

1. ACTION TRIED IN THE CHANCERY DIVISION.

Where an action commenced in the Chancery Division is tried there, and the judge finds on the facts and reserves judgment; O. XXXIX., r. 1 (*cited post*, 3) does not apply, but the party dissatisfied with the verdict or finding must appeal therefrom to the Court of Appeal within twenty-one days, as in the case of an interlocutory order: (*Krehl v. Burrell*, L. Rep. 10 Ch. Div. 420; 38 L. T. Rep. N. S. 407; 48 L. J. 252, Ch.; 27 W. R. 234.)

And in all actions in the Chancery Division, where there are distinct questions of fact in dispute between the parties to be tried by a judge alone, judges should try such questions as questions the findings upon which are separate from the judgment to be pronounced upon them, so as to necessitate an appeal within twenty-one days: (*Id.*)

Where definite issues of fact are settled—that is, distinctly announced—before the trial begins, the judgment must be appealed from within twenty-one days, whether the judge delivers his finding or verdict on the facts on a day prior to the judgment on the whole case, or whether both are given at the same time: (*Id.*; *Lowe v. Lowe*, L. Rep. 10 Ch. Div. 432; 40 L. T. Rep. N. S. 236; 48 L. J. 361, Ch.; 27 W. R. 309.)

The issue need not be formal: (per Cotton, L.J., *Potter v. Cotton*, L. Rep. 5 Ex. Div. 137; 41 L. T. Rep. N. S. 460; 49 L. J. 158, Ex.; 28 W. R. 160.)

But this rule does not apply where the judge merely commences his judgment by saying that he has to decide a question of fact: (*Id.*)

In such case, and in all others where the issues of fact are not settled before trial, an appeal lies from the judgment both on facts and law at any time within a year: (*Id.*; see also *Dollman v. Jones*, L. Rep. 12 Ch. Div. 553; 41 L. T. Rep. N. S. 258; 27 W. R. 877.)

If upon the hearing of an appeal from a judgment . . . of a judge without a jury it shall appear to the Court of Appeal that a new trial ought to be had, it shall be lawful for the said Court of Appeal, if it shall think fit, to order that the verdict and judgment shall be set aside, and that a new trial shall be had: (O. LVIII., r. 5a, March, 1879; and see APPEAL.)

2. ACTION TRIED BEFORE A JUDGE ONLY OF ANOTHER DIVISION.

When the trial has been by a judge without a jury, the application for a new trial shall be to the Court of Appeal: (O. XXXIX., r. 1, Dec., 1876, repealing O. XXXIX., r. 1.)

The rule applies only to actions tried in the Queen's Bench, Common Pleas, or Exchequer Divisions, and not to trials by a judge of actions commenced in the Chancery Division and there tried: (see *sup.* l.)

The rule applies if notice of trial with a jury has been given, but the jury are discharged: (*Metropolitan Bank v. Heiron*, W. N. 1880, p. 132.)

And it would apply to a Chancery Division action sent for trial by a jury, if the jury were discharged by consent, and the judge would try the action.

The application must be to the Court of Appeal, whether the ground is surprise, that the judge has misdirected himself as to the law, that his findings are against the weight of evidence, or almost any other ground: (*Oastler v. Henderson*, L. Rep. 2 Q. B. Div. 575; 37 L. T. Rep. N. S. 22; 46 L. J. 607, Q. B.; *Potter v. Cotton*, *sup.*)

But where the judge has wrongly rejected evidence, the motion is for a new trial: (*Metropolitan Inner Circle Company v. Metropolitan Railway*, W. N. 1880, p. 134.)

Apparently the time for appealing, twenty-one days or one year, depends on the same circumstances as in the case of a trial by a judge in the Chancery Division: (see judgment of Cotton, L.J., in *Jones v. Hough*, L. Rep. 5 Ex. Div. 115; 42 L. T. Rep. N. S. 108; 49 L. J. 211, Q. B.)

If there is any difference, it is that in the common law trials all appeals must be brought within twenty-one days: (see judgment of Thesiger, L.J., in *Krehl v. Burrell*, *sup.*)

It is unnecessary to move the Court of Appeal for a new trial as well, but whether this has been done or not, if the judge below has upon the materials before him come to an erroneous conclusion as to facts, the Court of Appeal has the same jurisdiction which he had, and may find the facts and give a proper judgment, awarding damages or otherwise; or, as when the matter turns upon the credibility of witnesses whom the judge below has seen, order a new trial: (*Jones v. Hough*, *sup.*; and see O. LVIII., r. 5a, March, 1879, *sup.* l.)

3. ACTION TRIED BEFORE JUDGE AND JURY.

Where in an action in the Queen's Bench, Common Pleas, or Exchequer Division there has been a trial by a jury, any application for a new trial

shall be to a divisional court: (O. XXXIX., r. 1, Dec., 1876, repealing O. XXXIX., r. 1.)

When an action, commenced in the Chancery Division, has been tried by a jury before one of the judges of a common law division it is thenceforth transferred to the division to which the judge belongs, and an application for a new trial must therefore be made to a divisional court of that division: (*Hunt v. City of London Real Property Company*, L. Rep. 3 Q. B. Div. 19; 37 L. T. Rep. N. S. 344; 47 L. J. 51, Ch.; 26 W. R. 37; *Jones v. Baxter*, L. Rep. 5 Ex. Div. 275; 28 W. R. 817.)

A motion to a divisional court for a new trial has been held to be proper in the following cases:

Where a judge directs a jury that on the undisputed facts they ought to find a verdict for one of the parties, and a verdict is accordingly entered for that party, and judgment given thereon: (*Yetts v. Foster*, L. Rep. 3 C. P. Div. 437; 38 L. T. Rep. N. S. 742; 26 W. R. 745.)

Where the judge is asked to nonsuit the plaintiffs, or to direct a finding for the defendants upon the ground that no evidence has been given in support of the plaintiff's case; but refuses to do so, and the jury find the issues left to them in favour of the plaintiffs, and the judge directs judgment to be entered for the plaintiffs, and states his reasons for holding that there was evidence in support of the finding of the jury: (*Davies v. Felix*, L. Rep. 4 Ex. Div. 32; 39 L. T. Rep. N. S. 322; 48 L. J. 3, Ex.; 27 W. R. 108.)

Where in an action tried by a jury the judge has given judgment for one party on the findings of the jury: (*Hamilton and Co. v. Johnson and Co.*, L. Rep. 5 Q. B. Div. 263; 41 L. T. Rep. N. S. 461; 49 L. J. 155, Q. B.; 28 W. R. 879.)

Where at the close of the plaintiff's case the judge holds that the evidence is not sufficient to maintain the action, and nonsuits the plaintiff: (*Etty v. Wilson*, L. Rep. 3 Ex. Div. 359; 39 L. T. Rep. N. S. 83; 47 L. J. 664, Q. B.; 27 W. R. 160.)

4. ISSUE TRIED BEFORE JUDGE AND JURY.

Where an issue has been directed by a judge of the Chancery Division, the action remains attached to the Chancery Division: (*Jones v. Baxter*, L. Rep. 5 Ex. Div. 275; 28 W. R. 817); and an application for a new trial must be made to the judge who directed the issue to be tried: (*Jenkins v. Morris*, L. Rep. 14 Ch. Div. 674; 42 L. T. Rep. N. S. 817; 49 L. J. 392, Ch.; and *Williams v. Guest*, there cited.)

5. ACTION REMITTED FOR TRIAL IN COUNTY COURT.

Where an action has been remitted, under 19 & 20 Vict. c. 108, s. 26, for trial in a County Court, the application for a new trial must be made to the division of the High Court which remitted the action (*Balmforth v. Pledge*, L. Rep. 1 Q. B. 427; *London v. Roffey*, L. Rep. 3 Q. B. Div. 6; 47 L. J. 16, Q. B.; 26 W. R. 79; *Dunn v. Pearson*, W. N. 1878, p. 82); and not to the Court of Appeal: (*Davis v. Godbehere*, L. Rep. 4 Ex. Div. 215; 40 L. T. Rep. N. S. 358; 48 L. J. 441, Ex.; 27 W. R. 485.)

III. APPLICATION.

1. HOW MADE.

[Where not made to the Court of Appeal] applications for new trials shall be by motion calling on the opposite party to show cause at the expiration of eight days from the date of the order, or so soon after as the case can be heard, why a new trial should not be directed: (O. XXXIX., r. 1A, March, 1879.)

When the application is by way of appeal to the Court of Appeal, the application is made as in other appeals: (see *sup.* II., 1, 2; APPEAL.)

2. WHEN MADE.

(a) After Trial before Judge and Jury.

Such motion shall be made within the times following, unless the court or a judge shall enlarge the time:—

An application to a divisional court for a new trial, if the trial has taken place in London or Westminster, shall be made within four days after the trial, or on the first subsequent day on which a divisional court to which the application may be made shall have actually sat to hear motions. If the trial has taken place elsewhere than in London or Middlesex, the motion shall be made within seven days after the last day of sitting on the circuits for England and Wales during which the action shall have been tried; or within the first four days of the next following sittings, if such day occurs during or within a week immediately before a vacation: (O. XXXIX., r. 1A, March, 1879.)

The time begins to run from the discharge of the jury: (*Shaw v. Hope*, 25 W. R. 729.)

The party is not bound to move before the fourth day, although a divisional court is sitting on the three first of the four days, and not on the fourth; and in such a case may move on the next day, after expiration of four days, on which a divisional court sits: (*Grant v. Holland*, W. N. 1880, p. 156.)

Sunday is not one of the four days: (*Id.*) As to cases tried at Winter Assizes, see *Beaucher v. London and Chatham Railway Company*, W. N., 1879, p. 40.

(b) After Trial before Judge alone [see *sup.* II., 1, 2].

(c) After Trial in County Court (19 & 20 Vict. c. 108, s. 26).

In this case the rules of the Supreme Court as to time does not apply (*London v. Roffey*, and other cases, cited *sup.* II., 5); but the application must be made within the time provided by the former practice (see COUNTY COURTS, II.)

IV. ORDER TO SHOW CAUSE.

1. SERVICE.

A copy of such order [to show cause] shall be served on the opposite party within four days from the time of the same being made (O. XXXIX. r. 2.)

2. EFFECT.

An order to show cause shall be a stay of proceedings in the action, unless the court shall order that it shall not be so as to the whole or any part of the action: (O. XXXIX., r. 5.)

It has been held that when a divisional court has refused an order *nisi*, and on appeal the Court of Appeal has granted the rule, the case is not governed by this rule, but by O. LVIII. r. 16 [see APPEAL], and that the Court of Appeal cannot order that proceedings shall be stayed (*Goddard v. Thompson*, 38 L. T. Rep. N. S. 166; 47 L. J. 382, Q. B.; 26 W. R. 362.); but the court below ought in a proper case to stay proceedings, and the Court of Appeal has "power to make any order which ought to have been made, and to make such further or other order, as the case may require:" (O. LVIII. r. 5.)

V. POWERS OF COURT.

A new trial may be ordered on any question in an action whatever be

the grounds for the new trial, without interfering with the finding or decision upon any other question : (O. XXXIX., r. 4.)

[When through] misdirection or the improper admission or rejection of evidence . . . some substantial wrong or miscarriage has been occasioned in the trial of the action ; and it [appears] to that court that such wrong or miscarriage affects part only of the matter in controversy, the court may give final judgment as to part thereof, and direct a new trial as to the other part only : (O. XXXIX. r. 3).

Where there are several distinct issues to be tried in one action, it is competent to the judge, in his discretion, and without the consent of the parties, to accept the verdict of the jury upon those issues on which they are able to agree, and discharge them upon the others without invalidating the trial, leaving the parties, if they think fit, to take down the undecided issues to a new trial ; and the court will give judgment on the decided issues, and has power, if asked, to send down the undecided issues to a new trial : (*Marsh v. Isaacs*, 45 L. J. 505, C.P.)

Upon a motion . . . for a new trial, the court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made as it may think fit : (O. XL., r. 10.)

The rule still applies, notwithstanding the rules of December, 1876 : (*Dawn v. Simmins*, 40 L. T. Rep. N. S. 556 ; 48 L. J. 343, C.P. ; affirmed 41 L. T. Rep. N. S. 783 ; W. N. 1879, p. 178.)

Judgment will be entered where no additional facts remain to be proved, and no jury would be justified in finding a contrary verdict on the facts proved : (*Yorkshire Banking Company v. Beatson*, L. Rep. 5 C. P. Div. 109 ; 42 L. T. Rep. N. S. 455 ; 49 L. J. 380, C. P. ; 28 W. R. 879.)

The rule as to entering judgment was not intended to put the court into the place of the jury : (*Brewster v. Durrand*, W. N. 1880, p. 27) ; and the court cannot give judgment where it will have the effect of withdrawing from the jury a question properly determinable by them only ; as whether a report said to be a libel was a fair report : (*Milissich v. Lloyd's*, W. N. 1877, p. 36.)

And judgment cannot be entered where, if a new trial is ordered, fresh evidence may be adduced) (*Clark v. Molyneux*, L. Rep. 3 Q. B. Div. 237 ; 37 L. T. Rep. N. S. 694 ; 47 L. J. 230, Q. B. ; 26 W. R. 104), or the facts may be found differently : (*Palmer v. Fitz-Wygram*, W. N. 1880, p. 26.)

It is unnecessary to give notice of appeal in order to obtain the judgment : (*Waddell v. Blockey*, L. Rep. 10 Ch. Div. 416 ; 40 L. T. Rep. N. S. 286 ; 27 W. R. 233.)

See also, as to entering judgment, *Anderson v. Pellier* (W. N. 1879, p. 212.)

When a new trial is granted at the instance of one of several defendants it must be granted against all the other defendants : (*Purnell v. Great Western Railway Company*, L. Rep. 1 Q. B. Div. 636 ; 34 L. T. Rep. N. S. 822 ; 45 L. J. 687, Q. B. ; 24 W. R. 909.)

VI. APPEAL.

1. FROM GRANTING OR REFUSING NEW TRIAL.

An appeal lies to the Court of Appeal from the granting or refusing of

a new trial, either by a Chancery Division judge of an issue, or by a divisional court of an action: (*Jenkins v. Morris*, L. Rep. 14 Ch. Div. 674; 42 L. T. Rep. N. S. 817; 49 L. J. 392, Ch.; *Purnell v. Great Western Railway Company, sup.*)

And the Court of Appeal may bring before it a party not moved against in the court below: (*Purnell v. Great Western Railway Company, sup.*)

2. GRANTING NEW TRIAL ON ORDINARY APPEAL.

See Order LVIII., r. 5a, March, 1879; APPEALS, VI., 11.

The court grants a four day order to show cause: (*Purnell v. Great Western Railway Company, sup.*)

Where, after a finding for the plaintiff by the jury, the judge held that the finding could not be supported, and entered judgment for the defendants, on appeal, the Court of Appeal held that the judge was not justified in disregarding the finding, and ordered a new trial: (*Perkins v. Dangerfield*, W. N. 1879, p. 172.)

Where by agreement the jury is discharged, and the case submitted to the decision of the judge, on a motion for a new trial it is competent for the judge to explain to the court the reasons for his finding: (*Chatterton v. Cave*, L. Rep. 3 App. Cas. 488; 38 L. T. Rep. N. S. 347; 47 L. J. 545, C. P.; 26 W. R. 498.)

The reasons in the above case were explained to the divisional court to which the application then had to be made. The application would now be to the Court of Appeal.

VII. COSTS.

Where a nonsuit is directed, or a verdict obtained, and afterwards a new trial being ordered, the party worsted in the former trial gets a verdict; unless the party is deprived of costs by the judge, the costs of both trials will follow the event: (*Green v. Wright*, L. Rep. 2 C. P. Div. 354; 36 L. T. Rep. N. S. 355; 46 L. J. 427, C. P.; 25 W. R. 502; *Field v. Great Northern Railway Company*, L. Rep. 3 Ex. Div. 261; 39 L. T. Rep. N. S. 80; 26 W. R. 817.)

Where the plaintiff, although successful on all issues in the first trial, is successful in some only in the second trial, the defendant getting a verdict on the other issues, the word "event" in O. LV., r. 1 (Costs) is read distributively: (*Myers v. Defries*, L. Rep. 5 Ex. Div. 180; 42 L. T. Rep. N. S. 137; 49 L. J. 266, Ex.; 28 W. R. 406.)

Where in an action to recover a sum of 85*l.*, and also a sum of 6*s.*, the plaintiff was nonsuited, and a new trial having been ordered, at the second trial, which took place before a jury, he failed as to his claim for 85*l.*, but proved his claim for 6*s.*, it was held, on appeal, that the judge was right in ordering that the plaintiff should pay the cost of both trials: (*Harris v. Petherick*, L. Rep. 4 Q. B. Div. 611; 41 L. T. Rep. N. S. 146.)

NEW TRUSTEES.

[See TRUSTEES.]

NEXT FRIEND.

[See PARTIES; COSTS.]

NONSUIT.

[See JUDGMENT; NEW TRIAL.]

NOTICES.

All notices required by the rules shall be in writing, unless expressly authorised by a court or judge to be given orally: (O. LVI., r. 1, as explained by O. LXIII., r. 2, April, 1880. See INTERPRETATION.)

Service of writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications, when not required to be personal, may be made by leaving the same at the solicitor's address endorsed on the documents in the cause, or, in case of a plaintiff suing in person, at his place of residence or address for service, as the case may be: (see O. IV., rr. 1, 2; C. O. 3; MOTION, JUDGMENT; WRIT OF SUMMONS.)

As to the time for serving notice, see TIME. As to notice of writ, see WRIT OF SUMMONS; of appearance, see APPEARANCE; to third parties, see PLEADING; of entering demurrer, see PLEADING; of motion, see MOTION, JUDGMENT; of judgment, see JUDGMENT, PARTITION; for jury, see TRIAL; of trial, see TRIAL, DISMISSING ACTION; to inspect or produce documents, see DISCOVERY, EVIDENCE; to produce witness for cross-examination, see EVIDENCE.

OATHS.

[See EVIDENCE.]

OFFICE COPIES.

[See COPIES; EVIDENCE.]

OFFICES.

[See CENTRAL OFFICE; SITTINGS; TIME.]

ORDERS.

A general form of order is given in Sched. H. 2 to the Rules of April, 1880. Clerical mistakes in . . . orders, or errors arising therein from any accidental slip or omission may at any time be corrected by the court or a judge on motion without an appeal: (O. XLIA, Dec. 1879; *Fritz v. Hobson*, L. Rep. 14 Ch. Div. 542; 42 L. T. Rep. N. S. 677; 28 W. R. 722; and see AMENDMENT, JUDGMENT.)

Where an order is made by consent, such consent may be withdrawn at any time before the order is passed and entered (Per Jessel, M.R., *Rogers v. Horn*, 26 W. R. 432); but in *Williams v. Meakin* (Court of Appeal, June 11, 1880) it was stated by counsel that the Master of the Rolls had said that the report of *Rogers v. Horn* was incorrect. Per

James, L.J., the passing and entering are only machinery: (*Williams v. Meakin, sup.*; and see COMPROMISE.)

. As to drawing up, entering, and passing orders, see JUDGMENT MOTION, PETITION; as to orders of cause, see MOTION, PETITION: [see also APPEAL, ARREST, COSTS, EXECUTION, INJUNCTION, INTERLOCUTORY PROCEEDINGS, PARTIES, PLEADINGS, &c.]

PALATINE COURT.

[See JURISDICTION; JUDGMENT, XXV.]

PARLIAMENTARY BILL.

A summons to proceed on the order is taken out. On the return of the summons the draft bill is directed to be brought in, and proceedings are adjourned. At the adjournment the draft is settled with the assistance of conveyancing counsel when required [see CONVEYANCING COUNSEL].

A memorandum is signed in the margin of the finally settled draft by the chief clerk.

The chief clerk makes his certificate [see CHAMBERS].

The draft bill is printed.

An affidavit verifying a printed copy is filed.

Draft bill, office copies, affidavit, and printed copy are left at chambers, and the chief clerk procures the judge's signature, in the presence of the witness intended for committee: (Dan. 1187-8.)

PARLIAMENTARY DEPOSITS.

[See COMPANIES, XI.; PAYMENT INTO AND OUT OF COURT].

PARTICULARS.

OF PLEADING.

[See PLEADING.]

OF SALE.

[See PROPERTY.]

PARTIES.

I. PLAINTIFFS.

1. MEANING OF "PLAINTIFF."
2. GENERAL RULES AS TO JOINING ALL PERSONS ENTITLED TO RELIEF.
3. PERSON SUING ON BEHALF OF HIMSELF AND OTHERS.
4. TRUSTEES.
5. EXECUTORS.
6. ADMINISTRATORS.

- (a) *Ordinary.*
- (b) *Ad litem.*
- (c) *Pendente lite.*
- (d) *Durante absentia.*
- (e) *Appointment of, by Court* [see *sup.*, 5].
- 7. LEGATEES.
- 8. NEXT OF KIN.
- 9. PERSONS INTERESTED IN PROCEEDS OF REALTY.
- 10. RESIDUARY DEVISEES.
- 11. HEIRS.
- 12. CESTUIS QUE TRUSTENT.
- 13. CLASS.
- 14. MARRIED WOMAN.
 - (a) *Swing in her own name alone.*
 - (1) *By Leave.*
 - (2) *Where Judicially Separated.*
 - (3) *With Protection Order.*
 - (4) *Having Separate Estate.*
 - (b) *Swing with Husband as Co-plaintiff.*
 - (c) *Swing by Next Friend.*
- 15. INFANTS.
 - (a) *How they Sue.*
 - (b) *Where they may Sue.*
 - (c) *Next Friend.*
 - (1) *Who may be.*
 - (2) *Written Authority.*
 - (3) *Liability to Costs.*
 - (4) *Retiring.*
 - (5) *Removal.*
 - (6) *Appointment of new Next Friend.*
 - (7) *Service and Entry of Order.*
 - (d) *Making Infant Co-plaintiff or Defendant.*
 - (e) *Effect of Infant attaining Majority.*
- 16. LUNATICS (SO FOUND).
- 17. LUNATICS (NOT SO FOUND).
- 18. PARTNERS.
- 19. CORPORATIONS, COMPANIES, AND SOCIETIES.
 - (a) *Generally.*
 - (b) *Sole Corporation.*
 - (c) *Foreign Corporation.*
 - (d) *Company under 7 Will. 4 & 1 Vict. c. 73.*
 - (e) *Company under Acts of 1862 and 1867.*
 - (f) *Banking Companies.*
 - (g) *Building Societies.*
 - (h) *Friendly Societies.*
 - (i) *Industrial and Provident Societies.*
 - (k) *Trade Unions.*
 - (l) *Treasury Solicitor* [see *post*, VI., 4, (i)].
- 20. PAUPERS.
 - (a) *Who may Sue as.*
 - (b) *Application.*
 - (c) *Evidence.*
 - (d) *Order.*
 - (e) *Effect of Order.*
 - (f) *Costs.*
 - (g) *Dispaupering.*
- 21. CONVICTS.
- 22. THE QUEEN'S ATTORNEY-GENERAL.
- 23. THE ATTORNEY-GENERAL OF THE QUEEN CONSORT.

24. THE ATTORNEY-GENERAL OF THE PRINCE OF WALES.
25. FOREIGN GOVERNMENTS.
26. BANKRUPTS.

II. DEFENDANTS.

1. MEANING OF "DEFENDANT."
2. GENERAL RULES AS TO JOINING ALL PERSONS LIABLE.
3. PERSON SUED ON BEHALF OF HIMSELF AND OTHERS.
4. TRUSTEES.
5. EXECUTORS.
6. ADMINISTRATORS.
7. LEGATEES.
8. NEXT OF KIN.
9. PERSONS INTERESTED IN PROCEEDS OF REALTY.
10. RESIDUARY DEVISEES.
11. HEIRS.
12. CESTUIS QUE TRUSTENT.
13. CLASS.
14. MARRIED WOMAN.
 - (a) *Sued in her own Name alone.*
 - (1) *By Leave.*
 - (2) *Where Husband Plaintiff.*
 - (3) *When Husband under Disability.*
 - (4) *In case of Separation or Protection Order.*
 - (b) *Sued with Husband as Co-defendant.*
 - (c) *Sued with Trustee of Separate Property.*
15. INFANTS.
 - (a) *To Defend by Guardian.*
 - (b) *Who Appointed Guardian.*
 - (c) *How Guardian Appointed.*
 - (1) *On Defendant's Application.*
 - (2) *On Plaintiff's Application.*
 - (3) *After Service of Notice of Judgment.*
 - (d) *Duties of Guardian.*
 - (e) *Removal of Guardian.*
16. LUNATICS (SO FOUND).
17. LUNATICS (NOT SO FOUND).
 - (a) *To Defend by Guardian.*
 - (b) *Appearance.*
 - (c) *Who Appointed Guardian.*
 - (d) *How Guardian Appointed.*
 - (1) *On Defendant's Application.*
 - (2) *On Plaintiff's Application.*
 - (3) *After Service of Notice of Judgment.*
 - (e) *Filing Order.*
 - (f) *Duties of Guardian.*
 - (g) *Discharging Order for Guardian.*
18. PARTNERS.
19. CORPORATIONS, COMPANIES, AND SOCIETIES.
 - (a) *Generally.*
 - (b) *Sole Corporation.*
 - (c) *Company under 7 Will. 4 & 1 Vict. c. 73.*
 - (d) *Bank of England.*
 - (e) *Company under Acts of 1862 and 1867.*
 - (f) *Banking Company.*
 - (g) *Building Societies.*
 - (h) *Friendly Societies.*
 - (i) *Industrial and Provident Societies.*
 - (k) *Trades Unions.*
 - (l) *Treasury Solicitor [see post, VI., 4, (i)].*

20. PAUPER.
21. CONVICT [see *sup.*, I., 21].
22. THE QUEEN'S ATTORNEY-GENERAL.
23. THE QUEEN CONSORT'S ATTORNEY-GENERAL.
24. THE PRINCE OF WALES' ATTORNEY-GENERAL.
25. FOREIGN GOVERNMENTS AND AMBASSADORS.
26. LANDLORD OBTAINING LEAVE TO DEFEND.

III. THIRD PARTIES.

IV. EFFECT OF MISJOINDER.

V. ADDING, SUBSTITUTING, AND STRIKING OUT.

1. ADDING AND SUBSTITUTING.

- (a) *General Rule.*
- (b) *Plaintiffs,*
 - (1) Examples under General Rule.
 - (2) In case of Mistake.
 - (3) Legatees, &c., suing without joining other persons entitled.
 - (4) Consent of Plaintiff.
 - (5) When and How Application made.
- (c) *Defendants.*
 - (1) Examples under General Rules.
 - (2) Legatees, &c., suing without joining other persons entitled [see *sup.* (b), (3).]
 - (3) When and How Application made [see *sup.* (b), (5).]
 - (4) Service of Writ or Notice.
 - (5) Delivery of Amended Statement of Claim.

2. STRIKING OUT.

- (a) *General Power.*
- (b) *By Whom Application made.*
- (c) *When and How Application made.*
- (d) *Effect of Order.*

VI. CHANGE OF PARTIES.

1. EXPLANATION OF TERMS.

- (a) *Abatement.*
- (b) *Defect.*
- (c) *Action.*
- (d) *Survive or Continue.*

2. CHANGES OF PARTIES IN CHANCERY DIVISION OR COURT OF APPEAL.

- (a) *Effect of Changes.*
 - (1) By Marriage.
 - (2) By Death.
 - (3) By Bankruptcy.
 - (4) By Assignment of Estate or Title.
 - (5) By Creation or Devolution of Estate or Title.
 - (6) By Lunacy, so Found by Inquisition.
 - (7) By Outlawry.
- (b) *Order Necessary on Change.*
 - (1) How obtained.
 - (2) Service of, and Appearance to.
 - (3) How Discharged.
- (c) *Proceedings not affected by Change.*

3. CHANGES OF PARTIES ON APPEAL TO THE HOUSE OF LORDS.

- (a) *Effect of Change.*
- (b) *Order necessary.*
 - (1) Before Appeal to the House brought.
 - (2) After Appeal to the House brought.

4. SPECIAL ENACTMENTS.

- (a) *Banking Companies.*
- (b) *Bankruptcy Trustees.*
- (c) *Building Societies.*
- (d) *Companies.*
- (e) *Costs.*
- (f) *Friendly Societies.*
- (g) *Industrial Societies.*
- (h) *Trade Unions.*
- (i) *Treasury Solicitor.*

I. PLAINTIFFS.

1. MEANING OF "PLAINTIFF."

The provisions of the 100th section of the [Judicature Act, 1873] shall apply to these rules (O. LXIII.) By the 100th section, in the construction of [the] Act, unless there is anything in the subject or context repugnant thereto . . . "plaintiff" shall include every person asking any relief (otherwise than by way of counter-claim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.

2. GENERAL RULE AS TO JOINING ALL PERSONS ENTITLED TO RELIEF.

All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person or persons who shall not be found entitled to relief, unless the court in disposing of the costs of the action shall otherwise direct: (O. XVI., r. 8.)

Although the injury to each of several persons has been several, they may sue jointly: (*Booth v. Briscoe*, 25 W. R. 838.)

No action shall be defeated by reason of the misjoinder of parties, and the court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it: (O. XVI., r. 13.)

(See COSTS and see 15 & 16 Vict. c. 86, s. 51; *post*, II., 2.)

3. PERSON SUING ON BEHALF OF HIMSELF AND OTHERS.

Where there are numerous parties having the same interest in one action, one or more of such parties may sue on behalf or for the benefit of all parties so interested: (O. XVI., r. 9.)

The owner of a share in a ship may sue on behalf of himself and numerous parties having the same interest, in an action for freight and dues for the use of the ship: (*De Hart v. Stevenson*, L. Rep. 1 Q.B. Div. 313; 45 L. J. 575, Q.B.)

A bondholder in a corporation may sue on behalf of himself and others to restrain improper dealings with funds: (*Wilson v. Church*, L. Rep. 9 Ch. Div. 552; 39 L. T. Rep. N. S. 413; 26 W. R. 735.)

As to creditors suing for administration, see ADMINISTRATION.

In all cases of suits for the protection of property pending litigation, . . . and in all cases in the nature of waste, one person may sue on behalf of himself and of all persons having the same interest: (O. XVI., r. 11; 15 & 16 Vict. c. 86, s. 42, r. 5.)

Notice of judgment must in cases under s. 42, be served on persons formerly necessary parties: (r. 8; see *Judgment*.)

4. TRUSTEES.

Trustees may sue on behalf of or as representing the property or estate of which they are trustees, without joining any of the parties beneficially interested in the trust or estate, and shall be considered as representing such parties in the action: (O. XVI., r. 7.)

Trustees for sales represent their beneficiaries in a partition action, and it is unnecessary to serve the beneficiaries with notice of judgment: (*Stace v. Gage*, L. Rep. 8 Ch. Div. 451; *Goodrich v. Marsh*, W. N. 1878, p. 186; *Simpson v. Denny*, L. Rep. 10 Ch. Div. 28.)

Subject to the provisions of the [Judicature Act, 1873] and the Rules, the provisions as to parties contained in sect. 42 of 15 & 16 Vict. c. 86, shall be in force in actions in the High Court of Justice: (O. XVI., r. 11.) The section provides as follows:

Any trustee may obtain a decree against any one legatee, next of kin, or *cestui que trust* for the administration of the estate or the execution of the trusts: (r. 6; see ADMINISTRATION.)

The persons who, according to [the former practice of the Court of Chancery] would be necessary parties to the suit, shall be served with notice of the [judgment]: (r. 8; see JUDGMENT.)

In all suits concerning real or personal estate which is vested in trustees under a will, settlement, or otherwise, such trustees shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as the executors and administrators in suits concerning personal estate, represent persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the parties beneficially interested under the trusts parties to the suit: (r. 9.)

As to Trustees of Bankrupts, see *post*, 26.

As to Lloyd's Corporation, see *Lloyd's v. Harper*, 42 L. T. Rep. N. S. 218; 49 L. J. 217, Ch; 28 W. R. 419.)

5. EXECUTORS AND REPRESENTATIVES EXPRESSLY APPOINTED.

Executors may sue on behalf of or as representing the estate of which they are representatives without joining any of the parties beneficially interested in the estate, and shall be considered as representing such parties in the action: (O. XVI., r. 7.)

Subject to the provisions of the [Judicature Act, 1873] and the rules, the provisions as to the parties contained in sect. 42 of 15 & 16 Vict. c. 86, shall be in force as to actions in the High Court of Justice: (O. XVI., r. 11.)

The section provides as follows:

Any executor may obtain a decree against any one legatee, next of kin, or *cestui que trust* for the administration of the estate or the execution of the trust: (r. 6; see ADMINISTRATION.)

All the executors must be parties, either as plaintiffs or defendants, in an administration action: (*Latch v. Latch*, L. Rep. 10 Ch. App. 464.)

The persons who, according to the [former practice of the Court of Chancery] would be necessary parties to the suit, shall be served with notice of the [judgment]: (r. 8; see JUDGMENT.)

If in any suit or other proceeding before the court it shall appear to the court that any deceased person who was interested in the matters in question has no legal personal representative, it shall be lawful for the court either to proceed in the absence of any person representing the estate of such deceased person, or to appoint some person to represent such estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the court shall think fit, either specially or

generally by public advertisements; and the order so made by the said court, and any orders consequent thereon shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly constituted legal personal representative of such deceased person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared and submitted his rights and interests to the protection of the court: (15 & 16 Vict. c. 86, s. 44.)

The section only applies to a case where there is a difficulty, either from insolvency or from any other cause, in obtaining representation to a deceased person. It is in the discretion of the court to exercise the power, which will not generally be exercised so that a whole adverse interest is so represented: (Dan. 181.)

The section extends to cases where the estate to be represented is sought to be made liable; where proceedings are pending in the Probate Division; where the next of kin refuse or neglect to administer; where it is uncertain whether the person whose estate was to be represented is alive or dead (Dan. 181); in an action by a transferee of policy moneys against the assurance company: (*Crossley v. City of Glasgow Life Assurance Company*, L. Rep. 4 Ch. Div. 421; but see *Webster v. British Empire Company*, 43 L. T. Rep. N. S. 229.)

Where a sole plaintiff died insolvent, and, so far as ascertainable, intestate, an order was made to enable the defendant to move to dismiss for want of prosecution: (*Wingrove v. Thompson*, L. Rep. 11 Ch. Div. 419; 27 W. R. 910.)

A representative will not be appointed where he would have to be active in prosecuting a judgment: or where a general administration is sought; or where the deceased was an accounting party; or where there is personal responsibility attached: (Dan. 182.)

The application should be made by the plaintiff, if any, on motion without serving the other parties, but the parties entitled to take out administration must have notice: (Dan. 183; but see *Wingrove v. Thompson*, *sup.*)

The court may make the order at the hearing: (Dan. 183.)

The proper person to be appointed is the person who would be appointed administrator *ad litem*: (*Id.*; see *post*, 6.)

On appointment he should give notice thereof, and of the solicitor who will act for him, to the Master at the Central Office, and produce the order for entry: (*Id.*; J. A. 1879.)

6. ADMINISTRATORS.

(a) Ordinary.

Administrators may sue . . . on behalf of or as representing the . . . estate of which they are . . . representatives, without joining any of the parties beneficially interested in the . . . estate, and shall be considered as representing such parties in the action: (O. XVI., r. 7.)

Subject to the provisions of the [Judicature Act 1873] and the rules, the provisions as to parties, contained in sect. 42 of 15 & 16 Vict., c. 86, shall be in force as to actions in the High Court of Justice: (O. XVI., r. 11.)

The section provides as follows:—

Any . . . administrator . . . may obtain a decree against any one legatee, next of kin, or *cestui que trust* for the administration of the estate, or the execution of the trusts: (r. 6; see ADMINISTRATION, TRUSTS.)

The persons, who, according to the [former practice of the Court of Chancery], would be necessary parties to the suit, shall be served with notice of the [judgment]: (r. 8; see JUDGMENT.)

(b) *Ad Litem.*

When it is necessary that the representative of a deceased person be made a party to a pending suit in the Chancery Division, but the executors and next of kin will not qualify themselves as his representatives, administration will be granted by the Probate Division to the nominee of a party, limited to attend, supply, substantiate, and confirm the proceedings already had, or that shall or may be had in the suit, or in any other cause or suit which may be commenced in the same or any other court between the parties, or any other parties, touching the matter at issue in the cause or suit, and until final decree is made therein, and carried into execution and the execution fully completed: (Coote's Pr. 152.)

Administration is also granted to the nominee of a plaintiff who is about to commence proceedings: (*Id.*)

The grant will be made whether proceedings are commenced by writ or petition: (*Id.*)

The grantee of administration has only power to carry on the proceedings, not to receive the fruits; but, if required, the Probate Division will allow a further limitation to receive any sum under the final order with interest: (Coote, 153.)

When the object of the suit is only to bind the estate, it is sufficiently represented by an administrator *ad litem*, and he generally represents it to the extent of the authority purported to be conferred by the letters of administration: (Dan. 180.)

But general administration will not be ordered in the presence of an administrator, only *ad litem*: (Dan. 179.)

When general administration is afterwards granted, the general administrator is bound by the former proceedings: (Dan. 180.)

(c) *Pendente Lite.*

The Probate Division may appoint any person administrator *pendente lite*, with all powers of a general administrator, except that of administering the residue: (20 & 21 Vict. c. 77, s. 70.)

In such cases the rule requiring a representative to be before the court is dispensed with: (Dan. 221.)

If a receiver has been appointed in the Chancery Division, his appointment will be discharged: (*Tichborne v. Tichborne*, L. Rep. 1 P. & D. 730.)

(d) *Durante Absentiâ.*

In this case the administration is limited for the purpose "to become and be made a party to [an action or actions] to be [commenced] against the administrator in any of Her Majesty's courts of equity, and to carry the decree or decrees of any of the said court or courts into effect, but no further or otherwise" (38 Geo. 3, c. 87, s. 2; see Coote's Pr. 154; *Donald v. Bather*, 16 Beav. 26.) It was granted to one of the next of kin, when one executor had never intermeddled, and both were out of the jurisdiction: (*Re Jenkins*, 41 L. T. Rep. N. S. 736; 49 L. J. 29, P. D. & A.; 28 W. R. 431.)

(e) *Appointment of, by Court.*

See 15 & 16 Vict. c. 86, s. 44, cited *sup.*, 5.

[And see ADMINISTRATION ACTION; and *post*, VI.]

7. LEGATEES.

Subject to the provisions of the [Judicature Act, 1873] and the rules, the provisions as to parties contained in sect. 42 of 15 & 16 Vict. c. 86 apply: (O. XVI., r. 11.)

The section, so far as relates to legatees, is as follows:—

Any residuary legatee . . . may, without serving the remaining

residuary legatees, . . . leave a decree for the administration of the personal estate of a deceased person: (r. 1; see ADMINISTRATION; *Woolaston v. Woolaston*, L. Rep. 7 Ch. Div. 58.)

Any legatee interested in a legacy charged upon real estate. . . . may, without serving any other legatee, . . . have a decree for the administration of the estate of a deceased person: (r. 2; see ADMINISTRATION.)

The persons who, according to [the former practice of the Court of Chancery], would be necessary parties to the suit shall be served with notice of the [judgment]: (r. 8; see JUDGMENT.)

8. NEXT OF KIN.

Any . . . next of kin may, without serving the remaining . . . next of kin, have a decree for the administration of the personal estate of a deceased person: (O. XVI., r. 11; 15 & 16 Vict. c. 86, s. 42, r. 1; see *post* V., 1; ADMINISTRATION; JUDGMENT.)

Notice of judgment must be served on persons formerly necessary parties: (r. 8; see JUDGMENT.)

The court may appoint a person or persons to represent the next of kin, as in case of an heir-at-law: (O. XVI., r. 9*a*, June, 1876; see *post*, 11.)

9. PERSONS INTERESTED IN PROCEEDS OF REALTY.

Any person interested in the proceeds of real estate directed to be sold, may, without serving any other . . . persons interested in the proceeds of the estate, have a decree for the administration of the estate of a deceased person: (O. XVI., r. 11; 15 & 16 Vict. c. 86, s. 42, r. 2; see ADMINISTRATION.)

Notice of judgment must be served on persons formerly necessary parties: (r. 8; see JUDGMENT.)

10. RESIDUARY DEVISEES.

Any residuary devisee . . . may, without serving any co-residuary devisee, . . . have [a decree for the administration of the estate of a deceased person]: (O. XVI., r. 11; 15 & 16 Vict. c. 86, s. 42, r. 3; see ADMINISTRATION.)

Notice of judgment must be served on persons formerly necessary parties: (r. 8; see JUDGMENT.)

11. HEIRS.

Any . . . heir may, without serving any . . . co-heirs, have [a decree for the administration of the estate of a deceased person]: (O. XVI. r. 11; 15 & 16 Vict. c. 86, s. 42, r. 3; see ADMINISTRATION.)

Notice of judgment must be served on persons formerly necessary parties: (r. 8; see JUDGMENT.)

In any case in which the right of an heir-at-law, or the next of kin, or a class, shall depend upon the construction which the court may put upon an instrument, and it shall not be known, or be difficult to ascertain, who is, or are, such heir-at-law, next of kin, or class, and the court shall consider that, in order to save expense, or for some other reason, it will be convenient to have the question, or questions of construction determined before such heir-at-law, next of kin, or class, shall have been ascertained by means of inquiry, or otherwise, the court may appoint some one, or more, persons to represent such heir-at-law, next of kin, or class, and the judgment of the court, in the presence of such person, or persons, shall be binding upon the party, or parties, or class, so represented: (O. XVI., r. 9*a*, June, 1876.)

Where upon the construction of a will questions had arisen as to what

classes of representatives of the testator were entitled, and there was difficulty in finding the heir who in the result might be held not entitled, the court appointed persons to represent the various classes of which some or one might be held entitled before the question of construction came on for decision: (*Re Peppitt*, L. Rep. 4 Ch. Div. 230; 46 L. J. Ch. 95.)

In suits to execute the trusts of a will, it shall not be necessary to make the heir-at-law a party; but the plaintiff shall be at liberty to make the heir-at-law a party where he desires to have the will established against him: (O. O. 7, r. 1.)

12. CESTUIS QUE TRUSTENT.

Any one of several *cestuis que trusts* under any deed or instrument, may, without serving any other of such *cestuis que trusts*, have a decree for the execution of the trusts of the deed or instrument: (O. XVI. r. 11; 15 & 16 Vict. c. 86, sect. 42, r. 4.)

Notice of judgment must be served on persons formerly necessary parties: (r. 8; see JUDGMENT.)

13. CLASS.

The court may appoint one, or more, persons to represent a class, as in the case of an heir-at-law: (see O. XVI., r. 9a, June, 1876; *sup.*, 11.)

14. MARRIED WOMAN.

(a) *Suing in her own name alone.*

(1) By Leave.

Married women may . . . by the leave of the court or a judge sue . . . without their husbands, and without a next friend, on giving such security (if any) for costs as the court or a judge may require: (O. XVI., r. 8; see COSTS.)

Where the husband was both the wife's next friend and a defendant, his name was struck out as a next friend, and his wife was allowed to sue alone: (*Lewis v. Nobbs*, L. Rep. 8 Ch. Div. 593; 42 L. J. 662, Ch.)

Security for costs may be ordered at any time: (*Martano v. Mann*, L. Rep. 14 Ch. Div. 419; 42 L. T. Rep. N. S. 890; 49 L. J. 510, Ch.)

When a married woman is unable to obtain a next friend of substance, she may, on *ex parte* motion supported by affidavit, obtain an order authorising her to commence or continue proceedings, or to appeal, without a next friend, *in formâ pauperis*: (Dan. 38.)

As to married women suing alone in cases of banishment of their husbands, or when their husbands are aliens, traitors, or felons, see Dan. 84, *et seq.*; 33 Vict. c. 14; 33 & 34 Vict. c. 23.

(2) Where Judicially Separated.

A married woman judicially separated from her husband may commence an action in her own name as if she were a *feme sole*: (20 & 21 Vict. c. 85, s. 26.)

(3) With Protection Order.

A married woman, who has obtained a protection order for property she has acquired by her lawful industry, or has become possessed of, since her desertion by her husband, is in the like position as a plaintiff: (*Id.*, s. 21; 21 & 22 Vict. c. 108, s. 6.) The order for protection has been extended to property to which the wife is possessed or entitled in remainder or reversion at the date of the desertion: (21 & 22 Vict. c. 108, s. 8.)

(4) Having Separate Estate.

Under 33 & 34 Vict. c. 93, a married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property thereby declared to be her separate property, viz., earnings made in an employment carried on separately, or obtained by the exercise of

literary, artistic, or scientific skill, investments of such earnings, deposits in savings' banks, and annuities granted by the Commissioners for the Reduction of the National Debt in her name, sums (over 20*l.*) transferred to her separate use in the Banks of England and Ireland, fully paid-up shares, debentures and debenture stock, or any stock to the holding of which no liability attaches, in an incorporated or joint-stock company, registered in her name to her separate use, property in a friendly society, benefit building, or loan society, to which no liability is attached, entered in her name to her separate use, real or personal property to any amount coming to her through an intestacy (if she has been married since the 9th of Aug., 1870), money, not exceeding 200*l.*, under any deed or will (if so married), and policies and all benefit thereunder effected by her, on her own or her husband's life, and expressed to be for her separate use (33 & 34 Vict. c. 93, ss. 1-5, 7, 8, 10); she may maintain an action in her own name for the recovery of any property belonging to her before marriage, and which her husband has by writing agreed shall belong to her for her separate use after marriage; and she has in her own name the same remedies against all persons for the protection and security of such wages, earnings, money, and property, and of any property purchased, or obtained by means thereof for her own use, as if such wages, &c., belonged to her as an unmarried woman: (*Id.*, s. 11.)

She may sue for damages for expulsion from separate property: (*Moor v. Robinson*, 40 L. T. Rep. N. S. 99; 48 L. J. 156, Q. B.)

(b) *Suing with Husband as co-Plaintiff.*

In all cases in which the husband seeks to recover the property of the wife, he should make her a co-plaintiff with himself whether the property accrued before or after marriage: (Dan. 85.)

Where a married woman sues as personal representative, her husband ought to be a co-plaintiff: (*Burdick v. Garrick*, L. Rep. 5 Ch. App. 238.)

Where the action is for the wife's *chose in action* not settled to her separate use, the defendant cannot object to the husband's suing jointly with her, nor is her right to a settlement affected by such joinder: (Dan. 103.)

(c) *Suing by Next Friend.*

Married women may sue as plaintiffs by their next friends, in the manner practised in the Court of Chancery before the passing of the [Judicature] Act [1873]: (O. XVI., r. 8.)

In all cases relating to the separate property of a married woman (other than such as was declared to be separate by the Married Women's Property Act, 1870), the suit should be commenced by her in the name of her next friend: (Dan. 102.) Her husband must be made a defendant: (*Id.* 103; *Roberts v. Evans*, L. Rep. 7 Ch. Div. 830; 38 L. T. Rep. N. S. 99; 47 L. J. 469, Ch.; 26 W. R. 280); but in cases in which he takes an independent interest in the property sought to be affected by the decree, he may, perhaps, be joined as a co-plaintiff with his wife, the latter suing by her next friend: (per Romilly, M.R., in *Richards v. Millett*, 9 L. T. Rep. N. S. 13.)

It is not necessary that the next friend should be the married woman's relation, but he must be a person of substance (Dan. 104; *Hind v. Whitmore*, 2 K. & J. 458; *Macann v. Borradaile*, 17 L. T. Rep. N. S. 135); the object for which a next friend is required being that he may be answerable for costs: (Dan. 104.)

Before the name of any person shall be used as next friend of a married woman such person shall sign a written authority to the solicitor for that purpose, and such authority shall be filed when the [writ is issued]: (15 & 16 Vict. c. 86, s. 11.)

If the next friend be found to be in insolvent circumstances the action will, on motion, be ordered to be stayed till he give security for costs, or the married woman shall give security for costs, or obtain the appointment of a substantial person as next friend, or obtain an order to sue *in formâ pauperis*: (Dan. 104, 105; *Hind v. Whitmore*, *sup.*; *Macann v. Borradaile*, *sup.*)

Security for costs may be ordered at any time: (*Martano v. Mann*, L. Rep. 14 Ch. Div. 419; 42 L. T. Rep. N. S. 890; 49 L. J. 510, Ch.)

In case a next friend dies, whether before or after appearance, a new next friend may be introduced under an order of course, and the same may be done where the next friend is incapable of acting or it is desirable to remove him, before any appearance has been entered; but after appearance, an order, on motion, with notice, or summons is necessary: (see Dan. 105.)

When a married woman applies to change the next friend the court has a discretion, having regard to the question of the defendant's costs being in peril, and the order is generally made on the condition of the new next friend giving security to answer past costs, and abide by the court's order as to future costs: (*Id.*; but see Pemberton on Judgments, 2nd edit. 200.)

Where, however, a new next friend had been substituted in the place of one who was insolvent, the court refused to order the former to find security for past costs: (*Macann v. Borradaile*, 17 L. T. Rep. N. S. 298.)

The retiring next friend has also been required to give security for costs up to the time of the change: (Dan. 106.)

Where the next friend dies, the defendant may obtain any order, on motion with notice, to dismiss the proceedings with costs, unless a new next friend is named within a reasonable time: (*Id.*)

A next friend may in every case be required to give security for costs (*Pennington v. Alvin*, 1 Sim. & St. 264; Pemb. 201); and where he goes to reside abroad permanently, the practice is the same as if he had been the actual plaintiff: (Dan. 106.)

The married woman's consent is required before a suit was instituted by the next friend, except where she was an infant: (Dan. 103.) If the next friend commences the action without her consent, she may, upon motion, obtain the dismissal of the suit with costs, which the next friend has to pay (*Kenrick v. Wood*, L. Rep. 9 Eq. 333); but this right does not exist for the benefit of a defendant: (*Davies v. Whitehead*, W. N. 1866, p. 162.)

15. INFANTS.

(a) *How they Sue.*

Infants may . . . sue as plaintiffs by their next friends, in the manner practised in the Court of Chancery before the passing of the [Judicature] Act [1873]: (O. XVI., r. 8.)

(b) *When they May Sue.*

Where from the nature of the demand made by the infant it would follow that, if the relief were granted, the rules of mutuality would require something to be done on his part, such an action cannot be maintained: (Dan. 66.)

(c) *Next Friend.*

(1) *Who may be.*

The court will allow any person to act, as next friend: (*Id.* 67.) He need not be a person of substance, and on special case being made out, may sue *in formâ pauperis*: (*Id.* 73.)

Communication ought to be made to the father, if any, of the infant, before commencing proceedings in the name of the latter. If the father has no adverse interest he will be substituted as next friend: (*Woolf v. Pemberton*, L. Rep. 6 Ch. Div. 19; 37 L. T. Rep. N. S. 319.)

(2) Written Authority.

Before the name of any person shall be used in any [action] to be instituted in the . . . court, as next friend of any infant . . . such person shall sign a written authority to the solicitor for that purpose, and such authority shall be filed [when the writ is issued]: (15 & 16 Vict. c. 86, s. 11.)

The authority is necessary in case a new next friend is appointed: (Dan. 76.)

(3) Liability to Costs.

As a general rule the next friend is liable to pay the defendant's costs of dismissing the action: (Dan. 77.)

An infant repudiating an action when he attains twenty-one cannot compel the next friend to pay the costs, unless he can establish that the action was improperly commenced: (Dan. 76.)

(4) Retiring.

Generally a next friend is not allowed to retire without giving security for the costs already incurred; and the court refused to allow another next friend to be substituted for the one who had up to that time conducted the suit in that capacity, and who desired to withdraw himself, without a previous inquiry whether it was for the benefit of the infant that such substitution should take place. The application to substitute in place of a next friend desirous of retiring is by summons: (Dan. 74-5.)

(5) Removal.

If the next friend of an infant does not do his duty, or if any other sufficient ground be made out, the court will remove him, as when he will not proceed with the action. And if he is connected with the defendants in the cause in such a manner as to render it improbable that the interest of the plaintiff will be properly supported, the court will remove him and appoint another: (Dan. 73.)

The next friend of infant plaintiffs has no power to deprive them of their right to appeal; and his refusal to appeal, though admittedly *bond fide*, is misconduct sufficient to justify his removal: (*Dupuy v. Welsford*, 42 L. T. Rep. N. S. 730; 28 W. R. 762.)

When it is necessary to appoint a new next friend in place of one incapable or removed, the solicitor of the plaintiff should apply for an order appointing a new next friend in his stead, whose fitness must be generally proved, and after such appointment his name should be made use of in all subsequent proceedings, where the former would have been named: (Dan. 75.)

In case of a next friend's death, the infant's nearest paternal relations are entitled to nominate a new one, who is appointed by order of course, without an affidavit of fitness: (*Talbot v. Talbot*, L. Rep. 17 Eq. 346.)

(6) Appointment of New Next Friend.

Before appearance, the new next friend's name may be introduced into the record, under an order on petition of course.

After appearance, in the case of death,

If the application is by the plaintiff's solicitor, it is for an order of course to amend.

If by another person, petition of course must be first presented at the Rolls to change the solicitors, and, an order having been made thereon, a petition of course must be presented for an order appointing a new next friend.

In other cases the application is by petition of course if defendants consent, otherwise by summons, or motion on notice: (Dan. 75.)

(7) *Serving and Entry of Order.*

Every order appointing a new next friend must be served on the solicitors of the defendants, and entered at the Central Office: (Dan. 76; J. A. 1879.)

(d) *Making Infant Co-plaintiff a Defendant.*

If an infant is made a co-plaintiff with others, and it appears that it will be more for his benefit that he should be made a defendant, an order to strike his name out as plaintiff, and to make him a defendant, may be made: (Dan. 70.)

As to inquiry whether an action is for an infant's benefit, see *STAYING PROCEEDINGS*.

(e) *Effect of Infant Attaining Majority.*

The next friend of a sole plaintiff ought to take no step in his name after he attains full age.

If an infant come of age pending his action, he may elect whether to proceed or not. If he elect to proceed, all further proceedings may be in his name without amendment, and he will be liable to costs from the commencement of the action. If he elect to abandon, he may (1) obtain an order of course to dismiss the action on payment of costs by himself, or (2) may refrain from taking any step, in which case he is not liable for costs. Repudiation on coming of age relates back to the commencement of the action, overriding all that has been done in it: (Dan. 76-77.)

16. *LUNATICS (SO FOUND).*

In all cases in which lunatics . . . might, before the passing of the [Judicature Act, 1873] have sued as plaintiff . . . in any action or suit . . . they may . . . sue as plaintiffs in any action by their committee or next friend in manner practised in the Court of Chancery before the passing of the said Act: (O. XVIII.)

Lunatics, so found, sued by the committees of their estates: (Ayck. 600; Dan. 80.)

The committee must previously obtain sanction under the jurisdiction in lunacy, by petition under the commission: (*Id.*; Elmer on Lunacy, 204.)

If there is no committee of the estate the lunatic must sue by his next friend: (Dan. 80.)

The lunatic must be a co-plaintiff, except in actions to avoid transactions entered into by a lunatic on the ground of his incapacity: (*Id.*; Elmer, 123.)

Before the name of any person shall be used . . . as next friend . . . such person shall sign a written authority to the solicitor for that purpose, and such authority shall be filed [when the writ is issued]: (15 & 16 Vict. c. 86, s. 11.)

17. *LUNATICS (NOT SO FOUND).*

In all cases in which . . . persons of unsound mind not so found by inquisition might . . . before the passing of the [Judicature Act, 1873] have sued as plaintiffs . . . in any action or suit, they may respectively sue as plaintiffs in any action by their next friend in manner practised in the Court of Chancery before the passing of the said Act: (O. XVIII.; Ayck. 600.)

Persons of full age, incapable of acting for themselves, though neither idiots nor lunatics, may sue by their next friend, without the intervention of the Attorney-General: (Dan. 83.)

A person of unsound mind not so found, may, by his next friend, be plaintiff in an action for obtaining a sale under the Partition Act: (*Watt v. Leach*, 26 W. R. 475.)

Before the name of any person shall be used . . . as next friend . . .

such person shall sign a written authority to the solicitor for that purpose, and such authority shall be filed [when the writ is issued]: (15 & 16 Vict. c. 86, s. 11.)

If an action is commenced by a next friend concerning the lunatic's estate, and he is subsequently found lunatic under a commission, no further proceedings can be taken in the action: (*Beall v. Smith*, L. Rep. 9 Ch. App. 85; 29 L. T. Rep. N. S. 625; 22 W. R. 121; 43 L. J. 245, Ch.)

18. PARTNERS.

Any two or more persons claiming . . . as co-partners may sue in the name of their respective firms, if any: (O. XVI., r. 10.)

A cost book mining company, though unincorporated, may sue by its partnership name: (*Escott v. Gray*, 39 L. T. Rep. N. S. 121.)

If the names of the partners are declared in writing on demand [see DISCOVERY] the proceedings continue in the name of the firm: (O. VII., r. 2.)

19. CORPORATIONS, COMPANIES, AND SOCIETIES.

(a) Generally.

The power to sue in its corporate name is inseparably incident to every corporation, whether sole or aggregate: (Dan. 23.)

A corporation which has a head cannot sue without it: (Dan. 24.)

(b) Sole Corporation.

A sole corporation suing for a corporate right, having two capacities—a natural and a corporate—must show in what capacity he sues.

(c) Foreign Corporation.

A foreign corporation may sue in its corporate name: (Dan. 25.)

(d) Companies Under 7 Will. 4 & 1 Vict. c. 73.

Companies established under 7 Will. 4 & 1 Vict. c. 73, may sue by their public officer.

(e) Companies under the Acts of 1862 and 1867.

Companies registered under the Companies Acts become incorporated and are able to sue like other corporations: (25 & 26 Vict. c. 89, s. 6.)

If an act, not *ultra vires*, has been done irregularly the court will not entertain the complaint, except at the instance of the majority and in a proceeding in which the company is plaintiff: (Buckley, 3rd edit., 395.)

The company must be plaintiff in any proceeding to recover its property or enforce its right: (*Id.*)

Any action which the claims of justice require to be entertained should be entertained, though the company is not a plaintiff: (*Id.*, 396.)

If the case is one in which the company ought to sue, then (subject as mentioned below) a shareholder must exhaust all reasonable means of obtaining the institution of an action by the company before suing himself: (*Id.*, 396.)

Where fraud is alleged to have been committed by persons who can command a majority of votes in a company, an action can be brought by one shareholder in his own name on behalf of the others, and he has no right to sue in the name of the company without the company's consent: (*Mason v. Harris*, 11 Ch. Div. 97; 40 L. T. Rep. N. S. 644; 48 L. J. Ch. 589; 27 W. R. 699.)

The name of a company should not be used as plaintiffs in an action by a shareholder when a very large majority of the shareholders have passed a resolution against it being so used. In such a case the court will order the name of the company to be struck out as plaintiffs and treat the shareholders who wish to institute the action as being entitled to proceed in his own name: (*Silber Light Company v. Silber*, *inf.*)

An action having been commenced by a shareholder in his own name and in that of the company as plaintiffs, the company afterwards went into voluntary liquidation, and the shareholders resolved by a large majority that the action should not be continued in the company's name. The court ordered the company's name to be struck out as plaintiffs, but gave to the plaintiff shareholder leave to add the company as defendants: (*Silber Light Company v. Silber*, 40 L. T. Rep. N. S. 184; 48 L. J. 385, Ch.; 27 W. R. 427.)

If the case be one in which the company ought to sue, the fact that the seal is in the possession of the adverse party will not prevent the intending plaintiffs from using the company's name, and it is unnecessary to get the resolution of a general meeting before suing: (*Pender v. Lushington*, L. Rep. 6 Ch. Div. 70.) In cases of urgency the company's name may be used at the plaintiff's peril, and subject to his being able to show that he has the support of the majority: (Buck. 596.) If the company's name has been used improperly it will be struck out: (*Id.*; *Silber Light Company v. Silber*, *sup.*; and see *post*, II., 19 (e).)

(f) *Banking Companies.*

Banking companies sue by their public officer (7 Geo. 4, c. 46, s. 9; see Grant on Bankers, 3rd edit., 559.) He may sue after the co-partnership has suspended payment: (*Davidson v. Cooper*, 11 M. & W. 778.)

(g) *Building Societies.*

Building societies not incorporated under 37 & 38 Vict. c. 42, sue by their treasurer or trustee in his or her proper name as treasurer or trustee of such society without other description: (10 Geo. 4, c. 56, s. 21; 6 & 7 Will. 4, c. 32.) Societies incorporated under the Act of 1874 sue in their corporate names like other corporations: (see 37 & 38 Vict. c. 42, s. 9.)

(h) *Friendly Societies.*

The trustees of any society or branch, or any other officers authorised by the rules may sue in their proper names without other description than the title of their office: (38 & 39 Vict. c. 60, s. 21.)

(i) *Industrial and Provident Societies.*

Registration renders the society a body corporate by the name described in the acknowledgment of registry, by which name it sues: (39 & 40 Vict. c. 45, s. 11.)

(k) *Trade Unions.*

The trustees of any registered trade union, or any other officer authorised by the rules, may sue in their proper names, without other description than the title of their office: (34 & 35 Vict. c. 31, s. 9.)

(l) *Treasury Solicitor* [see *post*, VI., 4 (i)].

20. PAUPER.

(a) *Who may Sue as.*

Plaintiffs generally may be admitted to sue *in formâ pauperis*, who are able to make the affidavit mentioned *post* (c).

An infant will be allowed to sue by his next friend: (Dan. 39.)

A married woman, if unable to procure a substantial person to act as next friend, will be allowed to sue, without a next friend, *in formâ pauperis*: (Dan. 38.)

Persons suing in a representative character are not generally allowed to do so as paupers: (*Id.*)

(b) *Applications.*

The application may be made at any time after the writ is issued or summons is issued: (Dan. 39.)

The plaintiff is liable to costs incurred before his admission to sue *in formâ pauperis* : (*Id.*)

The order may generally be obtained as of course upon petition at the Rolls. The presentation of the petition of course is accompanied by the office copy of the certificate of poverty, and in the case of a plaintiff there should be the affidavit of counsel, mentioned below, at the foot, that he has good cause of suit : (Jarm. Ch. Pr. 836 ; Dan. 40 ; C. O. 7, r. 8.)

In the case of a married woman or an infant, the application is by motion *ex parte* : (Dan. 38, 39.)

No person shall be admitted to prosecute any suit in this court *in formâ pauperis*, without a certificate of counsel that he conceives the case to be proper for relief in this court : (C. O. 7, r. 8.)

(c) Evidence.

The application must be supported by an affidavit, sworn by the plaintiff, that he is not worth the sum of 5*l.*, his wearing apparel and the subject matter of the proceedings only*excepted : (Dan. 41.)

In case of a married woman or infant, the affidavit must also state her or his inability to procure any substantial person to act as next friend : (Dan. 38-39.)

(d) Order.

The orders admit the plaintiff to sue, and assign him counsel and a solicitor : (Dan. 41.)

The order must be served without delay to entitle the party to the immediate benefit of it ; but he will not be allowed to keep it back and produce it at the last moment, so as to obtain *dives* costs if he succeeds, or to obtain the benefit of it if he fails : (Jarm. 841.)

The order is not necessarily inoperative until service : (Dan. 41.)

The order must be entered at the Central Office, and must be produced to the officers of the court when required : (Dan. 41.)

(e) Effect of Order.

The existing rules and practice, applicable to proceedings by persons suing *in formâ pauperis*, shall continue and be applicable to proceedings to which this order relates : (Order as to Fees, 28th Oct. 1875, r. 5.)

The order, when obtained, in effect exempts the party from payment of any fees or expenses throughout the suit or proceeding except for office copies, and from the payment of costs in case of failure therein : (Jarm. 841.)

The pauper may make copies himself, and have them marked as office copies free of charge : (Dan. 44.)

Where a plaintiff was admitted to sue after a chief clerk's certificate was ready to be delivered out, it was ordered to be delivered out without payment of court fees : (*Thomas v. Ellis*, L. Rep. 8 Ch. Div. 518 ; 26 W. R. 839.)

After an admittance to sue or defend *in formâ pauperis*, no fee, profit, or reward shall be taken of the pauper by any counsel or solicitor, for the despatch of the pauper's business, during the time it shall depend in court and he shall continue *in formâ pauperis* ; nor shall any agreement be made for any recompense or reward afterwards. And any person offending herein shall be deemed guilty of a contempt of court ; and the party admitted, who shall give any such fee or reward or make any such agreement, shall be from thenceforth dispaupered, and not be afterwards admitted again in that suit to sue or defend *in formâ pauperis* : (C. O. 7, r. 9.)

The counsel or solicitor assigned by the court to assist a person admitted *in formâ pauperis*, either to sue or defend, may not refuse so

to do, unless such counsel or solicitor satisfy the judge who granted the admittance, with some good reason for his unwillingness to be so assigned: (*Id.*, r. 10.)

A pauper plaintiff, to whom counsel and solicitor are assigned, cannot appear in person: (*Parkinson v. Hanbury*, 22 L. J. 979, Ch.)

No process of contempt shall be issued at the instance of any person suing or defending *in formâ pauperis*, until it be signed by his solicitor in the suit. And no notice of motion served or petition presented on behalf of any person admitted to sue or defend *in formâ pauperis* (except for the discharge of his solicitor) shall be of any effect, nor shall any person served with such notice or petition be bound to appear thereon, unless such notice or petition be signed by the solicitor of such person so suing or defending. And such solicitor shall take care that no such process be taken out, and that no such notice or petition be served, needlessly or for vexation, but upon just and good grounds: (C. O. 7, r. 11.)

(f) Costs.

Where costs are ordered to be paid to a party suing or defending *in formâ pauperis*, such costs shall be taxed as *dives* costs, unless the court shall otherwise direct: (C. O. 40, r. 5.)

The charges for copies delivered by a person admitted to sue or defend *in formâ pauperis*, other than those delivered by his solicitor, shall be at the rate of one penny-halfpenny per folio: (Ch. Reg. H. T. 1860, O. 4, r. 3.)

(g) Dispaupering.

If it be made to appear at any time that the pauper is of such ability that he ought not to be allowed to sue or defend *in formâ pauperis*; or if the pauper is guilty of vexatious or improper conduct, the court will, on motion, made without delay, on notice, order him to be dispaupered: (Dan. 43-4.)

21. CONVICTS.

Persons convicted after the 4th July, 1870, of treason or felony, and sentenced to death or penal servitude, are disabled from suing: (33 & 34 Vict. c. 23, ss. 6, 8.) The Crown may appoint an administrator or administrators (s. 9), in whom all the convict's real and personal property, including *choses in action*, vests for all the estate and interest of the convict therein (s. 10). If no administrator is appointed, an interim curator may be appointed by the justices (s. 21), and may, unless or until an administrator is appointed, sue or defend in his own name as interim curator in respect of the convict's property: (s. 24; see also ss. 26-29.)

22. THE QUEEN'S ATTORNEY-GENERAL.

Where the rights of the Queen, or of those who partake of her prerogative, are the subject of an action, the name of the Attorney-General, or, if that office is vacant, of the Solicitor-General, is used as plaintiff: (Dan. 6.)

When the Duchy of Cornwall is in the hands of the Crown, the Queen's Attorney-General conducts all proceedings relating to the duchy: (Dan. 7.)

The Attorney-General is also properly plaintiff in actions in support of the rights of those whose protection devolves upon the Crown as supreme head of the Church, and on behalf of individuals under the protection of the Crown as *parens patriæ*, as the objects of general charities, idiots, and lunatics: (Dan. 7, 8.)

In case of actions immediately concerning the rights of the Crown, the officers proceed upon their own authority, without the intervention of

anyone, but where the rights are not immediately concerned some person must be added as a relator. The relator can take no step in his own name, independently of the law officer: (Dan. 13.)

If the action is on behalf of a lunatic he must be added as a party, and not merely as a relator: (Dan. 9.)

Any person not under disability may be a relator: (Dan. 15.)

Before the name of any person shall be used as a relator such person shall sign a written authority to the solicitor for that purpose, and such authority shall be filed [on issuing the writ]: (15 & 16 Vict. c. 86, s. 11.)

23. THE ATTORNEY-GENERAL OF THE QUEEN CONSORT.

The Queen Consort sues by her Attorney-General or Solicitor-General, not in her own name: (Dan. 19.)

24. THE ATTORNEY-GENERAL OF THE PRINCE OF WALES.

The Prince of Wales, as Duke of Cornwall, when of full age, and while such duchy is not in the hands of the Crown, sues in matters relating to the duchy, in the name of his Attorney-General. When the Prince of Wales is under age the action is commenced by the Queen's Attorney-General joining with him the Attorney-General for the Prince as Duke of Cornwall: (Dan. 20.)

25. FOREIGN GOVERNMENTS.

A foreign government may sue, in respect of its private rights, by the name by which it or its sovereign has been recognised by the Government of this country, and is not bound to sue in the name of any officer of the Government, or to join any such officer as co-plaintiff: (Dan. 21, 22, citing *United States of America v. Wagner*, L. Rep. 2 Ch. App. 582.)

26. BANKRUPTS.

Where the cause of action has accrued since bankruptcy, a bankrupt may maintain an action unless his trustee interposes: (*Jameson v. Brick and Stone Company*, W. N. 1878, p. 233; 39 L. T. Rep. N. S. 594.)

A trustee in bankruptcy or liquidation possesses all the rights of an ordinary litigant, including a right to compromise actions which he has instituted in his capacity of trustee: (*Leeming v. Lady Murray*, L. Rep. 13 Ch. Div. 128.)

II. DEFENDANTS.

1. MEANING OF "DEFENDANT."

The provisions of the 100th section of the [Judicature Act, 1873] shall apply to these rules: (O. LXIII.)

By the 100th section: "In the construction of [the] Act, unless there is anything in the subject or context repugnant thereto . . . 'defendant' shall include every person served with any writ of summons or process, or served with notice of or entitled to attend any proceedings."

2. GENERAL RULES AS TO JOINING ALL PERSONS LIABLE.

All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment: (O. XVI., r. 3.)

It shall not be necessary that every defendant to any action shall be interested as to all the relief thereby prayed for, or as to every cause of action included therein; but the court or a judge may make such order as may appear just to prevent any defendant from being embarrassed or

put to expense by being required to attend any proceedings in such action in which he may have no interest : (O. XVI., r. 4.)

The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes : (O. XVI., r. 5.)

Where the plaintiff has a joint and several demand against several persons, either as principals or sureties, it is not necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto ; but the plaintiff may proceed against one or more of the persons severally liable : (C. O. 7, r. 2 ; see Morg. & Chute, 5th edit. 474 ; *Wilson v. Rhodes*, L. Rep. 8 Ch. Div. 777.)

Where in any action, whether founded upon contract or otherwise, the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that in such action the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties to the action : (O. XVI., r. 6.)

The rules deal with cases in which there are many persons interested, and many interests involved, and give the court power once for all to dispose of those cases, and to dispose of all the interests of many parties : (per Bacon, V.C., *Cox v. Barker*, L. Rep. 3 Ch. Div. 369.) It is not necessary for a plaintiff to bring an action, first against A., and then against B., and to run the risk of a contrary view being taken of the two cases, but he may have both defendants before the court and try it out between them : (per Mellish, L.J., *Honduras Railway Company v. Lefevre and Tucker*, L. Rep. 2 Ex. Div. 306 ; 46 L. J. 391, Ex. ; 25 W. R. 310.)

The alternative relief claimed against one defendant need not be consistent with that prayed against another defendant. Thus where the plaintiff claimed an injunction and damages for a trespass against a defendant whose defence was that he had a good title under the same landlord as the plaintiff, the court allowed the landlord to be added as a party, and a claim to be inserted against him under his covenant for quiet enjoyment : (*Child v. Stenning*, L. Rep. 5 Ch. Div. 695 ; 46 L. J. 521, Ch.) At the hearing the plaintiff is not bound to elect against which defendant to proceed, and one defendant may support the plaintiff's case against the other (same case, L. Rep. 7 Ch. Div. 413 ; 38 L. T. Rep. N. S. 232 ; 47 L. J. 371, Ch. ; 26 W. R. 265) ; the defendant who is the cause of the whole litigation must pay the cost of the plaintiff and the other defendants : (*Child v. Stenning*, L. Rep. 11 Ch. Div. 82.)

It shall be lawful for the court to adjudicate on questions arising between parties, notwithstanding that they may be some only of the parties interested in the property respecting which the question may have arisen, or that the property in question is comprised with other property in the same settlement, will, or other instrument, without making the other parties interested in the property respecting which the question may have arisen, or interested under the same settlement, will, or other instrument, parties to the suit, and without requiring the whole trusts and purposes of the settlement, will, or other instrument, to be executed under the direction of the court, and without taking the accounts of the trustees or other accounting parties, or ascertaining the particulars or amount of the property touching which the question or questions may have arisen : provided always, that if the court shall be of opinion that the application is fraudulent or collusive, or for some other reason ought not to be enter-

tained, it shall have power to refuse to make the order prayed: (15 & 16 Vict. c. 86, s. 51.)

No action shall be defeated by reason of the misjoinder of parties, and the court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it: (O. XVI., r. 13.)

By analogy to the decisions on the 15 & 16 Vict. c. 86, s. 51, some of the persons interested in the question at issue, in every point of view, must be before the court, so that every class is represented: (*Swallow v. Binns*, 9 Hare App. xlvii.; 20 L. T. Rep. O. S. 216; 17 Jur. 295.)

This was acted on in *Purnell v. Hingston* (3 Sm. & G. 337). The absent parties are not bound by the judgment: (Dan. 172-3.)

3. PERSON SUED ON BEHALF OF HIMSELF AND OTHERS.

Where there are numerous parties having the same interest in one action, one or more of such parties may . . . be sued, or may be authorised by the court to defend in such action, on behalf of or for the benefit of all parties so interested: (O. XVI., r. 9.)

Where one multitude of persons are interested in a general right, and another multitude are interested in contesting it, and it is impossible to try the existence of the right between the two multitudes on account of their number, the plaintiff has the right of selecting the defendants unless the persons interested in resisting choose to assert their rights by action. If they do not so assert their rights they will be bound by the proceedings, if the court thinks they were fairly represented, and that the matter was fairly contested: (*Commissioners of Sewers v. Gellatly*, L. Rep. 3 Ch. Div. 615; see also *Wilson v. Church*, L. Rep. 13 Ch. Div. 1, 48.)

4. TRUSTEES.

Trustees . . . may . . . be sued on behalf of or as representing the property or estate of which they are trustees . . . without joining any of the parties beneficially interested in the trust . . . and shall be considered as representing such parties in the action: (O. XVI., r. 7.)

This applies to a partition action, and it is unnecessary to serve the beneficiaries with notice of judgment: (*Goodrich v. March*, W. N. 1878, p. 186; *Simpson v. Denny*, L. Rep. 10 Ch. Div. 28.)

As to suits concerning real or personal estate vested in trustees under a will, settlement, or otherwise, see *sup.*, I., 4; *Bulley v. Bulley*, L. Rep. 8 Ch. Div. 489; and *Mills v. Jennings*, L. Rep. 13 Ch. Div. 639; 42 L. T. Rep. N. S. 169; 49 L. J. 209, Ch.; 28 W. R. 549.

As to proceeding in a trustee's absence, see 13 & 14 Vict. c. 60, s. 49.

5. EXECUTORS.

Executors . . . may . . . be sued on behalf of or as representing the property or estate of which they are . . . representatives, without joining any of the parties beneficially interested in the . . . estate; and shall be considered as representing such parties in the action: (O. XVI., r. 7; see *sup.*, I., 5, as to appointing person to represent the estate.)

As to administrator *ad litem*, and administrator *pendente lite*, see *sup.*, I., 6.

6. ADMINISTRATOR.

Administrators may . . . be sued on behalf of or as representing the . . . estate of which they are . . . representatives, without joining any of the parties beneficially interested in the estate, and shall be considered as representing such parties in the action: (O. XVI., r. 7; see *sup.*, I., 5, as to appointing a person to represent the estate.)

As to administrator *ad litem*, and administrator *pendente lite*, see *sup.*, I., 6.

7. LEGATEES.

[See *sup.*, I., 7.]

After notice given under 22 & 23 Vict. c. 35, s. 29, the legatees may be sued without making the executor a defendant: (*Hunter v. Young*, L. Rep. 4 Ex. Div. 256; 41 L. T. Rep. N. S. 142; 48 L. J. 846, Ex.; 27 W. R. 637.)

8. NEXT OF KIN.

[See *sup.*, I., 8, and JUDGMENT.]

9. PERSON INTERESTED IN PROCEEDS OF REALTY.

[See *sup.*, I., 9, and JUDGMENT.]

10. RESIDUARY DEVISEE.

[See *sup.*, I., 10, and JUDGMENT.]

11. HEIRS.

[See *sup.*, I., 11, and JUDGMENT.]

12. CESTUI QUE TRUSTENT.]

[See *sup.*, I., 12, and JUDGMENT.]

13. CLASS.

[See *sup.*, I., 13.]

14. MARRIED WOMAN.

(a) *Sued in her own Name alone.*

(1) By Leave.

Married women may . . . by leave of the court or a judge, defend without their husbands, on giving such security (if any) for costs as the court or a judge may require: (O. XVI., r. 8.)

A married woman cannot appear or defend separately from her husband without first obtaining a special order. Leave obtained on petition of course is irregular: (*Noel v. Noel*, L. Rep. 13 Ch. Div. 510; 42 L. T. Rep. N. S. 352; 28 W. R. 720.)

When the wife had a separate income of 1500*l.* per annum, no security was required: (*Id.*)

(2) Where Husband Plaintiff.

A husband may make his wife a defendant in his action in cases relating to her separate estate: (*Earl v. Ferris*, 19 Beav. 67.)

Where the husband was the next friend of infant plaintiffs, and also defendant with his wife, his name was ordered to be struck out as defendant, his wife being allowed to defend separately: (*Lewis v. Nobbs*, L. Rep. 8 Ch. Div. 591; 47 L. J. 662, Ch.; 26 W. R. 631.)

(3) Where Husband under Disability.

By analogy to the former practice, an action may be instituted against a married woman alone, when her husband is an exile, or has abjured the realm, or has been banished by Act of Parliament, or is transported under a criminal sentence, or is an alien enemy: (Dan. 162; and see 33 Vict. c. 14; 33 & 34 Vict. c. 23.)

(4) In case of Separation or Protection Order.

When a married woman has been judicially separated from her husband, or has obtained a protection order, she may be sued as a *feme sole*: (20 & 21 Vict. c. 85, ss. 26, 21.)

(b) *Sued with Husband, as co-defendant.*

In cases other than those mentioned *sup.* (a) the husband should be made a co-defendant (Dan. 162); even when the wife is sued in respect of her separate estate: (per Cotton, L.J., *Attwood v. Chichester*, 38 L. T. Rep. N. S. 48; *Hancocks v. Lablache*, L. Rep. 3 O. P. Div. 197; 38 L. T. Rep. N. S. 753; 47 L. J. 514, C. P.; 26 W. R. 402; *Hodson v. Mochi*, L. Rep.

8 Ch. Div. 571; 47 L. J. 604, Ch.; 38 L. T. Rep. N. S. 635; 26 W. R. 590; *Lewis v. Nobbs*) and the Married Women's Property Act, 1870, has not made the wife liable to be sued without her husband being made a co-defendant: (*Hancock v. Lablache, sup.*).

A husband married after the 9th Aug. 1870, and before the 30th July, 1874, is not liable for the debts of his wife contracted before the marriage (33 & 34 Vict. c. 93, s. 12), but inasmuch as she is liable to be sued for such debts, and her separate estate is liable to satisfy them, he ought to be made a party.

A husband married after the 30th July, 1874, is liable for such debts only to the extent of the assets derived from the marriage (37 & 38 Vict. c. 50) but he ought in all cases to be made a co-defendant (*London and Provincial Bank v. Bogle*, L. Rep. 7 Ch. Div. 776); for, though he is altogether successful, the plaintiffs will be allowed to add his costs to their debt: (*Id.*)

In an action against a husband and wife, married after the 30th July, 1874, to recover a debt contracted by the wife before marriage, it is not necessary that the statement of claim should allege that the husband has received any of the assets of the wife: (*Matthews v. Whittle*, L. Rep. 13 Ch. Div. 811; 43 L. T. Rep. N. S. 114; 28 W. R. 822.)

(c) *Sued with Trustee of Separate Property.*

It is doubtful whether the trustee of separate property ought to be joined in an action, in respect of it, against a married woman. According to Cotton, L.J. the trustee ought to be joined: (*Attwood v. Chichester, sup.*)

Hall, V.C. held that it was unnecessary to join the trustee of the separate property as a party (*Davies v. Jenkins*, L. Rep. 6 Ch. Div. 728) in an action where it was sought to render the separate estate liable. He said "The form of the order in *Picard v. Hine* (L. Rep. 5 Ch. 278) goes to the length of charging any sum vested in anybody, and there would in this case be no advantage in alleging a claim to any particular sum vested in some particular person. To do that might lead to inconvenience, and add to the costs by making such person a party in the first instance."

Fry, J., made a declaration that a married woman's property generally was chargeable with the debt sued for, and costs of the action, in the absence of any trustee, and subsequently in the same case, the name of the trustee of certain property having been ascertained, declared that such property was charged with the debt and costs, without prejudice to any claims by such trustee: (*Collett v. Dickenson*, L. Rep. 11 Ch. Div. 687; 40 L. T. Rep. N. S. 394; followed by Denman, J., in *Flower v. Buller*, 43 L. T. Rep. N. S. 311; 28 W. R. 948). Fry, J., refused to make such a declaration, in the absence of the trustee, on a motion for judgment on admission in the pleadings: (*Pike v. Fitzgibbon*, 41 L. T. Rep. N. S. 148.)

15. INFANTS.

(a) *To Defend by Guardian.*

Infants may, in [the manner practised in the Court of Chancery before the passing of the Judicature Act, 1873,] defend any action by their guardians appointed for that purpose: (O. XVI., r. 8.)

Where the infant is a married woman, she must defend by her guardian, but her husband will be appointed guardian where he is defendant with her, and they intend to defend jointly: (Dan. 148.)

It is not usual to describe the defendant as an infant in the writ or pleadings, unless any question turns on the fact of infancy: (Dan. 146.)

The infant may appear himself: (*Id.*; see APPEARANCE.)

(b) *Who appointed Guardian.*

The court will appoint a guardian, who should not be a mere volunteer : (Dan. 146 ; Ayek. 589.)

The court will not appoint the plaintiff, a married woman, or a person out of the jurisdiction, but a co-defendant having no adverse interest may be appointed : (*Id.*)

(c) *How Guardian appointed.*(1) *On Defendant's Application.*

The appointment may be made by order, granted on a motion or petition of course, supported by an affidavit, of which the office copy must be left with the petition, of the fitness of the proposed guardian, and that he has no interest adverse to the interest of the infant : (Jarm. 228 ; Dan. 146.)

The affidavit as to interest must be made by the infant's solicitor : (Dan. 146.)

If the infant is respondent to a petition, an affidavit of service thereof on him is required : (*Id.*)

(2) *On Plaintiff's Application.*

Where no appearance has been entered to a writ of summons for a defendant who is an infant or a person of unsound mind not so found by inquisition, the plaintiff may apply to the court or a judge for an order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action. But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of such application was, after the expiration of the time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such writ of summons, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of the father or guardian, if any, of such infant, unless the court or judge at the time of hearing such application shall dispense with such last-mentioned service : (O. XIII., r. 1.)

Service on the principal of a college, where the infant was, was held sufficient, the residence of the parents not being known (*Christie v. Cameron*, 25 L. J. 488.) The requisitions of the rule must be strictly complied with, unless the court thinks fit to dispense with the service, on the father or guardian, of the notice of motion : (Jarm. 40.) Any appearance entered at the instance of a plaintiff for a defendant, who is at the time of the entry thereof an infant, is irregular and of no validity (Jarm. 40 ; C. O. 10, r. 5) and must be withdrawn.

The application is by motion : (Dan. 147.)

Where appearance has been entered for the infant, service on the solicitor is sufficient : (*Id.*)

The solicitor to the court is usually appointed : (*Id.*)

(3) *After Service of Notice of Judgment.*

The service is effected in the same manner as a writ of summons in an action : (O. XVI., r. 12a, April, 1880.)

Guardians *ad litem* appointed for infants, who shall be served with notice of any decree or order, are to be appointed in like manner as guardians *ad litem* to answer and defend [were formerly] appointed in suits on bills filed : (C. O. 7, r. 6.)

At any time during the proceedings at any judge's chambers under any decree or order, the judge may, if he shall think fit, require a guardian

ad litem to be appointed for any infant, who has been served with notice of such decree or order: (*Id.*, r. 7.)

The application to appoint a guardian and for leave to attend the proceedings are combined in one motion or petition: (Dan. 363.) [See JUDGMENT, XVI.]

(d) *Duties of Guardian.*

The guardian's duty is to put in the proper defence for the infant and to do what he is ordered to do by the court. He is responsible for the propriety and conduct of the defence: (Dan. 148.)

(e) *Removal of Guardian.*

The guardian may be removed for failure in performance of his duty or for other good ground, on application by the infant by his next friend for the purpose, by summons or motion on notice: (Dan. 148.)

16. LUNATICS (SO FOUND).

In all cases in which lunatics . . . before the passing of the [Judicature Act, 1873] would have been liable to be sued as defendants in any action or suit, they may [in manner practised in the Court of Chancery before the passing of the said Act] defend any action by their committees: (O. XVIII.)

A lunatic so found defends by the committee of his estate, who is made a co-defendant with the lunatic: (Dan. 158; Elmer on Lunacy, 6th edit., 123.)

No order is necessary to entitle the committee to defend, but he must obtain the sanction of the lunacy jurisdiction before defending. (As to the practice, see Elmer, 57.)

If the lunatic has no committee, or the committee is plaintiff, a guardian should be appointed by order obtained on motion or petition of course: (Dan. 159; Elmer, 123.) As to the procedure when the committee dies, see *post*, VI.

Where a lunatic defendant had no committee, service was directed on the keeper or person with whom she resided: (*Thom v. Smith*, 27 W. R. 162.)

In all causes and matters to which any [lunatic] is a party, any consent as to the mode of taking evidence, or of any other procedure, shall, if given with the sanction of the court or of the judge in chambers, by the . . . guardian committee, or other persons acting on behalf of the person under such disability, have the same force and effect as if such party were under no disability, and had given such consent. [But] no such consent by any committee of a lunatic shall be valid as between him and the lunatic unless given with the sanction of the [jurisdiction] in lunacy: (Ch. Ord. Feb. 5, 1861.)

17. LUNATICS (NOT SO FOUND).

(a) *To Defend by Guardian.*

In all cases in which . . . persons of unsound mind not so found by inquisition . . . before the passing of the [Judicature Act, 1873], . . . would have been liable to be sued as defendants in any action or suit . . . they may [in manner practised in the Court of Chancery before the passing of the said Act] defend any action by their guardian appointed for the purpose: (O. XVIII.)

Persons of unsound or weak mind, not so found, defend by guardian: (Dan. 159.)

(b) *Appearance.*

An appearance may be entered for the defendant before the guardian is appointed: (Dan. 160.)

(c) *Who appointed Guardian.*

A co-defendant may be appointed, if he has no adverse interest, but not the plaintiff, or a married woman, or a person residing out of the jurisdiction: (*Id.*)

(d) *How Guardian Appointed.*(1) *On Defendant's Application.*

The appointment is made by order, on motion or petition of course, as in case of an infant: (see *sup.* 15.)

(2) *On Plaintiff's Application.*

The proceedings are the same as in the case of an infant defendant. Any appearance entered at the instance of the plaintiff for a defendant, who, at the time of the entry thereof, is a person of weak or unsound mind, unable of himself to defend the suit, is irregular and of no validity: (C. O. 10, r. 5.)

(3) *After Service of Notice of Judgment.*

The notice is served like a writ of summons: (see O. XVI., r. 12a, April, 1880.)

Guardians *ad litem* appointed for persons of unsound mind not found so by inquisition, who shall be served with notice of any decree or order, shall be appointed in like manner as guardians *ad litem* to answer and defend are appointed in actions: (C. O. 7, r. 6.)

At any time during the proceedings at any judge's chambers under any decree or order, the judge may, if he shall think fit, require a guardian *ad litem* to be appointed for any . . . person of unsound mind not found so by inquisition, who has been served with notice of such decree or order: (C. O. 7, r. 7.)

(e) *Filing Order.*

The order must be entered in the Central Office: (Dan. 162; J. A. 1879.)

(f) *Duties of Guardian.*

The guardian must obtain the sanction of the court or a judge in chambers before consenting to any departure from the ordinary course of taking evidence or procedure: (Dan. 161.)

(g) *Discharging Order for Guardian.*

If the infirmity is disputed or the defendant has obtained the order irregularly, the plaintiff may move, on notice, to discharge the order, and the court may direct an inquiry whether the defendant is competent: (Dan. 161.)

The defendant, on recovery, may move, on notice to the plaintiff and the guardian, to discharge the order, and the guardian will be discharged as from the day the order of discharge is made: (*Blyth v. Green*, W. N. 1876, p. 214.)

18. PARTNERS.

Any two or more persons . . . being liable as co-partners may . . . be sued in the name of their respective firms, if any; and any party to an action may in such case apply by summons to a judge for a statement of the names of the persons who are co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the judge may direct: (O. XVI., r. 10.)

A refusal to make the statement does not subject to an attachment: (*Pike v. Frank Keene and Byne*, W. N. 1876.)

A cost-book mining company, though unincorporated, may be sued by its partnership name: (*Escott v. Gray*, 39 L. T. Rep. N. S. 121; 47 L. J. 606, C. P.)

As to change of partners in the firm, see *Ex parte Blain* (L. Rep. 12 Ch. Div. 533.)

Any person carrying on business in the name of a firm apparently consisting of more than one person, may be sued in the name of such firm: (O. XVI., r. 10a, June, 1876.)

19. CORPORATIONS, COMPANIES, AND SOCIETIES.

(a) *Generally.*

Corporations must be sued by their corporate name: (Dan. 132.)

A corporation aggregate which has a head cannot be sued without it: (*Id.*)

(b) *Sole Corporation.*

A corporation sole must appear, defend, and be proceeded against, as if he were a private individual: (Dan. 134.)

(c) *Companies under 7 Will. 4 & 1 Vict. c. 73.*

Companies established by 7 Will. 4 & 1 Vict. c. 73, may be sued by one of the public officers appointed for that purpose.

(d) *Bank of England.*

It is unnecessary to make the bank a party to an action for the purpose of compelling or authorising it to suffer, or restraining it from permitting, a transfer of stock: (39 & 40 Geo. 3, c. 36.) The bank is bound to deliver a certificate that the fund is standing in the name of the party, or of the persons whom he represents to him or his solicitor: (*Id.*, Dan. 135.)

(e) *Companies under the Acts of 1862 and 1867.*

Companies registered under the Companies Acts, become incorporated, and may be sued like other corporations: (25 & 26 Vict. c. 89, s. 6.)

A single shareholder suing on behalf of himself and others, or suing alone, and not on behalf of others, may make the company a defendant, and restrain it and the directors from doing an act illegal or *ultra vires*: (Buck. 396.)

Where the majority of a company propose to benefit themselves at the expense of the minority, the court's interference may be obtained by the latter, and the action may be brought by one shareholder on behalf of himself and others against the company: (*Menier v. Hooper's Telegraph Works*, L. Rep. 9 Ch. App. 350.)

(f) *Banking Companies.*

Banking companies may be sued by their public officers: (7 Geo. 4, c. 46, s. 9.)

(g) *Building Societies.*

Building societies not incorporated under 37 & 38 Vict. c. 42, are sued by their treasurer or trustee in his or her proper name, as treasurer or trustee of such society without other description: (10 Geo. 4, c. 56, s. 21; 6 & 7 Will. 4, c. 32.)

Societies incorporated under the Act of 1874, are sued in their corporate names, like other corporations: (see 37 & 38 Vict. c. 42, s. 9.)

(h) *Friendly Societies.*

The trustees of any society or branch, or any other officers authorised by the rules, may be sued in their proper names, without other description than the title of their office: (38 & 39 Vict. c. 60, s. 21.)

In legal proceedings brought under the Act by a member or person claiming through a member, the society may also be sued in the name, as defendant, of any officer or person who receives contributions or issues policies on behalf of the society within the jurisdiction of the court in which the proceeding is brought, with the addition of the words "on behalf of the society" (naming the same): (*Id.*)

(i) Industrial and Provident Societies.

The registration renders the society a body corporate by the name described in the acknowledgment of registry, and by that name it may be sued : (39 & 40 Vict. c. 45, s. 11.)

(k) Trade Unions.

The trustees of any registered trade union, or any other officer authorised by the rules, are sued in their proper names without other description than the title of their office : (34 & 35 Vict. c. 31, s. 9 ; see *Rigby v. Connol*, 42 L. T. Rep. N. S. 139 ; L. Rep. 14 Ch. Div. 482 ; 49 L. J. 328, Ch. ; 28 W. R. 650.)

(l) Treasury Solicitor [see post, VI., 4 (i)].

20. PAUPER.

The admission to be sued as a pauper is obtained in the same manner as an admission to sue as a pauper (*sup.* I., 20) except that no certificate of counsel is required, and the petition is required to contain no statement of the case : (Dan. 142.)

21. CONVICTS.

[See *sup.*, I., 21.]

22. THE QUEEN'S ATTORNEY-GENERAL.

Where the rights of the Crown are immediately in question, as in cases in which the Queen is in actual possession of the property in dispute, or where any title is vested in her which the action seeks to divert, proceedings must not be commenced by writ, but the party must apply to the Queen by Petition of Right : (Dan. 121 ; see PETITION OF RIGHT.)

In some cases the Attorney-General represents the Crown as defendant, *e.g.* :

- (1) In actions by public accountants (where the Chancery Division has concurrent jurisdiction with the Exchequer Division) : (Dan. 123) ;
- (2) Where the heir or next of kin of a deceased would be a necessary party, and no heir or next of kin can be found : (Dan. 125.)
- (3) Where the Queen is considered as the protector of the rights of others, as where the subject-matter is wholly or in part money appropriated to general charitable purposes, where there is no established charitable institution, or it is not of a permanent nature : (Dan. 126-7.)

The Solicitor-General represents the Queen when the office of Attorney-General is vacant.

23. THE ATTORNEY-GENERAL OF THE QUEEN CONSORT.

The Queen Consort must be sued by her Attorney or Solicitor General in the same manner as a King or Queen Regnant : (Dan. 129.)

24. THE ATTORNEY-GENERAL OF THE PRINCE OF WALES.

The Prince of Wales, as Duke of Cornwall must be sued by his Attorney or Solicitor General : (Dan. 129.)

25. FOREIGN GOVERNMENTS AND AMBASSADORS.

A sovereign prince or foreign government is exempt from all liability of being sued in the courts of this country for any acts done in such character : (Dan. 130.)

Any property of a foreign sovereign or state used for public purposes is exempt from the jurisdiction of any tribunal in this country : (*The Parlement Belge*, 42 L. T. Rep. N. S. 273 ; 28 W. R. 642.)

If a foreign sovereign sues in an English court he submits to the jurisdiction, and becomes subject, as to all matters connected with the action, to the court's jurisdiction : (*Id.*)

Then a cross action for discovery may be commenced against the

sovereign or government: (*Republic of Costa Rica v. Erlanger*, 1 Ch. Div. 171.)

And the foreign government's action will be stayed till it has named a proper person to give security: (*Id.*)

A foreign government interested in a fund which the court is called on to distribute, will be made a party so as to make the action perfect as to parties, and to enable the government to claim its rights, but not to attempt to compel it to submit to the jurisdiction: (Dan. 131.)

In submitting to be made a defendant in an action for the purpose of obtaining leave to remove property, a defendant does not thereby lose his rights as a foreign sovereign: (*Vavas seur v. Krupp*, L. Rep. 9 Ch. Div. 351; 39 L. T. Rep. N. S. 427; 27 W. R. 176.)

Ambassadors are protected from being sued by 7 Ann, c. 12; but if subjects of the sovereign to whom they are accredited, the immunity, extends only to things connected with their office and ministry: (Dan. 132.)

26. LANDLORD OBTAINING LEAVE TO DEFEND.

Any person not named as a defendant in a writ of summons for the recovery of land may by leave of the court or judge appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or his tenant: (O. XII., r. 18.) [See APPEARANCE.]

An equitable tenant for life will be allowed leave to defend: (*Longbourne v. Fisher*, 38 L. T. Rep. N. S. 216; 47 L. J. 379, Ch.; 26 W. R. 277.)

Where a person not named as defendant in any writ of summons for the recovery of land, has obtained leave, he . . . shall in all subsequent proceedings be named as a party defendant to the action: (O. XII., r. 20.)

III. THIRD PARTIES.

[See PLEADING.]

The rules as to adding, substituting, and striking out, seem to apply, *mutatis mutandis*, to third parties, in the same manner as to defendants: (see *sup.*, II., 1.)

IV. EFFECT OF MISJOINDER.

No action shall be defeated by reason of the misjoinder of parties, and the court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it: (O. XVI., r. 13.)

V. ADDING, SUBSTITUTING, AND STRIKING OUT.

1. ADDING AND SUBSTITUTING.

(a) General Rule.

The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order . . . that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added: (O. XVI., r. 13.)

As to plaintiff, see *inf.* (b). As to defendant, see *inf.* (c).

Any person who might have been joined originally is a person who ought to be joined within the meaning of this rule: (*Edwards v. Lowther*, 45 L. J. 417, C. P.)

And see *Attorney-General v. Council of Birmingham*, *post*.

As to the form of order, see *Edwards v. Lowther*, 24 W. R. 434; *Marquis of Londonderry v. Rhoswydol Company*, W. N. 1879, p. 136.

(b) *Plaintiffs.*(1) *Examples under General Power.*

The plaintiffs will not be allowed by amendment to introduce new plaintiffs, and make an entirely new case: (*New Westminster Brewery v. Hannah*, W. N. 1877, p. 35.)

Where a person sued on behalf of himself and others (see *sup.*, I., 3) the court refused to add the names of the others as plaintiffs in order to secure their liability to the plaintiff for costs: (*De Hart v. Stevenson*, L. Rep. 1 Q. B. Div. 313.)

A mortgagor, who has the control and management of the mortgaged property, may maintain an action to restrain a breach of covenant, without joining the mortgagee as a party: (*Fairclough v. Marshall*, L. Rep. 4 Ex. Div. 37; 39 L. T. Rep. N. S. 390.)

(2) *In Case of Mistake.*

Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff or plaintiffs, the court or a judge may, if satisfied that it has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons to be substituted or added as plaintiff or plaintiffs upon such terms as may seem just: (O. XVI., r. 2.)

The power may be exercised where the mistake is one either of fact or of law (*Duckett v. Gover*, L. Rep. 6 Ch. Div. 8); but the action must have been commenced through a *bonâ fide* mistake: (per Jessel, M.R., *Clowes v. Hilliard*, L. Rep. 4 Ch. Div. 415.)

Where, after an action for specific performance of an agreement to take a lease had been commenced, and the sole plaintiff had died, it was discovered that there had been a misapprehension as to the root of her title, and that it was necessary for her son and daughter to concur, in order to make the agreement effectual, leave was given at the hearing to amend the pleadings, by adding the son and daughter as co-plaintiffs with the executor of the deceased plaintiff, and making the consequential amendments: (*Long v. Crossley*, L. Rep. 13 Ch. Div. 388; 41 L. T. Rep. N. S. 793; 49 L. J. 168, Ch.; 28 W. R. 226.)

Where a shareholder brought an action on behalf of himself and the other shareholders against the company's solicitor and vendor to set aside an alleged fraudulent contract, leave was given to the plaintiff, after demurrer, to add the company as plaintiffs: (*Duckett v. Gover*, L. Rep. 6 Ch. Div. 82.)

An order was made to add the assignor of a debt, in an action by the equitable assignee thereof: (*Turquand v. Fearon*, L. Rep. 4 Q. B. Div. 280; 40 L. T. Rep. N. S. 191; 48 L. J. 341, Q. B.; 27 W. R. 46.)

When an order was made at chambers, at the plaintiff's instance, to add a person's name as co-plaintiff, without the consent of the latter, and without any condition of indemnity in his favour, it was held, upon appeal, that the new plaintiff had not been added upon such terms as seemed just, and that it was competent to the defendant to make the objection: (*Turquand v. Fearon*, 40 L. T. Rep. N. S. 191.)

Orders substituting persons as plaintiffs were made in *Mercantile River Plate v. Isaac* (W. N., 1876, p. 205), an action under the Bills of Exchange Act; and in *Val de Travers Asphalt Company v. London Tramways Company* (40 L. T. Rep. N. S. 133; 48 L. J. 312, C. P.); and *Tildesley v. Harper* (L. Rep. 3 Ch. Div. 277).

(3) *Legatee, &c., suing without joining other Persons entitled.*

In [the case of a legatee, next of kin, person interested in the proceeds

of real estate directed to be sold, residuary devisee, heirs, *cestui que trust*, person suing for the protection of property pending litigation, person suing in a case in the nature of waste, or executor, administrator, or trustee suing for administration, or execution of trusts without joining all persons formerly necessary parties as mentioned *sup.*] the court, if it shall think fit, may require any other person or persons to be made a party or parties to the suit . . . and may make such order in any particular case as it may deem just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question : (15 & 16 Vict. c. 86, s. 42, r. 7.)

[Where the trustees represent the persons beneficially entitled in suits concerning real or personal estate vested in the former [see *sup.*, I. and II.,] the court may, upon consideration of the matter, on the hearing, if it shall so think fit, order such persons [beneficially interested, or any of them, to be made parties]: (15 & 16 Vict. c. 86, s. 42, r. 9.)

[Where trustees, executors, or administrators, sue or are sued, without joining the parties beneficially interested in the trust or estate [*sup.*, I., II.] the court or a judge may at any stage of the proceedings, order any of such parties to be made parties to the action, either in addition to or in lieu of the previously existing parties thereto : (O. XVI., r. 7.)

(4) Consent of Plaintiff.

No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent thereto : (O. XVI., r. 13.)

Where an action was brought by shareholders for the company, leave was given to add the company as plaintiffs, without the production of any authority to sue in their name : (*Duckett v. Gover, sup.*)

The order was refused without consent in *Turquand v. Fearon (sup.)*; but was made in *Val de Travers Asphalt Company v. London Tramways Company (sup.)*

(5) When and How Application Made.

Any application to add or strike out or substitute a plaintiff or defendant may be made to the court or a judge at any time before trial by motion or summons, or at the trial of the action in a summary manner : (O. XVI., r. 14.)

Parties cannot be added after final judgment : (*Attorney-General v. Council of Birmingham*, 43 L. T. Rep. N. S. 77.)

An application should not be made *ex parte* : (*Tildesley v. Harper, sup.*)

An objection to part of a plaintiff's claim, on the ground that his interest in the subject-matter of the action had only accrued at a date subsequent to the transactions out of which such part of the claim arose, having been made in the statement of defence, it was held too late at the trial to apply under Order XVI., r. 14, to add an additional party as co-plaintiff in respect of the former title : (*Nobel's Explosives Company v. Jones*, 42 L. T. Rep. N. S. 754; 28 W. R. 653.)

See also as to adding at the trial : (*Ruston v. Tobin*, W. N., 1880, p. 19.)

(c) Defendants.

(1) Examples under General Rule.

The rule does not apply where the person to be added as a defendant is a person against whom the plaintiff has no claim; nor will other persons be added as defendants merely for the convenience of other defendants between whom and the persons desired to be joined there may be questions which will afterwards have to be settled : (*Norris v. Beazley*,

L. Rep. 2 C. P. Div. 80, 84; 46 L. J. 169, C. P.; *Harry v. Davy*, L. Rep. 2 Ch. Div. 721; 45 L. J. 697, Ch.)

(2) Where Legatees, &c., Suing Without Joining other Persons Entitled [see *sup.* (b) (3).]

(3) When and How Application Made [see *sup.* (b) (5).]

As to consolidated action, see *Re Wortley* (L. Rep. 4 Ch. Div. 180.)

(4) Service of Writ or Notice.

All persons whose names are . . . added as defendants shall be served with a summons or notice in manner [thereinafter] mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against them shall be deemed to have begun only on the service of such summons or notice: (O. XVI., r. 13.)

Where a defendant is added, unless otherwise ordered by the court or judge, the plaintiff shall file an amended copy of and sue out a writ of summons, and serve such new defendant with such writ or notice in lieu of service thereof in the same manner as original defendants are served: (O. XVI., r. 15.)

This does not apply to consolidated actions: (see *Re Wortley*, L. Rep. 4 Ch. Div. 180; 46 L. J. 182, Ch.)

(5) Delivery of Amended Statement of Claim.

If a statement of claim has been delivered previously to such defendant being added, the same shall, unless otherwise ordered by the court or judge, be amended in such manner as the making such new defendant a party shall render desirable; and a copy of such amended statement of claim shall be delivered to such new defendant at the time when he is served with the writ of summons or notice or afterwards, within four days after his appearance: (O. XVI., r. 16.)

2. STRIKING OUT.

(a) General Power.

The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined, be struck out: (O. XVI., r. 13.)

The name of an officer of a corporation, made a defendant for the mere purpose of discovery in an action against such corporation, will be struck out: (*Wilson v. Church*, L. Rep. 9 Ch. Div. 552; 39 L. T. Rep. N. S. 413; 26 W. R. 735.)

(b) By whom Application made.

An application to strike out the name of a person who has been added as a plaintiff, can only be made by such person: (*Duckett v. Gover*, 25 W. R. 554.)

(c) When and how, and how Application made.

[See *sup.* p. 5.]

The application should as a rule be by summons: (*Wilson v. Church*, *sup.*)

A defendant, improperly joined, may be struck out after he has delivered his defence; but if he does not apply at the first possible moment, it will be without costs: (*Vallance v. Midland Land and Investment Corporation*, L. Rep. 2 Ch. Div. 369.)

(d) Effect of Order.

An order to strike out one defendant, with liberty to amend, does not authorise the striking out of another defendant: (*Wymer v. Dodds*, L. Rep. 11 Ch. Div. 436; 40 L. T. Rep. N. S. 420; 48 L. J. 568, Ch.; 27 W. R. 675.)

VI. CHANGE OF PARTIES.

1. EXPLANATION OF TERMS.

(a) *Abatement.*

An abatement of an action occurs when, by reason of some event subsequent to its commencement, there can be no proceeding at all either as to the whole or part of the action: (Lord Redesdale on Pleading, 56.)

(b) *Defect.*

An action becomes defective when, by some event subsequent to its commencement, no proceeding can be had as to the whole or as to part with effect: (Red. Pl. 56.)

(c) *Action.*

An action includes, A suit commenced before, but continued after the present practice (*Darcy v. Whittaker*, 33 L. T. Rep. N. S. 778; 24 W. R. 244; *Jackson v. North-Eastern Railway Company*, L. Rep. 5 Ch. Div. 844; 36 L. T. Rep. N. S. 779; 46 L. J. Ch., 723; 25 W. R. 518.); also

A petition for payment out of a fund paid into court under the Lands Clauses Consolidation Act, 1845 (*Re Atkins' Estate*, L. Rep. 1 Ch. Div. 82; 45 L. J. Ch., 117);

A petition for winding-up a company (*Re Dynevor Duffryn Collieries Company*, W. N. 1878, p. 199);

A special case by analogy to the former practice: (Morg. Ch. Acts, 4th edit. 211.)

The term does not include actions consolidated by order (*Re Wortley*, L. Rep. 4 Ch. Div. 180; 46 L. J. Ch. 182; 25 W. R. 295.); or proceedings to make absolute a rule for a stop order: (*Finney v. Hinde*, L. Rep. 4 Q. B. Div. 102; 40 L. T. Rep. N. S. 193.)

(d) *Survive or Continue.*

All actions survive or continue which do not fall within the maxim "Actio personalis moritur cum personâ" as altered by statute: (*Twycross v. Grant*, L. Rep. 4 C. P. Div. 40; 39 L. T. Rep. N. S. 618; *Ashley v. Taylor*, L. Rep. 10 Ch. Div. 768; 39 L. T. Rep. N. S. 573; see *Eldridge v. Burgess*, L. Rep. 7 Ch. Div. 411; 38 L. T. Rep. N. S. 232; 47 L. J. Ch. 342; 26 W. R. 435.)

2. CHANGES OF PARTIES IN CHANCERY DIVISION OR COURT OF APPEAL.

(a) *Effect of Change.*(1) *By Marriage.*

An action shall not become abated by reason of the marriage . . . of any of the parties, if the cause of action survive or continue: (O. L., r. 1.)

In case of the marriage . . . of any party to an action the court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved in the action, order that the husband . . . if any, of such party be made a party to the action, or be served with notice thereof in such manner and form as [thereinafter] prescribed, and on such terms as the court or judge shall think just, and shall make such order for the disposal of the action as may be just: (O. L., r. 2.)

Where by reason of marriage . . . occurring after the commencement of an action, and causing a change or transmission of interest or liability . . . it becomes necessary or desirable that any person not already a party to the action should be made a party thereto, or that any person already a party thereto should be made a party thereto in another capacity, an order that the proceedings in the action shall be carried on between the

continuing parties to the action, and such new party or parties, may be obtained: (O. L., r. 4.)

When a female plaintiff marries and continues the action by a next friend, his consent should either be entered as evidence in the order or filed, the filing being noted in the order: (Pemb. Judg. 136.)

The next friend may be dispensed with by order under Order XVI., r. 8. The husband will be made a defendant (*Id.*; *Roberts v. Evans*, L. Rep. 7 Ch. Div. 830; 38 L. T. Rep. N. S. 99; 47 L. J. 469, Ch.; 26 W. R. 280), unless dispensed with under Order XVI., r. 8.

By analogy to the former practice, where two or more plaintiffs are suing on behalf of themselves and the rest of a class, and one, being a female, marries, the action is unaffected: (Pemb. R. & S. 3.)

By analogy to the old practice when a female defendant marries it will be unnecessary to obtain any order, but the husband and wife must be named in future proceedings: (Pemb. R. & S. 5.)

(2) By Death.

An action shall not become abated by reason of the death of any of the parties, if the cause of action survive or continue: (O. L. r. 1.)

In case of the death of any party to an action the court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved in the action, order that the personal representative or other successor in interest, if any, of such party, be made a party to the action, or be served with notice thereof in such manner and form as [thereinafter] prescribed, and on such terms as the court or judge shall think just, and shall make such order for the disposal of the action as may be just: (O. L., r. 2; *Stone v. Bennett*, W. N. 1876, p. 152.)

Where it is desired to add a personal representative of a deceased party, the application should be *ex parte*: (*Ashley v. Taylor*, L. Rep. 10 Ch. Div. 768; 39 L. T. Rep. N. S. 573.)

If a party to litigation dies at any stage, and his personal representative elects to go on, he is personally liable to the costs without prejudice to any right he may have to get the costs out of the estate which he represents: (*Boynton v. Boynton*, L. Rep. 4 App. Cas. 733; 41 L. T. Rep. N. S. 450.)

When, by reason of death occurring after the commencement of an action, and causing a change or transmission of interest or liability, ... it becomes necessary or desirable that any person not already a party to the action should be made a party thereto, or that any person already a party thereto should be made a party thereto in another capacity, an order that the proceedings in the action shall be carried on between the continuing parties to the action, and such new party or parties may be obtained: (O. L., r. 4.)

"Change or transmission of interest or liability" occurs where the particular interest which was vested in one person on his death goes to another, or that the particular liability which attached to one person upon his death attaches to another: (*Hills v. Springett*, L. Rep. 5 Eq. 123.)

By analogy to the former practice in case of the entire cessor by death of the interest of a person suing *en autre droit*, the person succeeding him in the representative capacity may be made a party: (Pemb. R. & S. 73, 74; *Gouger v. Latouche*, 2 Moll. 406.)

A tenant in tail succeeding to the title upon the death of a party who was a preceding tenant in tail, if he comes in by the same title, and whether claiming through the first tenant in tail or by force of a fresh limitation, may be made a party: (Pemb. Judg. 132; *Lloyd v. Jones*, 9 Ves. 87; *Cresswell v. Bateman*, 6 W. R. 206, 220; *Egremont v.*

Thompson, L. Rep. 4 Ch. 448; *Williams v. Llanelly Company*, L. Rep. 10 Eq. 401.)

As to remainderman in fee, party, continuing on death of tenant for life, party, see *Wilson v. Wilson*, L. Rep. 9 Eq. 452; 22 L. T. Rep. N. S. 201.

Where an ecclesiastical person or corporation sole, suing or being sued in respect of his preferment, dies, the succeeding bishop, rector, or corporation sole, is the person by or against whom the action may be continued. But where the action is by a corporation sole having a personal interest, it can be continued, so far as it affects such personal interest, by the personal representative: (Pemb. Judg. 132.)

By analogy to the old practice, where two or more persons, members of one of the classes of residuary legatees, *cestuis que trustent*, &c., who, under 15 & 16 Vict. c. 86, s. 42, are represented by one member of the class, are suing, the death of one plaintiff will not affect the action (Pemb. R. & S. 3, 4; *Hinde v. Morton*, 2 Hem. & Mil. 368); but the fact must be notified, in order that notice of the order for administration, &c., may be served on his representative.

By analogy to the former practice, if the whole interest of a party dying survives to another party to the suit, so that no claim can be made by or against the representatives of the party dying, there is no necessity for an order: (Pemb. R. & S. 2.)

By analogy to the former practice, where two or more plaintiffs are suing on behalf of themselves and the rest of a class, and one dies, the action is unaffected: (Pemb. R. & S. 3.)

By analogy to the former practice, where a defendant dies, proceedings as between the other parties to the action will be unaffected: (Pemb. 6.)

By analogy to the former practice, an order need be obtained only against such of the executors of a deceased defendant as proved the will: (Pemb. 5; *Strickland v. Strickland*, 12 Sim. 463.)

Where a sole plaintiff died insolvent, and, so far as could be ascertained, intestate, an order appointing a person to represent the estate of the plaintiff, that the defendant might have an opportunity to move for dismissal of the action in default of due prosecution thereof, was made on the defendant's application: (*Wingrove v. Thompson*, L. Rep. 11 Ch. Div. 419; 27 W. R. 910.)

(3) By Bankruptcy

An action shall not become abated by reason of the . . . bankruptcy of any of the parties, if the cause of action survive or continue: (O. L., r. 1.)

Where issue was joined, and notice of trial given by the sole plaintiff who then filed a liquidation petition, on which a trustee was appointed, and when the action came on for trial no one appeared either for the plaintiff or trustee, and there was no evidence that any notice of the action had been served on the trustee, it was held that Order L., r. 1, applied only when the cause of action survived or continued in some person before the court; that the action had abated, and that the only order the court could make was to strike it out of the list: (*Eldridge v. Burgess*, L. Rep. 7 Ch. Div. 411; 38 L. T. Rep. N. S. 232; 47 L. J. 342, Ch.)

Liquidation proceedings are included in the term bankruptcy: (*Jackson v. North-Eastern Railway Company*, L. Rep. 5 Ch. Div. 844; 36 L. T. Rep. N. S. 779; 46 L. J. Ch. 723; 25 W. R. 518.)

In case of the . . . bankruptcy . . . of any party to an action the court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved in the action, order that the . . .

trustee, or other successor in interest, shall be made a party to the action, or be served with notice thereof in such form and manner as [thereinafter] prescribed, and on such terms as the court or judge shall think just, and shall make such order for the disposal of the action as may be just: (O. L., r. 2.)

Where by reason of bankruptcy . . . occurring after the commencement of an action, and causing a change or transmission of interest or liability, it becomes necessary or desirable that any person not already a party to the action should be made a party thereto, or that any person already a party thereto should be made a party thereto in another capacity, an order that the proceedings in the action shall be carried on between the continuing parties to the action, and such new party or parties, may be obtained: (O. L., r. 4.)

The bankrupt cannot continue the action (*Jackson v. North-Eastern Railway Company*, L. Rep. 5 Ch. Div. 844; 36 L. T. Rep. N. S. 779; 46 L. J. Ch. 723; 25 W. R. 518), and if the trustees of a bankrupt plaintiff omit to obtain an order joining them as parties, the action will be dismissed for want of prosecution with costs against the estate: (*Wright v. Swindon, &c., Railway Company*, L. Rep. 4 Ch. Div. 164; 46 L. J. Ch. 199.)

Where a defendant became bankrupt after trial it was held that he could appeal against an injunction restraining him from selling articles with labels in imitation of those used by the plaintiff, and from using a certain name, in the manufacture of those articles in such manner as to lead to the belief that the articles made by the defendant had been manufactured by the plaintiff, although the trustee in the bankruptcy did not join in the appeal: (*Dence v. Mason*, 41 L. T. Rep. N. S. 573.)

By analogy to the former practice, where two or more plaintiffs are suing on behalf of themselves and the rest of a class, and one becomes bankrupt, the action is unaffected: (Pemb. R. & S. 3.)

Where a defendant becomes bankrupt it is the plaintiff's duty to make the trustee a bankrupt and proceed with the action, and in default, by analogy to the former practice, the action will be dismissed with costs: (Pemb. R. & S. 8; *Blackmore v. Smith*, 1 Mac. & G. 80.)

Where a defendant becomes bankrupt after the pleadings have been closed and the action set down for trial, and the trustee in bankruptcy, after having been made a defendant by an order of revivor, and served with a notice of trial, does not enter an appearance, it is not necessary to file the pleadings and a notice of motion for judgment against the trustee in order to obtain judgment against him by default: (*Chorlton v. Dickie*, L. Rep. 13 Ch. Div. 160; 41 L. T. Rep. N. S. 167; 49 L. J. 40, Ch.; 28 W. R. 228.)

Where some of several defendants jointly and severally liable to the plaintiff become bankrupt, the action may proceed against the other defendants without the trustees in bankruptcy being made parties, or served with notice: (*Lloyd v. Dimmack*, L. Rep. 7 Ch. Div. 398; 38 L. T. Rep. N. S. 173; 47 L. J. Ch. 398; 26 W. R. 458; and see *Goddard v. Poole*, W. N. 1875, p. 230.)

(4) By Assignment of Estate or Title.

An action . . . shall not become defective by the assignment . . . of any estate or title *pendente lite*: (O. L., r. 1.)

In case of an assignment . . . of any estate or title *pendente lite*, the action may be continued by or against the person to or upon whom such estate or title has come: (O. L., r. 3.)

Where by reason of . . . any . . . event occurring after the com-

mencement of an action, and causing a change or transmission of interest or liability, it becomes necessary or desirable that any person not already a party to the action should be made a party thereto, or that any person already a party thereto should be made a party thereto in another capacity, an order that the proceedings in the action shall be carried on between the continuing parties to the action and such new party or parties, may be obtained: (O. L., r. 4.)

By analogy to the former practice, a merely equitable assignment, unless the assignee intervenes, may be treated as nugatory: (Pemb. R. & S. 44.)

Where a trustee in bankruptcy commenced an action against the defendant to set aside as fraudulent an indenture executed by the bankrupt, or to have it declared to be a security only for the money actually paid to the bankrupt, and after the writ was issued, but before delivery of the statement of claim, the trustee assigned to C. all his estate and interest as trustee in the bankrupt estate for 2000*l.*, and C. accordingly obtained an order giving him liberty to carry on and prosecute the action and proceedings therein in like manner as the same might have been carried on by the plaintiff, the trustee, if he had not assigned his interest, on an application subsequently made by the defendant to discharge the order on the ground that it was the assignment, not of property but of a lawsuit, it was held in the Court of Appeal that the order was right: (*Seear v. Lawson*, 42 L. T. Rep. N. S. 892; 28 W. R. 929.)

(5) By Creation or Devolution of Estate or Title.

An action shall not become defective by the . . . creation or devolution of any estate or title *pendente lite*: (O. L., r. 1.)

In case of a . . . creation or devolution of any estate or title *pendente lite*, the action may be continued by or against the person to or upon whom such estate or title has come or devolved: (O. L., r. 3.)

In case of the . . . devolution of estate by operation of law, of any party to an action, the court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved in the action, order that the . . . successor in interest, if any, of such party be made a party to the action, or be served with notice thereof in such manner and form as [thereinafter] prescribed, and on such terms as the court or judge shall think just, and shall make such order for the disposal of the action as may be just: (Ord. L., r. 2.)

Where by reason of . . . any . . . event occurring after the commencement of an action, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the action, it becomes necessary or desirable that any person not already a party to the action should be made a party thereto, or that any person already a party thereto, should be made a party thereto in another capacity, an order that the proceedings in the action shall be carried on between the continuing parties to the action, and such new party or parties may be obtained: (O. L., r. 4.)

As to adding an infant tenant-in-tail coming into existence after commencement of the action, see *Haldane v. Eckford*, W. N. 1879, p. 80.

(6) By Lunacy, so found by Inquisition.

If an action is commenced on behalf of a person of unsound mind not so found by inquisition, and he is afterwards found lunatic by inquisition, the action abates; and all proceedings without the sanction of the jurisdiction in lunacy, whether a committee has been appointed or not, are irregular and void: (*Elmer on Lunacy*, 6th edit. 123; *Beale v. Smith*, L. Rep. 9 Ch. App. 85; 29 L. T. Rep. N. S. 834; 43 L. J. 245, Ch.; 22 W. R. 121.)

The sanction of the Jurisdiction in Lunacy should be obtained by order on the petition of the committee of the estate: (Elmer, 204.)

Fry, J., gave leave to the committee in *Re Green*, 41 L. T. Rep. N. S. 30.

Where a plaintiff was a person of unsound mind not so found and sued by a next friend and was found a lunatic during the progress of the action, and a committee appointed, an order was made under Order L., r. 4, giving the committee leave to continue the action: (*Re Green's Estate*; *Green v. Pratt*, 41 L. T. Rep. N. S. 30; 48 L. J. 681, Ch.)

The Commission of Lunacy does not protect the lunatic against an action: (Elmer, 37.)

But an order to appear must be obtained by the committee of the estate from the jurisdiction in lunacy: (Elmer, 203.)

The lunatic and the committee will both be parties, and if the interest of a plaintiff, who is also the committee, is adverse to that of a lunatic defendant, a guardian must be appointed on behalf of the lunatic: (Elmer, 123; *Snell v. Hyatt*, 1 Dick. 287; see *sup.* l., 16.)

(7) Outlawry.

If a party (other than a party suing *en autre droit*) became outlawed, the suit immediately ceased as far as he was concerned; and if the outlaw was a plaintiff, the defendant might move to dismiss for want of prosecution: (Pemb. R. & S. 9; *Knowles v. Rhydfed Colliery Company*, 1 L. T. Rep. N. S. 321; Johns. 630.)

Outlawry in civil proceedings is now abolished, but without prejudice to anything done before the 15th August, 1879: (see 42 & 43 Vict. c. 59, ss. 3, 4.)

(b) Order Necessary on Change.

(1) How Obtained.

Whether the change has occurred pending proceedings in the Chancery Division or pending proceedings in the Court of Appeal, the application for an order to join persons as parties or give them notice of the proceedings must be made in the Chancery Division: (*Flower v. Lloyd*, L. Rep. 6 Ch. Div. 297; 37 L. T. Rep. N. S. 419; 25 W. R. 793; *British Dynamite Company v. Krebs*, L. Rep. 11 Ch. Div. 448; 40 L. T. Rep. N. S. 14.)

An order to join new parties, where, after the commencement of the action, any event has occurred causing a change or transmission of interest or liability, or a person interested has come into existence "may be obtained *ex parte* on application to the court or a judge" [O. L., r. 4] by any person who is a party, or who is the person to be joined as a new party [O. L., r. 5] "upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence:" (O. L., r. 4.)

There is no rule of priority in moving for the order: (Pemb. Judg. 130.)

The allegation must show a title to the order but need not be proved: (Pemb. Judg. 133.)

The order is made on motion or petition of course, without being mentioned to the court, unless there are special circumstances: (*Roffey v. Miller*, W. N. 1875, p. 225; *Darcy v. Whittaker*, 33 L. T. Rep. N. S. 778; W. N. 1876, p. 17; *Walker v. Blackmore*, W. N. 1876, p. 112; *Middleton v. Pollock*, *id.* 250.) It may also be obtained on summons in chambers (*Walker v. Blackmore*); but it is irregular to serve a person not a party to the action with a summons: (*Ashley v. Taylor*, L. Rep. 10 Ch. Div. 768; 39 L. T. Rep. N. S. 573.)

(2) Service of, and Appearance to.

An order so obtained shall, unless the court or judge shall otherwise direct, be served upon the continuing party or parties to the action, or their solicitors, and also upon each such new party, unless the person making the application be himself the only new party, and the order shall from the time of such service, subject nevertheless to the next two following rules, be binding on the persons served therewith; and every person served therewith who is not already a party to the action shall be bound to enter an appearance thereto within the same time and in the same manner as if he had been served with a writ of summons: (O. L., r. 5.)

Appearance must be entered within eight days, including the day of service, when the party served is within the jurisdiction.

When the party to be served is out of the jurisdiction, the order must limit the time within which appearance must be entered.

Substituted service will be ordered in a proper case.

[See WRIT OF SUMMONS; APPEARANCE.]

(3) How Discharged.

Where any person who is under no disability, or under no disability other than coverture, or being under any disability other than coverture but having a guardian *ad litem* in the action, shall be served with such order, such person may apply to the court or a judge to discharge or vary such order at any time within twelve days from the service thereof: (O. L., r. 6.)

If the disability is coverture the husband should join in the application. The persons defending by guardians *ad litem*, who are appointed for that purpose in the action, are infants (O. XVI., r. 8.); persons of unsound mind not so found by inquisition (O. XVIII.); lunatics so found by inquisition in lunacy whose committees have an adverse interest and are plaintiffs: (Elmer on Lunacy, 123; *Snell v. Hyatt*, Dick. 287; see *sup.*, II.)

Where any person being under any disability other than coverture, and not having a guardian *ad litem* appointed in the action, is served with any such order, such person may apply to the court or a judge to discharge or vary such order at any time within twelve days from the appointment of a guardian or guardians *ad litem* for such party, and until such period of twelve days shall have expired, such order shall have no force or effect as against such last-mentioned person: (O. L., r. 7.)

The application to discharge is by motion on notice or summons in chambers.

(c) *Proceedings not Affected by Change.*

Notwithstanding the happening of any change in the parties, by analogy to the old practice, where money has been ascertained or declared by the court to belong to certain persons, orders may be made on petition for payment out to such persons or their representatives: (*Roundell v. Curren*, 6 Ves. 250; *Legard v. Hodges*, cited Pemb. R. & S. 18.)

Orders obtained irregularly, without an order to continue having been made, may be discharged: (Pemb. R. & S. 16; *Boddy v. Kent*, 1 Mer. 361.)

Orders may be obtained as to the conduct of the cause: (Pemb. R. & S. 19; *Cook v. Bolton*, 5 Russ. 282.)

A judgment may be delivered or drawn up: (Pemb. R. & S. 19.)

In a creditor's action for administration against an executrix a decree had been made and a summons taken out for a receiver, but pending the summons the sole defendant died. The court, on the application of the plaintiff, appointed an interim receiver, whose powers were to extend

for ten days after the appointment of an administrator *de bonis non*, the plaintiff undertaking to use all possible speed in obtaining the appointment of such administrator and to accept short notice of motion to discharge the receiver: (*Re Parker*; *Cash v. Parker*, L. Rep. 12 Ch. Div. 293; 40 L. T. Rep. N. S. 878.)

3. CHANGES OF PARTIES ON APPEAL TO THE HOUSE OF LORDS.

(a) *Effect of Changes.*

By analogy to the former practice, whenever, after judgment has been given in the Court of Appeal, any change of parties occurs which causes the action to abate, or renders it defective, or necessitates the obtaining of an order in the Chancery Division, the appeal to the House will abate or become defective: (Pemb. 20; *Macqueen's House of Lords Practice*, 246.)

(b) *Order Necessary.*

(1) Before Appeal to the House brought.

Whenever the change has occurred before the appeal has been brought to the House, such an order as would have been necessary if the change had occurred pending the progress of the action in the Chancery Division must be obtained in the Chancery Division before the appeal is brought to the House; (Pemb. R. & S. 20; *Flower v. Lloyd*, L. Rep. 6 Ch. Div. 297; 37 L. T. Rep. N. S. 419; 25 W. R. 793; *British Dynamite Company, v. Krebs*, L. Rep. 11 Ch. Div. 448; 40 L. T. Rep. N. S. 14; *Denison & Scott*, xiv.)

(2) After Appeal to the House brought.

Whenever the change has occurred after an appeal has been brought to the House, such an order as would have been necessary if it had occurred pending the progress of the action in the Chancery Division, must first be obtained in the Chancery Division, and an order to revive the appeal must then be obtained on petition to the House: (*Denis. & Scott*, 95; *Flower v. Lloyd*; *British Dynamite Company v. Krebs, sup.*)

Where any party or parties to an appeal shall die pending the same, subsequently to the printed cases having been lodged, and the appeal shall be revived against his or her representative or representatives as the person or persons standing in the place of the person or persons so dying as aforesaid, a supplemental case shall be lodged by the party or parties so reviving the same respectively, stating the order or orders respectively made by the House in such case: (S. O. VIII., 1876.)

4. SPECIAL ENACTMENTS.

(a) *Banking Companies.*

The death, resignation, or removal of a public officer will not abate any action or other proceeding by or on behalf of or against the copartnership, but the same may be continued in the name of any other public officer of the copartnership for the time being: (7 Geo. 4, c. 46, s. 9; *Grant on Bankers*, 3rd edit. 563.) No order is necessary to bring the new public officer before the court: (*Butchart v. Dresser*, 16 L. J. 198, Ch.)

(b) *Bankruptcy Trustees.*

Any action or other proceeding for the recovery of things in action, the property of the bankrupt, shall be instituted by the trustee in his official name, as in the Act provided, and such things shall for the purpose of the action or other proceeding be deemed to be assignable in law, and to have been duly assigned to the trustee in his official capacity: (32 & 33 Vict. c. 71, s. 22.)

The trustee may sue and be sued by the official name of "The trustee

of the property of _____, a bankrupt," inserting the name of the bankrupt: (32 & 33 Vict. c. 71, s. 83, sub-s. 7.)

(c) *Building Societies.*

Actions by or against a building society not incorporated under the Building Societies Act, 1874, are not abated or discontinued by the death or removal of the trustees or treasurers suing or sued on behalf of the society: (10 Geo. 4, c. 56, s. 21; 6 & 7 Will. 4, c. 32; 37 & 38 Vict. c. 42, s. 7.)

Societies which have obtained a certificate under the Building Societies Act, 1874, are bodies corporate by their registered names, having perpetual succession: (37 & 38 Vict. c. 42, s. 9.)

(d) *Companies.*

Where an existing company has registered under the Companies Act, 1862, legal proceedings against the company, or its public officer, or any member may be continued as if no registration had taken place: (25 & 26 Vict. c. 89, s. 195.)

Change of name of a company does not render defective any proceedings by or against the company, and the proceedings may be continued in the new name: (25 & 26 Vict. c. 89, ss. 13, 20.)

After a winding-up order no proceedings are to be continued, except with the leave of the court: (25 & 26 Vict. c. 89, ss. 85, 87.)

The official liquidator, when appointed, must be made a party: (*Humby v. Moody*, cited Pemb. R. & S. 14.)

He is described by the style of the official liquidator of the particular company, and not by his official name, and may, with the sanction of the court, bring or defend any legal proceeding in the name and on behalf of the company: (25 & 26 Vict. c. 89, ss. 94, 95.)

(e) *Costs.*

Whenever any decree or order shall have been made for payment of costs in any suit, and such suit shall afterwards become abated, it shall be lawful for any person interested under such decree or order to revive such suit, and thereupon to prosecute and enforce such decree or order, and so on from time to time as often as any such abatement shall happen: (33 & 34 Vict. c. 28, s. 19.)

(f) *Friendly Societies.*

An action by or against a friendly society will not abate or discontinue by the death, resignation, or removal from office of any officer suing or sued on behalf of the society or by any act of such officer: (38 & 39 Vict. c. 60, s. 21.)

(g) *Industrial and Provident Societies.*

The registration of a society under the Industrial and Provident Societies Act, 1876, renders it a body corporate by the name described in the acknowledgment of registry, by which name it may sue and be sued. All legal proceedings pending by or against the trustees of any such society may be prosecuted in the registered name of the society without abatement: (39 & 40 Vict. c. 45, s. 11.)

(h) *Trade Unions.*

Proceedings will not be discontinued or abate by the death or removal or resignation of any officer suing or being sued on behalf of a registered trade union, or by any change of name of such union: (34 & 35 Vict. c. 31, s. 9; 39 & 40 Vict. c. 22, s. 11.)

(i) *Treasury Solicitor.*

The person holding the office of the Solicitor for the affairs of Her

Majesty's Treasury is now a corporation sole by that name, with perpetual succession and a capacity to sue and be sued : (39 & 40 Vict. c. 18.)

PARTITION.

- I. MEANING OF "ACTION FOR PARTITION."
- II. JURISDICTION.
 1. TO ORDER PARTITION.
 2. TO ORDER SALE.
 - (a) *Independently of Statute.*
 - (b) *Under Partition Act, 1868.*
- III. PARTIES.
- IV. WRIT.
- V. EVIDENCE.
- VI. REQUEST FOR SALE.
 1. GENERALLY [see *post*, VIII., 2].
 2. BY PERSONS UNDER DISABILITY.
- VII. JUDGMENT FOR PARTITION.
 1. ORDERING COMMISSION AND INQUIRIES.
 2. ORDERING PARTITION TO BE MADE IN CHAMBERS.
- VIII. JUDGMENT FOR SALE.
 1. ON ADMISSIONS IN PLEADINGS.
 2. WHEN MADE GENERALLY.
 - (a) *On Request of Any Party, where other, Dissent.*
 - (b) *On Request of Moiety of Parties.*
 - (c) *On Request subject to Right of Purchase.*
 3. LEAVE TO BID.
 4. SALE WITHOUT FURTHER CONSIDERATION.
- IX. NOTICE OF JUDGMENT.
 1. ON WHOM SERVED.
 2. DISPENSING WITH SERVICE.
 3. EFFECT OF SERVICE OR ADVERTISEMENT.
- X. HOW PROPERTY PARTITIONED.
 1. UNDER COMMISSION.
 - (a) *By whom Commission prepared.*
 - (b) *Naming Commissioners.*
 - (c) *Swing out Commission.*
 - (d) *Examining Witnesses.*
 - (e) *Production of Deeds.*
 - (f) *Duties and Powers.*
 - (g) *Certificates and Return.*
 - (h) *Order Nisi Confirming Commission.*
 - (i) *Quashing Commission.*
 - (k) *New Commission.*
 - (l) *Order absolute Confirming Commission.*
 2. IN CHAMBERS.
 3. MUTUAL CONVEYANCES.
 4. VESTING ORDERS.
 5. TITLE DEEDS.
- XI. SALES.
 1. REQUESTS AND ORDER [see *sup.*, VI., VIII.]
 2. LEAVE TO BID [see *sup.*, VIII., 3].
 3. VESTING ORDERS.
 4. APPLICATION OF PROCEEDS.
 - (a) *Generally.*

(b) *Where Notice to Parties Dispensed with.*

- (1) Payment into Court.
- (2) Fixing Time for Distribution.
- (3) Notices of Intended Distribution.
- (4) Distribution.
- (5) Payment to Excluded Persons.

XII. COSTS.

I. MEANING OF "ACTION FOR PARTITION."

For the purpose of the Partition [Acts, 1868 and 1876] an action for partition shall include an action for sale and distribution of the proceeds: (39 & 40 Vict. c. 17, s. 7.)

II. JURISDICTION.

1. TO ORDER PARTITION.

Causes and matters for the partition or sale of real estates are assigned to the Chancery Division: (J. A. 1873, s. 34.)

The right to partition is confined to tenants in possession; joint tenants, or tenants in common in reversion or remainder, not having the right: (*Evans v. Bagshaw*, L. Rep. 5 Ch. App. 340; Seton, 1012.)

Manors, advowsons, rent charges, leaseholds for years, copyholds, and lands of customary tenure, may be partitioned: (Seton, 1012-3.)

A bill for a partition was a matter of right, and there was, in 1754, no reported instance of a want of success in the plaintiff in such a suit, except where he was unable to prove his title to the subject matter: (Per Sir Thomas Clarke, M.R., in *Parker v. Gerard*, Amb. 236.)

Leave and time were allowed to the plaintiff to make out his title: (*Cartwright v. Pulteney*, 3 Atk. 380; Amb. 236.)

The strongest arguments of inconvenience failed to deprive plaintiffs of their right: (Story, s. 656; and for instances see *Parker v. Gerard*, *sup.*; *Warner v. Baynes*, Amb. 589; *Turner v. Morgan*, 8 Ves. 144a.)

When only a dry legal estate was vested in trustees, a partition was granted on the bill of a *cestui que trust* (*Brook v. Hertford*, 2 P. Wms. 518); but, ordinarily, the court will not divide an estate on the action of a merely equitable owner: (see *Taylor v. Grange*, 43 L. T. Rep. N. S. 233.)

Where a testator devised real estate, subject to an existing mortgage, to trustees upon trust for his daughters for life, and afterwards for their children, the will containing directions to the trustees to work a quarry on the estate, and make roads over the estate for the purpose, and to apply the clear gains to or for the benefit of his children and their issue; and one of the daughters claimed a partition, judgment for partition was refused: (*Taylor v. Grange*, *sup.*)

The court may adjudge a partition of part of an estate, and sale of another part: (*Roebuck v. Chadebet*, L. Rep. 8 Eq. 127.)

2. TO ORDER SALE.

(a) *Independently of Statute.*

Prior to the Partition Act, 1868, the court could not order a sale against one of the parties interested: (*Griffin v. Griffin*, 8 L. T. Rep. N. S. 758.)

But, where some of the interested parties were infants, and the others wanted a sale, the court exercised its discretion of judging whether the infants would derive benefit from a sale: (*Id.*)

(b) *Under Partition Act 1868.*

[See *post*, VIII.]

When the testator has himself fixed the period at which the trustees of

his will are to sell his real estate, and divide the proceeds, the court has no jurisdiction to anticipate that period by directing a sale in a partition action at the request of persons equitably entitled to an undivided moiety of the property: (*Swaine v. Denby*, L. Rep. 14 Ch. Div. 326; 28 W. R. 622.)

The court may direct the sale of the fee simple of an estate, subject to an executory devise over: (*Groves v. Carbert*, 55 L. T. 165, cited *Shelford R. P.* 747.)

III. PARTIES.

A tenant for life is entitled to ask for partition: (*Gaskell v. Gaskell*, 6 Sim. 643.)

Trustees represent their beneficiaries in an action, under the Partition Acts 1868 and 1876: (*Simpson v. Denny*, L. Rep. 10 Ch. Div. 28; *Goodrich v. Marsh*, W. N. 1878, p. 186; O. XVI., r. 7; see PARTIES.) And it is unnecessary to make the *cestuis que trustent* parties, or serve them with notice of judgment: (*Goodrich v. Marsh*, *sup.*)

Any person who, if [the] Act had not been passed, might have maintained a suit for partition may maintain such suit against any one or more of the parties interested, without serving the other or others (if any) of those parties; and it shall not be competent to any defendant in the suit to object for want of parties: (31 & 32 Vict. c. 40, s. 9; and see *post*, IX.)

IV. WRIT.

For the purposes of the partition [Acts, 1868 and 1876] an action for partition shall include an action for sale and distribution of the proceeds; and in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition: (39 & 40 Vict. c. 17, s. 7.)

It may be well in some cases to claim a partition to provide for the event of the opposite party attempting to buy out the plaintiff under s. 5: (see *post*, VIII.)

A question of disputed title can be raised by the same writ as that claiming partition without obtaining the leave of the court: (*Gledhill v. Hunter*, L. Rep. 14 Ch. Div. 492; 42 L. T. Rep. N. S. 392; 49 L. J. 333, Ch.; 28 W. R. 530; but see *Whetstone v. Dewis*, L. Rep. 1 Ch. Div. 99; 33 L. T. Rep. N. S. 501; 45 L. J. 504, Ch.; 24 W. R. 93.)

V. EVIDENCE.

The plaintiff's title must be clearly shown: (*Jope v. Morshead*, 6 Beav. 213; *Parker v. Gerard*, Amb. 236.)

When parties claiming under a derivation title proposed to take a judgment directing inquiries as to the persons interested with an order for sale, dependent on the result of inquiries, Hall, V.C., directed a general affidavit concisely verifying the statement of claim to be supplied and gave judgment: (*Senior v. Hereford*, L. Rep. 4 Ch. Div. 494.)

VI. REQUEST FOR SALE.

1. GENERALLY.

[See *post*, VIII., 2.]

2. BY PERSONS UNDER DISABILITY.

In an action for partition a request for sale may be made or an undertaking to purchase given on the part of a married woman, infant, person of unsound mind, or person under any other disability, by the next friend,

guardian, committee in lunacy (if so authorised by order in lunacy) or other person authorised to act on behalf of the person under such disability, but the court shall not be bound to comply with any such request or undertaking on the part of an infant unless it appear that the sale or purchase will be for his benefit: (39 & 40 Vict. c. 17, s. 7.)

According to Malins, V.C. "guardian" means, not a guardian *ad litem*, but a testamentary guardian, or guardian appointed by the court: (*Platt v. Platt*, W. N. 1880, p. 59; 28 W. R. 533.)

According to Jessel, M.R., the word means a guardian *ad litem*: (*Rimington v. Hartley*, L. Rep. 14 Ch. Div. 630; 43 L. T. Rep. N. S. 15.)

In a partition action by a married woman and her husband, her request for sale may be made by her counsel authorised to act on her behalf: (*Crookes v. Whitworth*, L. Rep. 10 Ch. Div. 289; 39 L. T. Rep. N. S. 348; 27 W. R. 149.)

A request for sale made on behalf of an infant will not be complied with unless the court be satisfied that such sale is for the benefit of the infant: (*Rimington v. Hartley*, *sup.*)

Where in an action for partition an undivided share belonged to a lunatic as tenant in tail, the lunacy jurisdiction authorised the committee of the lunatic to make a request for sale under the 6th section, and to join in conveying the estate to the purchaser, but directed that the proceeds of sale of the lunatic's share should be subject to the same uses as that share was subject to before the sale, the court having jurisdiction to bar the lunatic's estate tail, but not so as to alter the original nature of the property: (*Re Pares*, L. Rep. 12 Ch. Div. 333; 41 L. T. Rep. N. S. 574; 28 W. R. 193.)

VII. JUDGMENT FOR PARTITION.

1. ORDERING COMMISSION AND INQUIRIES.

Where the partition is to be made by commission, and the title of the plaintiff and of all other parties is clear, the court, at the original hearing will order a commission to issue in the first instance without any previous inquiry: (Dan. 1022.)

If the titles are not clear, the court directs an inquiry as to them: (*Id.*)

If necessary the court will direct an inquiry to ascertain the shares in which the parties are entitled, and by the same order direct partition: (see *Agar v. Fairfax*, 17 Ves. 533; 2 W. & T. L. C. 4th edit. 447.)

At the hearing of the cause the court may direct such inquiries as to the nature of the property, and the persons interested therein, and other matters, as it thinks necessary or proper with a view to an order for partition or sale being made on further consideration: (31 & 32 Vict. c. 40, s. 9.)

But such an inquiry as to title will not be made to enable the plaintiff to complete his own defective title: (Dan. 1022.)

When the defendants desire that there shall be no partition of their several shares, the partition may be confined to the aliquot share of the plaintiff: (*Id.*)

Sometimes the court does not at the hearing order the commission to issue, but waits till further consideration: (*Id.*)

2. ORDERING PARTITION TO BE MADE IN CHAMBERS.

Sometimes the court orders the partition to be made in chambers, or gives the parties liberty to carry into chambers a scheme before the issue of a commission which has been directed: (Dan. 1030.)

VIII. JUDGMENT FOR SALE.

1. ON ADMISSIONS IN PLEADINGS.

An order for sale may be made in a partition action on a motion upon admissions in the pleadings under Rules of Court, 1875, Order XL., rule 11. In such an order the court will direct an account of rents and profits received by the plaintiff, where he has been in possession, and adjourn further consideration: (*Burnell v. Burnell*, L. Rep. 11 Ch. Div. 213; 48 L. J. 412, Ch.; 27 W. R. 749.)

2. WHERE MADE GENERALLY.

(a) *On Request of Any Party when Others Dissent.*

In a suit for partition, where, if [the] Act had not been passed, a decree for partition might have been made, then if it appears to the court that, by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the court may, if it thinks fit on the request of any of the parties interested, and notwithstanding the dissent or liability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions: (31 & 32 Vict. c. 40, s. 3.)

This section, and ss. 4 and 5, must be construed together. When a party, holder of shares under a moiety, requests a sale under sect. 3, he cannot be forced to sell his share at a valuation under sect. 5 (see *post* (c)). If he presses for a sale, and the court thinks that the opposing parties in fairness ought either to buy him out or consent to a sale, it may order a sale unless they will agree to take his share at a valuation; in which case the party requesting a sale may either accept that valuation or refuse it, by withdrawing his request, in which case he still has his common law right to partition: (*Gilbert v. Smith*, *sub nom. Pitt v. Jones*, L. Rep. 5 App. Cas. 651, 659; *Williams v. Games*, L. Rep. 10 Ch. App. 204; 32 L. T. Rep. N. S. 414.)

And although the party requesting sale refuses to accept a valuation, but does not withdraw his request, the court may still make an order for sale, if a sale is considered by the court as "more beneficial for the parties interested" within the meaning of sect. 3: (*Id.*)

When property consisting of three dwelling-houses in a town was divisible into sixteen shares, three of which were vested in persons who desired a sale, the owners of the remaining thirteen shares desiring to purchase the three shares at a valuation, it was held that from the nature of the property, and the interests, a sale was more beneficial than a partition, and a sale was accordingly directed, with liberty to all parties, other than those who had the conduct of the sale, to bid: (*Id.*; see also *Drinkwater v. Radcliffe*, L. Rep. 2 Eq. 528; 33 L. T. Rep. N. S. 417.)

In an action commenced in the district registry asking for the sale of freehold hereditaments, under the 3rd section, it was held, upon motion for judgment, that, although the usual inquiries might be directed to be made in the district registry, the proper course was to apply in chambers for the order for sale: (*Sykes v. Schofield*, L. Rep. 14 Ch. Div. 629; 42 L. T. Rep. N. S. 822)

(b) *On Request of Moiety of Parties.*

In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the

property to which the suit relates, request the court to direct a sale of the property, and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions: (31 & 32 Vict. c. 40, s. 4.)

The section is retrospective: (*Lys v. Lys*, L. Rep. 7 Eq. 126.)

This section is imperative, and obliges the court to order a sale where the owners of a moiety ask for it, unless the court sees some good reason why a sale should not be ordered: (*Pemberton v. Barnes*, L. Rep. 10 Ch. App. 685; approved so far by Lord Blackburn in *Pitt v. Jones*, L. Rep. 5 App. Cas. 659.)

Where an estate, comprising a first-class mansion, with a park of nearly 300 acres, above 3000 acres of agricultural land, and a manor, the rights of which extended over thirty square miles, belonged to plaintiff and defendant in moieties, and the plaintiff adduced evidence, which was not contradicted, that under the circumstances a sale of the whole would bring more than the aggregate purchase moneys of sales of each part after partition, a sale was ordered, notwithstanding the defendant's objection: (*Pemberton v. Barnes*, *sup.*)

Where the property consisted of ten leasehold houses, hired under one lease, and the plaintiff and defendant, the latter an infant, were entitled in equal moieties, a sale was ordered, notwithstanding the infant's objection on the ground that his income would be materially diminished: (*Rowe v. Gray*, L. Rep. 5 Ch. Div. 263.)

Where the plaintiff and defendant were entitled to an estate consisting of a mansion house and 185 acres of land in equal moieties, the plaintiff was also tenant for life of a larger estate which almost surrounded it, and both formerly formed part of the family estate of the ancestors of the plaintiff and defendant, in an action for partition and sale, asking that the mansion house and part of the lands should be allotted to the plaintiff, and alleging that the value of the mansion house would be depreciated if severed from the larger estate, with which it had formerly been held, and offering to pay what should be necessary for equality of partition, the defendant, who was also the owner of land in the neighbourhood, desired a sale, and alleged that he was willing to purchase the property, it was held that, under sect. 4, no good reason having been shown why a sale should not be ordered, a sale must be directed: (*Porter v. Lopes*, L. Rep. 7 Ch. Div. 358.)

Where the plaintiff in a partition action was owner of one-fourth of the property, the subject of the action; and claimed a right to purchase at a valuation under sect. 5, it was held, that the owner of the other three-fourths was entitled under sect. 4 to have a sale by auction: (*Roughton v. Gibson*, 36 L. T. Rep. N. S. 93; 46 L. J. 366, Ch.)

The larger owner, in case of purchase by her, was directed to pay into court one half of the purchase money only: (*Id.*)

The rule laid down in *Saxton v. Bartley*, that the court has a discretion to grant or refuse an order for sale, and the rule laid down in *Pemberton v. Barnes*, that an offer to purchase at a valuation under sect. 5 ousts the court's jurisdiction to order a sale, are inconsistent with the decisions of the House of Lords and the Court of Appeal in *Gilbert v. Smith*, *Pitt v. Jones*, *sup.*, and with the decision of Jessell, M.R., in *Drinkwater v. Radcliffe*, 33 L. T. Rep. N. S. 417; L. Rep. 20 Eq. 635.)

Where, in an action by the owner of a moiety requesting a sale of nineteen leasehold houses, the court was of opinion that a partition was as feasible as a sale, and that a partition would cause no loss to the plaintiff, while

a sale would cause a great loss to the defendant, and that vindictive feeling on the part of the plaintiff's partner against the defendant had brought about the action, a partition was directed: (*Saxton v. Bartley*, W. N. 1879, p. 94; 48 L. J. Ch. 519; 27 W. R. 615.)

(c) *On Request, Subject to Right of Purchase.*

In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if any party interested in the property to which the suit relates request the court to direct a sale of the property and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions; and in case of such undertaking being given the court may order a valuation of the share of the party requesting a sale in such manner as the court thinks fit, and may give all necessary or proper consequential directions: (31 & 32 Vict. c. 40, s. 5.)

This section is controlled by ss. 3 and 4 to the extent that, notwithstanding an undertaking to purchase at a valuation (1) A party requesting a sale under sect. 3 is entitled to withdraw his request, and fall back on his right of petition; (2) A sale may be ordered where under any circumstances it appears to the court more beneficial to order a sale under the third section; (3) A party entitled to a moiety or more may insist on a sale where there is no good reason to the contrary: (see cases cited *sup.* (a) (b).)

An undertaking to purchase may now be given on behalf of persons under disability: (see *sup.* VII., 2.)

3. LEAVE TO BID.

On any sale under this Act the court may, if it thinks fit, allow any of the parties interested in the property to bid at the sale, on such terms as to nonpayment of deposit, or as to setting off or accounting for the purchase money, or any part thereof, instead of paying the same, or as to any other matters, as to the court seem reasonable: (31 & 32 Vict. c. 40, s. 6.)

4. SALE WITHOUT FURTHER CONSIDERATION.

A judgment is not wrong in directing a sale without reserving further consideration: (*Powell v. Powell*, L. Rep. 10 Ch. App. 130.)

The court will not, upon an order for sale by auction in an action under the Partition Acts, 1868 and 1876, give leave to bid at the auction to the party having the conduct of the sale: (*Verrall v. Cathcart*, W. N. 1880, p. 100; 27 W. R. 645; and see *Gilbert v. Smith*, *sup.*; but see *Pennington v. Dalbiac*, 18 W. R. 684.)

IX. NOTICE OF JUDGMENT.

1. ON WHOM SERVED.

All persons who, if this Act had not been passed, would have been necessary parties to the suit, shall be served with notice of the [judgment] or order on the hearing: (31 & 32 Vict. c. 40, s. 9.)

2. DISPENSING WITH SERVICE.

Where, in an action for partition, it appears to the court that notice of the judgment on the hearing of the cause cannot be served on all the persons on whom that notice is, by the Partition Act, 1868, required to be served, or cannot be so served without expense disproportionate to the

value of the property to which the action relates, the court may, if it thinks fit, on the request of any of the parties interested in the property, and notwithstanding the dissent or liability of any others of them; by order, dispense with that service on any person, or class of persons, specified in the order, and, instead thereof, may direct advertisements to be published at such times and in such manner as the court shall think fit, calling upon all persons claiming to be interested in such property, who have not been served, to come in and establish their respective claims in respect thereof, before the judge in chambers within a time to be thereby limited: (39 & 40 Vict. c. 17, s. 3.)

Advertisements even were dispensed with in *Barton v. Barton*, W. N. 1877, p. 23.

3. EFFECT OF SERVICE OR ADVERTISEMENT.

[All persons served with notice of judgment or order] after such notice shall be bound by the proceedings as if they had been originally parties to the suit, and shall be deemed parties to the suit, and all such persons may have liberty to attend the proceedings, and any such person may, within a time limited by general orders, apply to the court to add to the [judgment] or order: (31 & 32 Vict. c. 40, s. 9; and see JUDGMENT.)

[When advertisements have been issued as mentioned, *sup.*, 2] after the expiration of the time so limited, all persons who shall not have so come in and established such claims, whether they are within or without the jurisdiction of the court (including persons under any disability), shall be bound by the proceedings in the action as if on the day of the date of the order dispensing with service they had been served with notice of the judgment, service whereof is dispensed with, and thereupon the powers of the court, under the Trustee Act, 1850, shall extend to their interests in the property to which the action relates, as if they had been parties to the action; and the court may thereupon, if it shall think fit, direct a sale of the property, and give all necessary or proper consequential directions: (39 & 40 Vict. c. 17, s. 3.)

X. HOW PROPERTY PARTITIONED.

1. UNDER COMMISSION.

(a) *By whom Commission Prepared.*

The commission is prepared and sent out by the solicitor of the plaintiff: (Dan. 1023.)

If he is neglectful, the defendant may obtain an order authorising him to sue it out: (*Id.*)

(b) *Naming Commissioners.*

The names should be agreed on by the parties who join and strike names. Each party appearing by a separate solicitor is entitled to name four commissioners, but two only of each set of four can be retained, and not less than four names will be inserted in the commission, unless the court or judge otherwise directs: (Dan. 1023.)

If the parties cannot agree upon the names, the judge at chambers will determine who shall be named, on summons: (*Id.*)

To save expense it is very common for the parties to agree, amongst themselves, upon two persons to act as commissioners, in which case two fictitious named are added to preserve the form of the writ: (*Id.*)

(c) *Suing Out Commission.*

The commission is sealed at the Central Office on production of the judgment or order directing it, and on a præcipe being left: (Dan. 1023.)

A form of præcipe is given in Schedule E. 27 to the Rules of April, 1880.

If the judgment or order directs a preliminary inquiry, the result of such inquiry, as it appears in the Chief Clerk's certificate, must be embodied in the writ : (Dan. 1023.)

The commission must be engrossed on parchment.

(d) *Examining Witnesses.*

No oath of secrecy is required to be taken by the commissioners or those employed under them : (Dan. 1023.)

The commissioners may cause all such witnesses as they may see occasion to come before them to be examined ; and, upon the witness attending, the oath may be administered to him by two or more of the acting commissioners, the oath being the same in form as that administered by the examiner, *mutatis mutandis* : (Dan. 1023 ; and see EVIDENCE.)

Attendance may be enforced as before an examiner : (Dan. 1024.)

The commissioners should examine the witnesses apart from each other, if they have any suspicion of manufactured evidence, but otherwise, their proceedings should be open, as they act in a judicial capacity, in the nature of a court at which the parties and their agents have a particular right to be present, as expressly directed by the writ of partition at Common Law : (Dan. 1024.)

The commissioners themselves administer the questions to the witnesses ; and ought not to let the solicitors put them : (Dan. 1024.)

The witnesses may be examined upon interrogatories, if so directed in the order and commission : (*Id.*)

The commissioners are not bound, personally, to take the depositions, that is, to write down the answers of the witnesses ; but may employ clerks to do this part, who must act entirely by their direction, and write the substance of what falls from the witnesses in the language the commissioners direct. If any dispute arises as to the evidence given by a witness, the commissioners must agree amongst themselves upon the words of the deposition, and, having done so, the depositions must be read over to the witness, and ought to be signed by the witness before he is dismissed : (*Id.*)

If any of the commissioners propose to receive evidence touching any matter not relevant, the other commissioners should object to receiving such evidence, and may refuse to sign the depositions, if taken, and to annex them to the return : (Dan. 1024.)

The depositions on behalf of the different parties should be kept distinct.

The depositions must be written on foolscap paper bookwise or briefwise : (Ch. O., 6th March, 1860, r. 16.)

They should, according to the directions in the commission, be returned with the commission : (Dan. 1024.)

(e) *Production of Deeds.*

According to the usual form of judgments for partition, all deeds, &c., relating to the estates to be divided, in the custody of any of the parties, are to be produced before the commissioners, upon oath, as the commissioners shall require, the method of compelling the production being by serving a copy of the judgment, and then proceeding by attachment and other process of contempt : (Dan. 1024-5.)

(f) *Duties and Powers of Commissioners.*

The commissioners, when once appointed, though named by the different parties, are commissioners for all the parties. They are to act as judges,

the whole power of the court being delegated to them; and, if four act, and there is a difference of opinion amongst them, one being of one opinion and three of another, the three make the return; and if three are present and two concur in opinion against the third, that is sufficient; but the commission does not authorise two out of four to act where all four are present; and, therefore, it does not authorise a double return by two commissioners one way, and by the other two another way; though if two only are present a return by them will be good: (Dan. 1025.)

The commissioners' proceedings ought to be open. The parties or their solicitors should attend them; should point out what may tend to give the commissioners full information; should produce their deeds and other evidence, as well written as oral; should know what evidence is given on both sides; should be at liberty to cross-examine the witnesses under the control of the commissioners, and take every step necessary to discover the truth and enable the commissioners to make a proper return: (Dan. 1025.)

The commission itself ought to be produced to the commissioners when they meet, and should remain with them till their proceedings are closed and the return annexed: (*Id.*)

The course to be pursued by the commissioners is pointed out by the terms of the commission. They are to meet at some place appointed, and thence to go to, enter upon, and walk over the estate. To do this, they must first ascertain the estates which are the subject of the commission, and for that purpose they must look into the pleadings; and if, from thence, they can ascertain the property, they must stop there; if they find the descriptions in those instruments not sufficiently accurate to enable them to proceed, they must endeavour to supply the defect in the pleadings by evidence. But the pleadings must still be their guide as to what evidence they shall receive; any evidence touching estates not in question in the cause, will be irrelevant to the business before the commissioners, and ought to be rejected by them, except so far as it may be necessary for the purpose of ascertaining what are the estates in question; and such evidence may be necessary if there is any confusion or intermixture of boundaries between the estates in question and those not in question: (Dan. 1025-6.)

Having ascertained the subject of partition, the commissioners must make a fair partition, division, and allotment thereof, into as many shares and proportions as the judgment or order directs, exercising the best of their skill, knowledge, and judgment; and provided they do that, and act fairly, the court will not distrust their return upon the mere allegation of conflicting opinions by different surveyors, with respect to the comparative value of the several lots. But where it is shown that the commissioners have committed a gross error in judgment (although there is no proof of partiality) the court will set aside their adjudication: (Dan. 1026.)

Every part of the estate need not be divided, but it is sufficient if each party has his proper share of the whole; (Dan. 1026.)

Although in making the partition care must be taken that each party has his proper part in value of the estate, no part of the estate should be lessened in value in order that each party should have his part of it: (Dan. 1027.)

The commissioners can only direct owelty when authorised by the judge: (*Id.*)

The commissioners having apportioned and divided the property, should proceed to set apart and allot the shares to the parties; this they should do, when it can be accomplished by lot, for which purpose they should

call in some indifferent person, and require that person to draw lots for the shares of each party.

The course of making the choice of shares, by lot, should not be resorted to where it cannot be done with fairness and with due regard to the situation of the parties and of the shares. In such cases it is the duty of the commissioners to assign the shares to those parties to whom they would be of most value, independently of their value in the market,) with reference to their respective situations in relation to the value of the property before the partition took place: (Dan. 1028.)

(9) Certificates and Return.

The commissioners, having divided and allotted the estate, prepare their certificate in the form of a report, detailing their proceedings, and appointing the shares of each party, according to their allotments, to be enjoyed by them in severalty, distinguishing each part, if so directed by the commission, by metes and bounds: (*Id.*)

The particulars, description, and quantities may be scheduled: (*Id.*)

The certificate is sealed and signed; the schedules and plans are signed; and the return is indorsed and signed, with word "Commissioners" under the signature: (Dan. 1028.)

If the commissioners cannot agree upon a division or allotment, they must make separate certificates, though the consequence will be, if the commissioners are equally divided, that both returns will quashed: (Dan. 1028-9.)

The certificate, with the plans if any, and the examinations of witnesses, must be annexed to the commission, which must then be closed up, and sealed by the commissioners. If, by mistake, any document which has been referred to by the commissioners in their certificate, has been omitted to be annexed, the court will, upon motion, direct it to be added. If there are two certificates they must both be annexed to the commission: (Dan. 1029.)

The commission, &c., are filed in the Central Office: (*Id.*)

(h) Order *Nisi* confirming Commission.

This is an order *nisi* obtained, after the filing, on motion of course, generally by the person suing it out, but on his neglect by the other party: (Dan. 1029.)

(i) Quashing Commission.

If there is any ground, as irregularity, misconduct, or partiality of commissioners, a motion to quash or suppress the certificate may be made on motion, supported by affidavit: (*Id.*)

If there be a double return, and one party alone applies to quash one of the certificates only, the court will, if it sees proper, order that return to be quashed: (*Id.*)

(k) New Commission.

If the return to a commission is quashed, the court will order a new commission to issue, and, where there were two returns, each by two commissioners, it ordered the new commission to be directed to five commissioners: (Dan. 1029-30.)

(l) Order absolute confirming Commission.

If no objections are taken to the certificate, the order confirming it should be made absolute, on motion of course, supported by affidavit of service of the order *nisi*, and the registrar's certificate of no cause shown: (Dan. 1030.)

2. IN CHAMBERS.

Where the judgment directs partition in chambers, or liberty to bring

in a scheme notwithstanding an order for a commission, the judgment is left at chambers, and a summons to proceed served: (Dan. 1030; and see CHAMBERS.)

On the return of the summons, directions are given for further prosecution: (*Id.*)

Evidence of valuers, &c., is produced, and the result certified by the chief clerk: (*Id.*)

3. MUTUAL CONVEYANCES.

However the partition is made, the judgment generally contains a direction that mutual conveyances be executed by the parties, for the purpose of vesting the allotted portions of the divided estates in each other in severalty: (Dan. 1030; and see DEEDS.)

4. VESTING ORDERS.

When any judgment is given for partition, the court may declare any party to the suit trustee of the lands within the meaning of the Trustee Acts, and that unborn persons who would on coming into existence become interested, would be trustees within the meaning of the Act; and vesting orders may be obtained, binding the estates and interest of such persons, born or unborn: (see Tr. A. 1850, s. 30, &c.; TRUSTEES.)

The usual course is by the judgment to declare that upon partition the infant will be a trustee of the parts allotted in severalty to the other parties, and by the same or a subsequent order to appoint one of the other conveying parties to convey for the infant, or to vest in such person the share of the infant for the purpose of carrying the judgment into effect: (Seton, 1029.)

If any of the parties is a lunatic, the order to vest or convey must be made in lunacy: (see TRUSTEES.)

Where a person of unsound mind, not so found, was interested, the decree, after allotting shares, directed mutual conveyances by parties *sui juris* to each other and the lunatic, and declared him a trustee for the others. A guardian *ad litem* was appointed in lunacy to convey and execute all deeds: (Seton, 1029.)

5. TITLE DEEDS.

The judgment generally contains a direction that, after the partition, such of the title deeds as shall relate solely to parts of the premises allotted to any of the parties alone, shall be delivered to or retained by parties; and that the rest shall remain in court; but, for the mutual benefit of the parties, subject to further order; or shall be retained by the party having custody thereof upon his undertaking to abide by any order which the court may make as to the same, with liberty for other parties to apply: (Dan. 1031.)

XI. SALES.

1. REQUEST AND ORDER.

[See *sup.*, VI., VIII.]

2. LEAVE TO BID.

[See *sup.*, VIII., 3.]

3. VESTING ORDERS.

Sect. 30 of the Trustee Act, 1850, shall extend and apply to cases where, in suits for partition, the court directs a sale instead of a division of the property: (31 & 32 Vict. c. 40, s. 7.)

4. APPLICATION OF PROCEEDS.

(a) *Generally.*

Sects. [34-36 of the Settled Estates Act, 1877] shall extend and apply

to money to be received on any sale effected under the authority of this Act: (31 & 32 Vict. c. 40, s. 8; and see SETTLED ESTATES ACT.)

Trustees may be directed to sell and divide the proceeds among the persons entitled out of court: (*Hayward v. Smith*, 20 L. T. Rep. N. S. 70.)

The share of a married woman in the proceeds of sale of real estate devised to her in fee, and which has been sold under an order in a partition action, may be paid to her husband on her electing by examination in court to take the money as personal estate: (*Standerling v. Hall*, L. Rep. 11 Ch. Div. 652; 27 W. R. 749.)

The proceeds of sale of an infant's or married woman's share are realty: (*Foster v. Foster*, L. Rep. 1 Ch. Div. 588; *Mildmay v. Quicke*, L. Rep. 6 Ch. Div. 553.)

A tenant for life is entitled only to the dividends, and not to have his former income made up out of capital: (*Langmead v. Cockerton*, W. N. 1877, p. 43.)

(b) *Where Notice to Parties Dispensed with.*

(1) *Payment into Court.*

Where an order is made under this Act dispensing with service of notice on any person or class of persons, and property is sold by order of the court, the following provisions shall have effect:

The proceeds of sale shall be paid into court to abide the further order of the court: (39 & 40 Vict. c. 17, s. 4, sub-sect. 1.)

(2) *Fixing Time for Distribution.*

The court shall, by order, fix a time, at the expiration of which the proceeds will be distributed, and may from time to time, by further order, extend that time: (39 & 40 Vict. c. 17, s. 4, sub-sect. 2.)

(3) *Notices of Intended Distribution.*

The court shall direct such notices to be given by advertisements or otherwise as it thinks best adapted for notifying to any persons on whom service is dispensed with, who may not have previously come in and established their claims, the fact of the sale, the time of the intended distribution, and the time within which a claim to participate in the proceeds must be made: (39 & 40 Vict. c. 17, s. 4, sub-sect. 3.)

(4) *Distribution.*

If, at the expiration of the time so fixed or extended, the interests of all the persons interested have been ascertained, the court shall distribute the proceeds in accordance with the rights of those persons: (39 & 40 Vict. c. 17, s. 4, sub-sect. 4.)

If, at the expiration of the time so fixed or extended, the interests of the people interested have not been ascertained, and it appears to the court that they cannot be ascertained, or cannot be ascertained without expense disproportionate to the value of the property or of the unascertained interests, the court shall distribute the proceeds in such manner as appears to the court to be most in accordance with the rights of the persons whose claims to participate in the proceeds have been established, whether all those persons are or are not before the court, and with such reservations (if any) as to the court may seem fit in favour of any other persons (whether ascertained or not) who may appear from the evidence before the court to have any *prima facie* rights which ought to be provided for, although such rights may not have been fully established, but to the exclusion of all other persons, and thereupon all such other persons shall by virtue of this Act be excluded from participation in those proceeds on the distribution thereof, but, notwithstanding the distribution any excluded person may recover from any participating person any portion received

by him of the share of the excluded person: (39 & 40 Viet. c. 17, s. 4, sub-s. 5.)

(5) Payment to Excluded Persons.

Where in an action for partition two or more sales are made, if any person who has by virtue of this Act been excluded from participation in the proceeds of any of those sales establishes his claim to participate in the proceeds of a subsequent sale, the shares of the other persons interested in the proceeds of the subsequent sale shall abate to the extent (if any) to which they were increased by the non-participation of the excluded person in the proceeds of the previous sale, and shall to that extent be applied in or towards payment to that person of the share to which he would have been entitled in the proceeds of the previous sale if his claim thereto had been established in due time: (39 & 40 Vict. c. 17, s. 5.)

XII. COSTS.

In a suit for partition, the court may make such order as it thinks just respecting costs up to the time of the hearing: (31 & 32 Viet. c. 40, s. 10.)

Although it cannot be said that the court is bound by the old rule prior to 1868, it is impossible to lay down a general rule on the subject, and there may be cases in which the court, in the exercise of its discretion, will follow the old practice: (per Lord Selborne, sitting for late M.R. in *Simpson v. Ritchie*, L. Rep. 16 Eq. 103.)

In the case before Lord Selborne the owner of one moiety of the estate had filed a bill for the sale thereof against the defendants, who were owners of the remaining shares, and the costs were ordered to be paid out of the estate: (*Simpson v. Ritchie*, *sup.*)

Where the plaintiff was entitled to one-fifth, and the defendants or their children to the other four-fifths, on a sale being ordered, the costs, including those of sale, were ordered to come out of the estate: (*Leach v. Westall*, 17 W. R. 313.)

In another case, where the parties were entitled in the same proportions, it was contended that the old rule as laid down in *Agar v. Fairfax* (presently noticed) still prevailed, and that each party should bear his own costs up to the hearing; but Lord Romilly laid down a general rule that the entire costs of the partition suit should be borne by the parties in proportion to their interests, as declared by the decree, except where there were any special circumstances arising from the conduct of any of the parties which might lead the court to apportion the costs otherwise; and he ordered the plaintiff to pay one-fifth, and the defendants four-fifths of the entire costs of suit (*Cannon v. Johnson*, L. Rep. 11 Eq. 90; 23 L. T. Rep. N. S. 583); and this rule has been adopted by Jessel, M.R.: (*Ball v. Kemp-Welch*, L. Rep. 14 Ch. Div. 512; 43 L. T. Rep. N. S. 116; 49 L. J. 528, Ch.; and see *Bowes v. Marquis of Bute*, 27 W. R. 756.)

Malins, V.C., ordered the costs of all parties, of the suit, to be a charge on the proceeds of sale (*Osborn v. Osborn*, L. Rep. 6 Eq. 338; 18 L. T. Rep. N. S. 679); and this decision was approved by Lord Romilly (*Miller v. Marriott*, L. Rep. 7 Eq. 1; 19 L. T. Rep. N. S. 304; overruling same judge's decision in *Landell v. Baker*, L. Rep. 6 Eq. 268.)

The old rule was that no costs were given up to the hearing, and in Lord Eldon's time the decree did not provide that costs of infants and married women should be borne by the share in respect of which they were incurred (*Agar v. Fairfax*, 17 Ves. 533, 557); but costs of hearing on further consideration subsequent to the confirmation of the commission were afterwards ordered to be borne by the parties according to the value of their respective shares (*Elton v. Elton*, 27 Beav. 632); and Stuart,

V.C., directed that costs of a tenant-in-tail in remainder expectant on the determination of the estates of two tenants in tail, one a lunatic and the other an infant, should be charged on the undivided share in which he was interested (*Singleton v. Hopkins*, 26 L. T. Rep. O. S. 146); which rule was followed by Wood, V.C., who ordered the costs of infants, both before and after the issuing of the commission, to be charged on their shares: (*Cox v. Cox*, 3 K. & J. 554; *Thackeray v. Parker*, 8 L. T. Rep. N. S. 602.)

The same rule also prevailed in Ireland: (Seton, 3rd edit., 578; and see Morg. & Dav. 172.)

But a defendant setting up an agreement as a bar to a partition, and failing, was ordered to pay the costs thereby occasioned (*Norris v. Timmins*, 1 Beav. 411); costs of a defendant improperly disputing plaintiff's title were ordered to be paid by the former (*Hill v. Fulbrooke*, Jac. 571; and see *Lyne v. Lyne*, 21 Beav. 318); costs of a purchaser of the plaintiff's share in part of the estate, who was made a defendant by amendment, were ordered to be paid by the plaintiff (*Williams v. Williams*, 10 W. R. 609); costs of a lessee of an undivided share were ordered to be paid by his lessor (*Cornish v. Gest*, 2 Cox, 27); and legatees, whose legacies were charged on an undivided share, had to bear their own costs: (*Green v. Mercer*, 4 I. E. R. 705.)

These seem to be the cases which Lord Selborne points out as proper for the court, in its discretion, to follow, under similar circumstances.

The costs of a partition action can be taxed as between solicitor and client only by the consent of the parties; otherwise they must be taxed as between party and party: (*Ball v. Kemp-Welch*, L. Rep. 14 Ch. Div. 512; 43 L. T. Rep. N. S. 116; 49 L. J. 528, Ch.)

PARTNERS.

I. JURISDICTION OVER.

1. GENERALLY.
2. GROUNDS FOR DISSOLVING FIRMS.

II. THEIR POSITION IN AN ORDINARY ACTION.

1. AS PARTIES [see PARTIES, I., 18; II., 18].
2. SERVICE OF WRIT [see WRIT OF SUMMONS].
3. APPEARANCE [see APPEARANCE, VI.]
4. DISCOVERY OF FIRM'S MEMBERS [see DISCOVERY, IV.]
5. EXECUTION.

III. ACTION FOR PARTNERSHIP ACCOUNT.

1. PARTIES.
2. INDORSEMENT OF WRIT.
3. OBTAINING ACCOUNT ON SUMMONS.
4. RECEIVER.
 - (a) Where Appointed.
 - (b) When Appointed.
 - (c) Who Appointed.
 - (d) Effect of Appointment.
5. SALE OF THE PARTNERSHIP PROPERTY.
6. JUDGMENT.
 - (a) Forms.
 - (b) For Receiver or Sale [see sup., 4, 5].
 - (c) Proceedings in Chambers.
7. COSTS.

I. JURISDICTION.

1. GENERALLY.

All causes and matters for the dissolution of partnerships.

or the taking of partnership accounts [are expressly assigned to the Chancery Division]: (J. A. 1873, s. 34.)

Generally the court will not decree specific performance of an agreement to perform and carry on a partnership (though there are limited exceptions, as that the court will direct the execution of a deed) or order the carrying on of a partnership, except with a view to winding it up. But the court will give effect to an agreement for a partnership which has been executed by the parties, (1) if there has been part performance, or, (2) if it is necessary in order to do substantial justice between the parties; and will, for that purpose, direct the execution of a deed, or execute a trust declared in the partnership agreement, or restrain breaches of partnership articles either by injunction or by ordering moneys wrongfully drawn out to be paid into court: (Seton, 1196, and see *Steuart v. Gladstone*, L. Rep. 10 Ch. Div. 626.)

As a foundation of a judgment for relief the court will decree the existence of a partnership: (Seton, 1196; *Syers v. Syers*, L. Rep. 1 App. Cas. 193.)

The court will enforce a right of pre-emption, secured by partnership articles, to surviving or continuing partners, though the prescribed mode of ascertaining the value of the shares (if not of the essence of the contract) is impracticable; but not a right of purchase at a valuation under a separate instrument, where the prescribed method of valuation is of the essence, and the parties refuse to proceed on it, or a right of sale of goodwill in favour of a retiring partner, where no price is fixed, or an agreement to sell goodwill unconnected with any fixed interest in the business premises: (Seton, 1196.)

After an assignment of goodwill the purchasing partner will be protected by injunction: (*Churton v. Douglas*, Joh. 174; *Ginesi v. Cooper*, L. Rep. 14 Ch. Div. 596; 42 L. T. Rep. N. S. 751; 49 L. J. 601, Ch.; *Leggott v. Barrett*, W. N. 1880, p. 157.)

Where a partnership is entered into under circumstances of fraud, the person defrauded may seek equitable relief and damages as well, and is entitled at his option, either to have the partnership set aside *ab initio*, or dissolved on the ground of fraud: (Seton, 1197.)

A dissolution of partnership will be declared void, (1) if unauthorised by the articles of partnership, (2) if in fraud of the trustee in bankruptcy, (3) if in fraud of third parties: (Seton, 1197.)

Where a partnership deed contains an arbitration clause, and disputes occur between the partners, the mere fact that one partner makes a charge of actual fraud against his co-partner is not sufficient to prevent the co-partner from insisting on a reference to arbitration, and the court ought, having regard to the discretion given by the Common Law Procedure Act, 1854, sect. 11, to allow the matters expressly agreed to be referred, to be so referred, but not if the partner charged with fraud desires a public examination into the truth of the charge: (*Russell v. Russell*, L. Rep. 14 Ch. Div. 471; 42 L. T. Rep. N. S. 112; 49 L. J. 268, Ch.)

The court has jurisdiction, if the defendant or the subject matter is, or the contract was entered into, within the territorial jurisdiction: (*Cookney v. Anderson*, 31 Beav. 462; 1 D. J. & S. 365, cited Seton, 1202.)

A suit for a general account of a partnership can only be sustained with a view to a dissolution (unless the defendant has improperly attempted to force the plaintiff to a dissolution, or unless all the parties cannot be made parties); but an action may be brought for an account of past partnership transactions or a particular transaction, without claiming a dissolution: (Seton, 1202.)

2. GROUNDS FOR DISSOLVING FIRMS.

The grounds for a judgment dissolving a partnership are—

(1) *Insanity*, which must be more than temporary, and may be raised by the sane partner or the insane partner's next friend: (Seton, 1204.)

It is doubtful whether judgment can be given until a committee is appointed: (*Jones v. Lloyd*, L. Rep. 18 Eq. 272.)

The dissolution dates from the judgment: (Seton, 1204.)

(2) *Misconduct*, where there is incompatibility of temper, or misconduct on both sides, but not when it consists of mere squabbles: (Seton, 1204.)

A partner cannot misconduct himself, and then take advantage of his own wrong by claiming dissolution: (*Id.*)

(3) *Insolvency* of the partnership: (*Id.*)

(4) *Hopelessness* of profits: (*Id.*)

II. THEIR POSITION IN AN ACTION.

1. AS PARTIES.

[See PARTIES, I., 18; II., 18.]

2. SERVICE OF WRIT.

[See WRIT OF SUMMONS.]

3. APPEARANCE.

[See APPEARANCE, VI.]

4. DISCOVERY OF FIRM'S MEMBERS.

[See DISCOVERY, IV.]

5. EXECUTION.

See O. XLII., r. 8 (cited EXECUTION, VI.) which applies only where a firm is sued.

Upon a judgment against one partner, the sheriff seizes in execution under a *fi. fa.* such of the partnership effects as are of a tangible nature, or within 1 & 2 Vict. c. 110, s. 12: (Seton, 1214.)

The sheriff seizes the whole of the partnership property, and sells only the debtor's share of it: (*Id.*)

The seizure does not extend to book debts, and the execution debtor is, after execution, still entitled to an account of the partnership property: (*Id.*)

Prior to the Judicature Acts, the other partners were, on seizure, entitled to have a receiver appointed. See now, Seton, 1214, and the suggestions of Lindley, J., there cited.

III. ACTION FOR PARTNERSHIP ACCOUNT.

1. PARTIES.

To a suit by beneficiaries against the representatives of a deceased partner, for a general partnership account, all the surviving partners must be made parties: (Seton, 1217, citing *Vyse v. Foster*, L. Rep. 7 E. & I. App. 318.)

But a suit may be maintained against the representatives for an account of profits actually received by them, without joining the members of any firm in which such profits were earned: (Seton, 1217, Lind. 1068.)

Such a suit against executors and survivors is only justified by special circumstances, as collusion, presenting a substantial impediment to justice in any suit by the executors; not by mere allegation that the executor refuses to sue: (Seton, 1217.)

2. INDORSEMENT OF WRIT.

The following form is given—

The plaintiff's claim is to have an account taken of the partnership dealings

between the plaintiff and defendant [under articles of partnership dated the day of], and to have the affairs of the partnership wound-up. (App. A. 2, s. 1, to Rules of 1875.)

In all cases of ordinary account, as for instance, in the case of a partnership . . . account, when the plaintiff in the first instance desires to have an account taken, the writ of summons shall be endorsed with a claim that such account be taken : (O. III., r. 8.)

3. OBTAINING ACCOUNT ON SUMMONS.

As to endorsing the writ, see *sup.*, 2; and as to obtaining the order for account under it, see ACCOUNT. Necessary accounts and inquiries may be ordered at any stage of the proceedings: (O. XXXIII; see ACCOUNT.)

For order under O. XV. r. 1, directing account of dealings, &c., prior and subsequent to a partner's death, see ACCOUNT; *Bellerby v. Smith*, Seton, 1208.

4. RECEIVER.

(a) Where Appointed.

A receiver of the partnership property will be appointed in cases of misconduct of one or more of the partners involving violation of the partnership contract, risk to the property, the exclusion of the others or other from the right of personal intervention, or other unrighteous act, but not for mere quarrels: (Seton, 433.)

If the existence of a partnership is questioned, a receiver will not generally be appointed: (*Id.*)

As to appointing a receiver when the sheriff seizes under an execution or a judgment against one partner only: (see Seton, 1214, and suggestions of Lindley, J., there stated.)

The court will not interfere with the management, except for the purpose of winding up and dividing assets: (Seton, 433-4; and cases there cited.)

(b) When Appointed.

[See RECEIVER.]

Jessel, M.R., has appointed a receiver and manager on an interlocutory application: (*Peek v. Trinsmaran Iron Company*, L. Rep. 2 Ch. Div. 115.)

(c) Who Appointed.

In one case a retired partner, who had advanced the capital, and was liable for the debts, was appointed receiver without salary: (*Hoffman v. Duncan*, 18 Jur. 69, cited Seton, 434.)

In another case the senior partner of a dissolved firm was appointed receiver and manager: (*Sargant v. Read*, L. Rep. 1 Ch. Div. 600.)

As to appointing a solicitor of both the parties to the action receiver, see *Re Lloyd*, L. Rep. 12 Ch. Div. 447.

(d) Effect of Appointment.

The effect of appointing a receiver is to exclude all the partners from the management, and not, as in case of injunction, the misconducting partner only: (Seton, 433, citing Lindl, 1066, Kerr, 60.)

5. SALE OF THE PARTNERSHIP PROPERTY.

On a dissolution each partner has a right to have a sale of the partnership property, though a division is directed by the articles of partnership: (Seton, 1204.)

The court will sell to a partner: (*Syers v. Syers*, L. Rep. 1 App. Cas. 174.)

The court will carry on a business for the purpose of winding up, or of sale as a going concern: (Seton, 1204.)

To prevent a total loss of the property, a sale as a going concern will be ordered before judgment: (*Id.*)

6. JUDGMENT.

(a) Forms of.

As to the form of judgment in partnership actions generally, see Seton, 1193-1219; *Hamer v. Giles*, L. Rep. 11 Ch. Div. 942; 41 L. T. Rep. N. S. 270; 48 L. J. 508, Ch.; *Austin v. Jackson*, 11 Ch. Div. 942, n.; *Potter v. Jackson*, L. Rep. 13 Ch. Div. 845; 42 L. T. Rep. N. S. 294; 49 L. J. 232; 28 W. R. 411.)

(b) For Receiver or Sale.

[See *sup.*, 4, 5.]

(c) Proceedings in Chambers.

Upon the return of the summons to proceed on the judgment, directions are given as to the person by whom, and the mode in which, the account is to be prepared and brought in: (Dan. 1140; and see ACCOUNT; CHAMBERS.)

When partnership accounts are ordered to be taken, they are to be taken without any special directions in the judgment, according to the partnership articles, when there are any, as to the dealings before judgment; but, if the business is afterwards continued, the accounts are to be taken in the ordinary way when there are no articles: (Ayck, 556; Seton, 1202, and *Ex parte Barber*, L. Rep. 5 Ch. App. 687, there cited.)

The books of the partnership are admissible in evidence for and against partners and their estates: (Seton, 1202.)

On the proceedings being concluded, the chief clerk makes his certificate: [see ACCOUNT, CHAMBERS.]

7. COSTS.

As to the necessity for providing for or reserving the question of costs in the judgment, see *Austin v. Jackson*, 11 Ch. Div. 942 n.

The rule is not correctly laid down in Seton (4th ed. 1206). Where there is no fault on either side, but the partnership accounts have to be taken in court, the costs of the suit for taking the accounts from the beginning are to be dealt with as all other costs of necessary administration—that is, they must come out of the partnership assets. Where an action for dissolution is rendered necessary by the misconduct of a partner, or where the taking of the accounts is rendered necessary by the misconduct of a partner, who is bound to keep the accounts, the court has not only jurisdiction, but is bound to exercise it by making that partner pay so much of the costs as are occasioned by his misconduct. But, in all other cases, there is no difference between the costs of the action for taking the accounts prior to the trial and the subsequent costs: (per Jessel, M.R., *Hamer v. Giles*, L. Rep. 11 Ch. Div. 942; 41 L. T. Rep. N. S. 270; 48 L. J. 508, Ch.)

The balance found due from the firm to one of the partners must be paid out of the assets in priority to the costs of the action: (*Potter v. Jackson*, L. Rep. 13 Ch. Div. 845; 42 L. T. Rep. N. S. 794; 49 L. J. 232, Ch.; 28 W. R. 411.)

If the assets are insufficient, after other payments, to pay the costs of the action, such costs must be borne by the partners in proportion to their shares in profits: (*Hamer v. Giles*, *Austin v. Jackson*, *Potter v. Jackson*, *sup.*)

In case of lunacy, all costs are ordered to be paid out of the estate: (*Id.*, citing *Rowlands v. Evans*, 14 W. R. 882.)

Where the share of profits had not been paid for many years, and the defendant admitted the allegation in the bill, and submitted to render an

account without alleging that nothing was due, the defendant was ordered to pay the costs up to the hearing: (*Norton v Russell*, L. Rep. 19 Eq. 343.)

PASSING JUDGMENT OR ORDER.

[See JUDGMENT, XV.]

PATENTS.

- I. JURISDICTION.
- II. INJUNCTION.
- III. PARTICULARS.
- IV. INSPECTION, EXPERIMENTS, &c. [see DISCOVERY, VI.; PROPERTY].
- V. EVIDENCE ON TRIAL.
- VI. TRIAL.
- VII. ACCOUNT OR DAMAGES.
- VIII. CERTIFICATE AS TO COSTS, &c.

I. JURISDICTION.

There shall not be transferred to or vested in the High Court of Justice any jurisdiction vested in the Lord Chancellor in relation to grants of letters patent: (J. A. 1873, s. 17, sub-s. 4.)

But the jurisdiction to expunge, vacate, or vary any entry in the Register of Patent Proprietors, on motion, and without commencing an action, is vested in the High Court of Justice: (15 & 16 Vict. c. 83, s. 38; J. A. 1873, s. 16; *Re Morgan's Patent*, 24 W. R. 245; Seton, 341-2; and see JURISDICTION.)

II. INJUNCTION.

An interlocutory injunction to restrain infringement will be granted (1) when the patent is old, and there has been long and undisturbed enjoyment, and evidence of actual public user; (2) where its validity has been established elsewhere, and the court sees no reason to doubt the result; (3) when the conduct of the defendant has been such that, as against him, there is no reason to doubt the validity of the patent: (Seton, 344.)

Although the mere recency of the patent does not prevent an interlocutory or even *ex parte* injunction, there must, in the case of a patent of no great age, be at least a fair *prima facie* case of validity: (Seton, 344); actual public user, legal title of the plaintiff, novelty, validity, and infringement must be shown by evidence: (*Id.*)

The sale in this country of articles made abroad according to a process patented here will be restrained: (Seton, 345.)

A mere licensee is entitled to an injunction, but not a mere agent to introduce, sell, and grant licences for the use of a foreign patent in this country: (*Id.*)

A judgment establishing the validity of a patent does not conclude a defendant in subsequent proceedings from contesting novelty; but he will, meantime, be restrained from infringement: (Seton, 348.)

III. PARTICULARS.

In any action for the infringement of letters' patent the plaintiff shall

deliver with his [statement of claim] particulars of the breaches complained of in the said action, and the defendant, on pleading thereto, shall deliver with his [defence] particulars of any objections on which he means to rely at the trial in support of the [defence] in the said action: (15 & 16 Vict. c. 83, s. 41.)

The place or places at, or in which, and in what manner the invention is alleged to have been used or published prior to the date of the letters patent shall be stated in such particulars: (15 & 16 Vict. c. 83, s. 41.)

The plaintiff must state in, or furnish with, his statement of claim particulars of breaches; and defendant must state in his defence any objections on which he intends to rely, and, in alleging prior user by other persons, must set forth the names of some of those persons; the principle being that the defendant shall have full, fair, and distinct notice of the case to be made against him; and that the plaintiff shall not be surprised by production on the trial of evidence of prior user or publication of which he has had no notice: (Seton, 350.)

In giving particulars of alleged prior user, it is not sufficient to give the names of the places in which, without furnishing the names of the persons by whom, the invention is alleged to have been used: (see Seton, 350.)

It shall, and may be lawful for any judge at chambers, to allow such plaintiff or defendant or prosecutors respectively to amend the particulars delivered as aforesaid, upon such terms as to such judge shall seem fit: (15 & 16 Vict. c. 83, s. 41.)

IV. INSPECTION, EXPERIMENTS, &c.

[See DISCOVERY, VI.; PROPERTY.]

V. EVIDENCE ON TRIAL.

At the trial of such action . . . no evidence shall be allowed to be given in support of any alleged infringement or of any objection impeaching the validity of such letters patent, which shall not be contained in the particulars delivered, as aforesaid: (15 & 16 Vict. c. 83, s. 41.)

After a patent suit has been set down for hearing, leave has been given to defendant to file an affidavit of alleged prior user discovered since the closing of the evidence, plaintiff having one week within which to file evidence in reply: (*Wilson v. Gann*, 23 W. R. 546, cited Seton, 350; see also *sup.*, II.)

Where the plaintiff in his particulars of breaches alleged that the defendant had at divers times infringed the patent by the manufacture, sale, and use of fancy rollers; and particularly in the cases of S. and T., the defendant having admitted manufacture for and sale to H., and the defendant not having applied for amended particulars, it was held that evidence in respect of H.'s case tendered by the plaintiff must be received: *Sykes v. Howarth*, L. Rep. 12 Ch. Div. 826; 41 L. T. Rep. N. S. 826; 48 L. J. 769, Ch.)

VI. TRIAL.

There is no right in a defendant to have the action, or issues of fact, tried before a jury: (see cases under 21 & 22 Vict. c. 27, cited Seton, 348; *Singer Manufacturing Company v. Loog*, L. Rep. 11 Ch. Div. 656; *Spratt's Patent v. Ward*, *Id.* 240; TRIAL.)

It is the practice in the Chancery Division to try patent suits before the court without a jury: (Seton, 848.)

VII. ACCOUNT OR DAMAGES.

A patentee must elect whether he will have an account of profits, or an inquiry as to damages : (Seton, 849.)

VIII. CERTIFICATE AS TO COSTS, ETC.

In taxing costs in any action . . . for infringing letters patent, regard shall be had to the particulars delivered in such action, and the plaintiff and defendant respectively shall not be allowed any costs in respect of any particular, unless certified by the judge before whom the trial was had, to have been proved by such plaintiff or defendant respectively, without regard to the general costs of the cause ; and it shall be lawful for the judge before whom any such action shall be tried to certify on the record that the validity of the letters patent in the declaration mentioned came in question ; and the record, with such certificate, being given in evidence in any suit or action for infringing the said letters patent, or in any proceeding by *scire facias* to repeal the letters patent, shall entitle the plaintiff in any suit or action, or the defendant in such proceeding by *scire facias*, on obtaining a decree, decretal order, or final judgment, to his full costs, charges, and expenses, taxed as between solicitor and client, unless the judge making such decree or order, or the judge trying such action or proceeding, shall certify that the plaintiff or defendant respectively ought not to have such full costs : (15 & 16 Vict. c. 83, s. 43.)

To obtain a certificate, the validity of the patent must have been contested, unless the plaintiff dismisses his action before hearing, or a certificate has been given in a previous action : (Seton, 356–7.)

PAUPERS.

[See LUNATICS ; PARTIES.]

PAYMENT INTO AND OUT OF COURT.

I. INTERPRETATION.

1. 35 & 36 VICT. c. 44.
2. RULES OF 1874 ; AMENDED ORDERS, &c.

II. STATUTES AS TO ACCOUNTANT-GENERAL.

III. POWERS OF PAYMASTER-GENERAL.

IV. INFORMATION, TRANSCRIPTS, LISTS.

V. REQUESTS, CERTIFICATES, &c.

1. FORM OF REQUEST.
2. PETITIONS AND SUMMONSES.
3. CERTIFICATES [see *post*, VI., XVI., XVIII.]
4. INDEXING AND OFFICE COPIES.

VI. REFERENCE TO RECORD.

VII. ORDERS OF COURT.

1. REFERENCE TO RECORD [see *sup.*, VI.]
2. TITLE OF CAUSE AND ACCOUNT.
3. DIRECTIONS AND TABULAR STATEMENT.
 - (a) Generally.
 - (b) As to Legacy or Succession Duty.
4. SUMS AND DATES.
5. AMOUNTS, PERCENTAGES, &c.

6. TIME OF PERIODICAL PAYMENTS.
7. DESCRIPTION OF DOCUMENTS TO BE EXECUTED.
8. DESCRIPTION OF PERSONS.
9. DRAWING UP.
10. PRINTING AND PASSING.
11. ENTRY.
12. FILING DUPLICATE.
13. DELIVERING OUT ORIGINAL.
14. AMENDMENT OF PRINTED ORDERS.
15. COPIES AND INDEXING.

VIII. PAYMENT AND TRANSFER IN.

1. WHAT SECURITIES, &C., RECEIVED.
2. BRINGING MONEY IN WITHOUT DIRECTION (SUSPENSE ACCOUNT).
3. BRINGING IN MONEY, &C., WITHOUT ORDER.
 - (a) *Where Allowed.*
 - (b) *How Payment Made.*
 - (c) *Filing Request.*
 - (d) *Receipt.*
 - (e) *Notice to Parties.*
4. ORDER FOR PAYMENT, &C., IN.
 - (a) *Reference to Record* [see *sup.*, VI.]
 - (b) *Title of Cause or Account.*
 - (c) *Source from which Derived.*
 - (d) *Directions, Drawing up, &c.* [see *sup.*, VII., and JUDGMENT.]
 - (e) *Providing for Investment.*
5. PAYMENTS, &C., UNDER ORDERS.
 - (a) *May be made before Service or after Time Limited.*
 - (b) *Interest or Dividends through Default Payable on Request.*
 - (c) *Notice to Parties.*
 - (d) *Consequences of Default not Prejudiced.*
 - (e) *Extending Time.*
 - (f) *Where Necessary for Defendant pleading Payment in.*
 - (g) *How Payment, &c., made under Orders Generally.*
 - (1) To be with Paymaster's Privity.
 - (2) Direction to Bank.
 - (3) Receipt.
 - (4) Bank Certificate.
 - (5) Filing Paymaster's Certificate.
 - (h) *How Transfer made under Order.*
 - (1) To be with Paymaster's Privity.
 - (2) Direction for Transfer.
 - (3) Bank Certificate.
 - (4) Filing Paymaster's Certificate.
 - (i) *Unascertained Money.*
6. CREDIT OF MONEY, &C.
7. PAYMENT, &C., IN UNDER PARTICULAR STATUTE.
 - (a) *Judicature Acts (Defendant Pleading Payment)* [see *sup.*, 3, 4].
 - (b) *Trustee Relief Act* [see TRUSTEE].
 - (c) *Lands Clauses Act* [see LANDS CLAUSES ACT].
 - (d) *Copyhold Acts* [see COPYHOLD ACTS].
 - (e) *Parliamentary Deposit Act.*
 - (1) Warrant.
 - (2) Payment in.
 - (3) Transfer of Stock in lieu of Payment in.
 - (4) How Long Money, &c., to Remain in.

- (f) *Railway and Tramway Private Bills.*
- (g) *Tramways Act.*
- (h) *Legacy Duty Act* [see LEGACY DUTY ACT].
- (i) *Railway Construction Facilities Act.*

IX. PLACING MONEY IN COURT ON DEPOSIT.

1. WHERE MONEY PLACED ON DEPOSIT.
2. WHERE REQUEST NECESSARY.
3. WHEN DEPOSIT MADE.
4. MONEY FROM CONVERSION OF GOVERNMENT SECURITIES.
5. STAYING DEPOSIT ON REQUEST.
6. WITHDRAWING MONEY FROM DEPOSIT.
7. INTEREST ON DEPOSITS.
 - (a) *On What Sums Computed.*
 - (b) *Rate.*
 - (c) *Periods for which Computed.*
 - (d) *Crediting.*
 - (e) *Calculation where Part Withdrawn.*
 - (f) *Placing Interest on Deposit.*
8. DIVIDENDS.
9. MONEYS ON DEPOSIT AFTER ORDER DEALING THEREWITH.

X. INVESTMENT.

1. MONEY IN COURT TO BE INVESTED.
2. APPLICATION.
3. ORDER.
 - (a) *When Necessary.*
 - (b) *Reference to Record* [see *sup.*, VI.]
 - (c) *Title of Cause and Account, Preparation, &c.* [see *sup.*, VII.]
4. WHEN REQUEST NECESSARY.
5. WHAT SUMS INVESTED.
6. IN WHAT SECURITIES.
 - (a) *Generally.*
 - (b) *Under Particular Statutes* [see *post*, 8].
7. GENERAL PROCEDURE AFTER REQUEST.
 - (a) *Direction to Broker.*
 - (b) *Cheque.*
 - (c) *Certificate of Transfer.*
 - (d) *Staying Investment.*
 - (e) *As to Exchequer Bills and Bonds.*
 - (f) *Accruing Dividends.*
 - (g) *Application of Money on Deposit* [see *sup.*, IX.]
8. INVESTMENT UNDER PARTICULAR STATUTE.
 - (a) *Trustee Relief Act* [see TRUSTEES].
 - (b) *Lands Clauses Act* [see LANDS CLAUSES ACT].
 - (c) *Copyhold Acts* [see COPYHOLD ACTS].
 - (d) *Parliamentary Deposit Act.*
 - (e) *Tramways Act.*
 - (f) *Legacy Duty Act.*
 - (g) *Railway Construction Facilities Act.*

XI. CARRYING OVER.

1. GENERALLY.
 - (a) *Where Money, &c., Carried Over.*
 - (b) *Order.*
 - (c) *Request.*
 - (d) *Certificate of Carrying Over.*
2. OF TAXATION FEES.
3. OF BALANCE UNDER 5*l.*

XII. SALE OF SECURITIES.

1. APPLICATION.

2. ORDER.
3. CERTIFICATE OF ORDER.
4. PAYMASTER'S DIRECTION TO BANK.
5. DIVIDENDS.

XIII. PAYMENT OUT.

1. OF INCOME.

- (a) *Application.*
- (b) *Service and Evidence.*
- (c) *Order.*
 - (1) Where Necessary.
 - (2) Reference to Record [see *sup.*, VI.]
 - (3) Title of Cause and Account [see *sup.*, VII.]
 - (4) Directions.
 - (5) Sums, Dates, Amounts, Times of Payment, &c. [see *sup.*, VII.]
 - (6) Description of Persons.
 - (7) Drawing up, Printing, Copies, &c. [see *sup.*, VII.]
- (d) *How Payment out made Generally.*
 - (1) Request.
 - (2) Withdrawing Deposits [see *sup.*, IX.]
 - (3) Withdrawing Investments [see *post*, XIV.]
 - (4) Cheque.
 - (5) Under Power of Attorney.
 - (6) To Partners.
 - (7) To Representatives or Survivor of Absolute Owner.
 - (8) To Surviving Representatives.
 - (9) To Married Women.
- (e) *Income under Particular Statutes.*
 - (1) Trustee Relief Act [see TRUSTEES].
 - (2) Lands Clauses Act [see LANDS CLAUSES ACT].
 - (3) Copyhold Acts [see COPYHOLD ACTS].
 - (4) Parliamentary Deposit Act [see *post*, 2].
 - (5) Railway and Tramway (Private) Bills.
 - (6) Tramways Act.
 - (7) Railway Construction Facilities Act.

2. OF PRINCIPAL.

- (a) *Application.*
- (b) *Service.*
- (c) *Evidence.*
- (d) *Order.*
 - (1) Where Necessary.
 - (2) Reference to Record [see *sup.*, VI.]
 - (3) Title of Cause and Account [see *sup.*, VII.]
 - (4) Directions.
 - (5) Sums, Dates, Amounts, &c. [see *sup.*, VII.]
 - (6) Description of Persons [see *sup.*, VII. ; XIII., 1.]
 - (7) Drawing up, Printing, Copies, &c. [see *sup.*, VII.]
- (e) *How Payment out made generally.*
 - (1) Request.
 - (2) Withdrawing Deposit [see *sup.*, IX.]
 - (3) Withdrawing Investment [see *post*, XIV.]
 - (4) Ascertaining Residues and Aliquot Shares.
 - (5) Cheque and Direction for Payment.
 - (6) Under Power of Attorney [see *sup.*, 1 (d) (5)].
 - (7) To Partners.
 - (8) To Representatives or Survivor of Absolute Owner.
 - (9) To Surviving Representatives.
 - (10) To Married Women.

(f) *Payment of Principal under particular Statutes.*

- (1) Judicature Acts (Defendant Pleading Payment).
- (2) Trustee Relief Act [see TRUSTEES].
- (3) Lands Clauses Act [see LANDS CLAUSES ACT].
- (4) Copyhold Acts [see COPYHOLD ACTS].
- (5) Parliamentary Deposit Act.
- (6) Railway and Tramway (Private) Bills.
- (7) Tramways Act.
- (8) Railway Construction Facilities' Act.

XIV. TRANSFER AND DELIVERY OUT.

1. APPLICATION.
2. SERVICE [see *sup.*, XIII., 2 (b)].
3. EVIDENCE [see *sup.*, XIII., 2 (c)].
4. ORDER.
 - (a) *When necessary.*
 - (b) *Reference to Record* [see *sup.*, VI.]
 - (c) *Title of Cause and Account* [see *sup.*, VII.]
 - (d) *Directions.*
 - (e) *Sums, Dates, Amounts, &c.* [see *sup.*, VII.]
 - (f) *Description of Persons* [see *sup.* VII.; XIII., 1].
 - (g) *Drawing up, Printing Copies, &c.* [see *sup.*, VII.]
5. HOW TRANSFER OR DELIVERY MADE GENERALLY.
 - (a) *Certificate of Order.*
 - (b) *Dividends.*
 - (c) *Ascertaining Residues or Aliquot Shares* [see *sup.*, XIII., *post*, XV.]
 - (d) *Direction.*
 - (e) *Bank Certificate.*
 - (f) *To Partners.*
 - (g) *To Representatives or Survivor of Absolute Owner.*
 - (h) *To Surviving Representatives.*
 - (i) *To Married Women.*
6. TRANSFER AND DELIVERY UNDER PARTICULAR STATUTES [see *sup.*, XIII., 2 (f)].

XV. ASCERTAINING SHARES AND COMPUTING INTEREST.

XVI. VERIFYING DOCUMENTS.

XVII. PROVISIONS AS TO LEGACY AND SUCCESSION DUTY.

XVIII. CERTIFICATES OF DEALING WITH FUND.

I. INTERPRETATION.

1. 35 & 36 VICT. c. 44.

In the Chancery (Funds) Act, 1872 (35 & 36 Vict. c. 44) the words in inverted commas have the meanings attached:

"Money in court"—any sum of money paid into the Bank of England with the privity of the Accountant-General . . . or of the Paymaster-General on behalf of the court . . . or placed to the credit of any cause, matter, or account in the court . . . [including] dividends on securities in court, and interest on money on deposit;

"Persons" includes a body corporate and company;

"Dividends" includes interest, or other periodical produce;

"Government securities"—any annuities, Exchequer bonds, Exchequer bills, and other parliamentary securities of the Government of the United Kingdom;

"Securities" includes Government securities, and any security of any foreign state, any part of Her Majesty's dominions out of the United Kingdom, or any body corporate or company, or standing in books kept

by any body corporate, company, or person in the United Kingdom, and all stocks, funds, and effects;

"Securities in court"—any securities as defined by [35 & 36 Vict. c. 44] standing or deposited in the name or to the credit or account of the Accountant-General . . . or of the Paymaster-General on behalf of the court . . . or placed to the credit of a cause, matter, or account in . . . court: (35 & 36 Vict. c. 44, s. 3.)

2. RULES OF 1874, AMENDED ORDERS, &c.

In these rules, and in orders, and in directions and certificates issued by the Chancery Paymaster, terms . . . have the same meaning as in the Chancery Funds Act; and the words in inverted commas have the meanings attached:

"Order"—an order of the Chancery Division intitled in a cause or matter in . . . court, and made by any judge or judges thereof, whether sitting in court or at chambers, or an order of the court intitled in the matter of the suitors of the court, or as to payments out of the "Appeal Deposit Account," an order made on a non-attendable petition presented to the Lord Chancellor; a decree, and a report of a master in lunacy confirmed by fiat, and thereby receiving the operation of an order under the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70). "Chief Clerk," the chief clerk of a judge of the said court. "Chief clerk's certificate" and "Certificate of a chief clerk," a certificate intitled in a cause or matter in the said court, and made by a chief clerk of a judge of the said court, and approved and signed by a judge thereof. "Bank," Bank of England or Governor and Company of the Bank of England. "Chancery Paymaster," Her Majesty's Paymaster-General for the time being, or the Assistant Paymaster-General for Chancery business for the time being deputed by the Paymaster-General to act on his behalf for Chancery business. "Chancery Pay Office," Paymaster-General's office for Chancery business. "Chancery Pay Office Account," the account at the Bank of the Paymaster-General for the time being on behalf of the Chancery Division. "Chancery Audit Office," the Chancery branch of the Department of the Comptroller and Auditor-General. "Title of the cause" (with respect to causes commenced since 1st November, 1852), the short title . . . in the following form, viz. (A. v. B. 1874, A. 100). "Cause or matter" includes a separate account in a cause or matter and a matter intitled merely as an account.

Words importing the plural include the singular, and *vice versa*.

Words importing males include females: (Ch. F. R. 1874, r. 2; Ch. F. A. O. 1874, r. 2.)

II. PROVISIONS AS TO ACCOUNTANT-GENERAL AND MONEY PAID IN UNDER FORMER RULES.

All Acts of Parliament . . . rules . . . orders, instruments, and proceedings referring to the Accountant-General of the Court of Chancery or Court of Exchequer are [subject to the Act and rules to] be construed and put into execution as if the Paymaster-General were therein named in [his place] . . . but so that all moneys and securities shall be paid, transferred, or deposited to the credit or on account of the Paymaster-General for the time being on behalf the court . . . and not into the name of the person who is such Paymaster-General: (Ch. F. A. 1872, s. 6.)

Money in court periodically payable at the commencement of the Chancery Funds Rules, 1872, shall continue to be payable by the Chancery Paymaster in pursuance and on the authority of the entries of the cheques for periodical payments in the receipt books in the Accountant-General's

office, or of such other documents as the Accountant-General had been accustomed to use in the preparation of such cheques, without the production of the orders and other documents in pursuance whereof such payments are made, being necessary : (Ch. F. R. 1874, r. 39.)

Cheques, which before the commencement of the Chancery Funds Rules, 1872, had been signed by the late Accountant-General or by any of his predecessors, but have not been paid at the commencement of these rules, shall be a sufficient authority to the Chancery Paymaster to cause payments to be made to the same persons, and of the same amounts as are named in such cheques, without the production of the orders or other documents, in pursuance whereof such cheques were so signed, being necessary : (Ch. F. R. 1874, r. 40.)

III. POWERS OF PAYMASTER-GENERAL.

The Paymaster-General for the time being shall perform all the duties and exercise all the powers and authorities [formerly] performed by or vested in or capable of being exercised by the Accountant-General of the Court of Chancery [and] may do any act, sign or execute any instrument, and exercise any authority required or exercised to be done, signed, executed or exercised by him for the purpose of [the Chancery Funds Act, 1872] or any rules . . . thereunder by [his] deputy or deputies : (Ch. F. A., 1872, s. 4, and see *sup.*, II.)

IV. INFORMATION, TRANSCRIPTS, LISTS.

The Chancery Paymaster, upon a request in writing made by or on behalf of a person claiming to be interested in money or securities standing in the books at the Chancery Pay Office to the credit of a cause or matter stated in such request, may, in his discretion, issue, for the information of a judge or an officer of the court, a certificate of the amount and description of such money or securities, and such certificate shall have reference to the morning of the day of the date thereof, and not include the transactions of that day, and the Chancery Paymaster shall notify on such certificate the dates of any orders restraining the transfer, sale, delivery out, or payment, or other dealing with the securities or money in court to the credit of the cause or matter mentioned in such certificate, and any charging orders, affecting such securities or money, of which respectively he has had notice, and with respect to any restraining or charging orders hereafter to be made, the names of the persons to whom notice is to be given, or in whose favour such restraining or charging orders have been made : (Ch. F. R. 1874, r. 87.)

And when a cause or matter has been inserted in the [Chancery Paymaster's published triennial] list the fact shall be notified on the certificate relating thereto : (Ch. F. R. 1874, r. 87.)

The Chancery Paymaster may in his discretion, on a request in writing, supply such information with respect to any transactions in the Chancery Pay Office as may from time to time be required in any particular case : (Ch. F. R. 1874, r. 90.)

Upon a request in writing made by or on behalf of a person claiming to be interested in money or securities standing in the books at the Chancery Pay Office to the credit of a cause or matter stated in such request, the Chancery Paymaster may, in his discretion, issue a transcript of the account in the said books in respect of such cause or matter ; and if so required by the person to whom it is issued, such transcript shall be authenticated at the Chancery Audit Office : (Ch. F. R. 1874, r. 88.)

As to the form of request, see *post*, V.

As soon as conveniently may be after the 1st of September, 1875, and

after the same day in every succeeding third year, a list shall be prepared by the Chancery Paymaster, and filed in the Report Office, and a copy thereof shall be inserted in the *London Gazette*, and exhibited in the several offices of the court, of the titles of the causes and matters in the books at the Chancery Pay Office (other than the causes or matters referred to in rule 92), to the credit of which any securities, or any money amounting to or exceeding 50*l.*, may be standing, which money or the dividends on which securities have not been dealt with by the Accountant-General or by the Chancery Paymaster (otherwise than by the continuous investment or placing on deposit of dividends), during the fifteen years immediately preceding such 1st of September, and no information shall be given by the Chancery Paymaster respecting any money or securities to the credit of a cause or matter contained in any such list until he has been furnished with a statement in writing by a solicitor requiring such information, of the name of the person on whose behalf he applies, and that, in such solicitor's opinion, the applicant is beneficially interested in such money or securities: (Ch. F. R. 1874, r. 91.)

Rule 92 relates only to causes or matters on which the balances do not exceed 5*l.*: (see *post*, XI.)

When a cause or matter has been inserted in the list . . . the fact shall be stated in every petition or summons effecting any money or securities to the credit of such cause or matter. In cases in which the money or securities effected by such petition shall together amount to or exceed in value 500*l.*, a copy of such petition, and notice of all proceedings in court or at chambers shall (unless the court otherwise directs), be served on the official solicitor of the court, who shall be at liberty to appear and attend thereon: (Ch. F. A. O. 1874, r. 14.)

V. REQUESTS AND OTHER DOCUMENTS.

1. FORM OF REQUESTS.

Every order or request that may be left at the Chancery Pay Office, and every statutory declaration or other document required to be retained there for the purpose of carrying into effect an order, may be printed or written, and shall have printed or written thereon the name and address of a solicitor: (Ch. F. R. 1874, r. 93.)

2. PETITIONS AND SUMMONSES.

As to references to the record, see *post*, VI.

As to statements whether legacy or succession duty has been paid, see Ch. F. A. O. 1874, r. 11, *post*, XVII.

As to statements and service required where the money to be dealt with has been entered in the triennial list, see *sup.*, IV.

3. CERTIFICATES.

[See *post*, VI., XVI., XVIII.]

4. INDEXING AND OFFICE COPIES.

An index shall be made and kept in the [Central] Office of the court of all documents by these rules directed to be filed there: (Ch. F. R. 1874, r. 95.)

The duplicate orders or records to be deposited with the clerks of entries pursuant to rule 18 of the Chancery Funds Consolidated Rules, 1874, shall annually (or oftener if the senior registrar shall direct) be bound up in volumes of convenient size, and indexed and transmitted to the Report Office in the same manner as written orders are now bound up, indexed, and transmitted, and written office copies or extracts may be made therefrom, subject to the existing regulations relating thereto: (Ch. F. A. O. 1874, r. 18.)

See also as to offices copies, *post*, VII.

VI. REFERENCE TO RECORD.

No order in a cause shall be passed or entered no certificate in a cause of a chief clerk, or of a [taxing officer] of the court signed or filed no petition in a cause answered no summons in a cause issued no affidavit made in a cause filed, until the same respectively be either marked [on the first page] with the reference to the record . . . or be inscribed with a note indicating that the cause was commenced prior to the 2nd November, 1852, and the correctness of such reference may be required to be authenticated by the official seal of the [Central Office] being impressed on every such document: (Ch. F. A. O. 1874, r. 17; J. A. 1879.)

VII. ORDERS OF COURT.

1. REFERENCE TO RECORD.

[See *sup.*, VI.]

2. TITLE OF CAUSE AND OF ACCOUNT.

Every order directing money or securities to be brought into court shall state in the body of such order the title of the cause or matter, and the separate account, if any, to the credit of which such money or securities are to be placed: (Ch. F. R. 1874, r. 7.)

Every order directing money or securities in court to be dealt with shall, except in the case of orders made in the matter of the suitors of the court, be intitled in the cause or matter (but not in any separate account therein), to the credit of which such money or securities shall be placed in the books at the Chancery Pay Office; and every such order shall state, in the body of such order, and not merely by reference to the title of it, the exact title of the cause or matter and separate account, if any, to the credit of which the money or securities dealt with shall be standing: (*Id.*)

The length of the title of any account hereafter directed by an order, or requested pursuant to an Act of Parliament or otherwise, to be raised in the books at the Chancery Pay Office shall not exceed thirty-six words, exclusive, in the case of a separate account in a cause or matter, of the title of the cause or matter in which such separate account is raised: (Ch. F. R. 1874, r. 94.)

[But] if a sufficient reason be assigned to the satisfaction of the registrar for extending beyond thirty-six words the title of an account directed by an order to be raised, such title may be so extended; and the registrar shall in such case add to the direction to raise such account the words "notwithstanding rule 94;" and . . . if a sufficient reason be assigned, to the satisfaction of the Chancery Paymaster, for so extending the title of an account requested to be raised, such title may be so extended; and the Chancery Paymaster shall in such case add the said words to the direction under the authority of which such account is to be raised: (*Id.*)

In such title four figures shall be reckoned as one word: (*Id.*)

This rule shall not apply to any account which has been directed to be raised by an order dated before the 7th day of January, 1873; and any account directed to be raised by an order dated since the 7th day of January, 1873, but before the commencement of these rules, shall be deemed to have been properly entitled notwithstanding the length of the title of such account may exceed thirty-six words: (*Id.*)

3. DIRECTIONS AND TABULAR STATEMENT.

(a) Generally.

Directions in orders to be acted upon by the Chancery Paymaster shall, so far as practicable, be expressed in or by reference to a schedule or tabular statement subjoined to the order: (Ch. F. R. 1874, r. 9.)

Each separate direction in such orders shall (as far as may be) be contained in a distinct paragraph; and [subject to the rule as to dates and sums mentioned *post*], in all other respects such orders shall be printed in such form and manner as the registrars shall deem expedient: (Ch. F. R. 1874, r. 15.)

(b) *As to Legacy or Succession Duty.*

Every order directing the payment of money or the transfer or delivery of securities in court, in respect of which duty shall be payable to the revenue under the Acts relating to legacy or succession duty, shall, unless such order expressly provides for the payment of the duty, also direct the Chancery Paymaster to have regard to the circumstance that such duty is payable; and when by an order money or securities, in respect of which such duty may be chargeable, are directed to be invested, carried over, or placed to a separate account, the words "subject to legacy duty" or "subject to succession duty," as the case may be, shall be added in the order to the title of the account thereby directed to be raised: (Ch. F. R. 1874, r. 14.)

Every order providing for payment, out of money or the proceeds of securities in court, of any duty payable under the Acts relating to legacy or succession duty shall direct that the amount of such duty shall, upon the requisition of the Commissioners of Inland Revenue, be transferred to the account of the Receiver-General of Inland Revenue at the bank: (Ch. F. R., 1874, r. 14.)

4. SUMS AND DATES.

Sums occurring in the body of every such order shall be expressed in words; dates occurring therein, and any sums in [the] schedule or tabular statement . . . shall be expressed in figures instead of words: (Ch. F. R., 1874, r. 15.)

5. AMOUNTS, PERCENTAGE, &C.

Every order directing money or securities in court to be dealt with, shall express the exact amount of money or securities to be dealt with whenever it can be ascertained, and the amount of money or securities standing in the books at the Chancery Pay Office, at the date of such order, to the credit of the cause or matter to which the money or securities to be dealt with may be placed, and not merely by reference to another order (except where the name of one person is ordered to be substituted for the name of another person to whom a payment, transfer, or delivery of money or securities has been directed by a former order: (Ch. F. R., 1874, r. 8.)

If the money or securities, or the dividends on securities, to be so dealt with under any such order, shall not be in court at the date thereof, the source from which such money, securities, or dividends will be derived shall be stated: (Ch. F. R., 1874, r. 8.)

In every case the exact amount of money or securities in court to be dealt with by the Chancery Paymaster, shall be expressed in an order or in a chief clerk's certificate, or in a certificate of a taxing master (unless such money be

(1) Payable as legacy or succession duty; or be

(2) Described as dividends to accrue on securities in court, or to be brought into court; or,

(3) [Described] as interest to be credited in respect of money on deposit; or,

(4) [Described] as money to arise by the realisation of securities; or,

(5) [Described] as the residue of such dividends, interest money, or securities respectively, after deducting an amount expressed in an order

or in such a certificate, or an amount directed to be realised unascertained at the date of the order directing the realisation thereof; or

(6) [Described] as an aliquot or proportionate part of such dividends, interest, money, securities, or residue, respectively: (Ch. F. R., 1874, r. 8.)

As to how the sums are ascertained, see *post*, XV.

Where the actual amounts to be dealt with cannot be ascertained at the date of the order, the aliquot or proportionate parts to be dealt with may be stated in [a] schedule or tabular statement [to be subjoined to the order] in words at length, but the total amount of the securities or money, or where the order does not dispose of the whole then the number of the aliquot or proportionate parts dealt with in any such schedule [must] be stated in words at length in the mandatory part of the order: (Ch. F. R., 1874, r. 9.)

When interest is payable in respect of any money in court directed by an order to be dealt with by the Chancery Paymaster, the order shall state the rate per centum at which, and (if the day to which interest is payable can be fixed by the order) the day inclusive to which such interest is completed, and the amount of such interest: (Ch. F. R., 1874, r. 10.)

If the day to which interest is to be computed cannot be fixed by the order, the day from which (exclusive) such interest is to be computed [must] (except in the case of a computation of subsequent interest from the foot of the certificate of a chief clerk . . .) be stated in the order, and such interest may be directed to be computed and certified by a chief clerk . . . or (where the computation is dependent upon the taxation of costs) by a taxing master: (Ch. F. R., 1874, r. 10.)

When the day for payment cannot be fixed by the order, and the interest is not directed to be certified . . . the order may direct the interest to the day for payment to be ascertained by an affidavit, or by a statutory declaration: (Ch. F. R., 1874, r. 10.)

6. TIME OF PERIODICAL PAYMENTS.

[See Ch. F. R. 1874, r. 13, *post*, XIII., 1.]

7. DESCRIPTION OF DOCUMENTS TO BE EXECUTED.

Whenever the dealing by the Chancery Paymaster with money or securities in court is, by an order, made contingent upon the execution of some document, the document shall be described, and the parties thereto by whom it is to be executed shall be named in an order, or in a certificate of . . . a chief clerk: (Ch. F. R. 1874, r. 11.)

As to verifying the documents, see *post*, XVI.

8. DESCRIPTION OF PERSONS.

Persons who are directed by an order to pay or transfer into, or deposit in court any money or securities, and persons to whom money or securities are directed to be paid, transferred, or delivered, and persons for or during whose lives or other less period payments are directed to be made, shall be described in the order, or in a certificate of a chief clerk . . . or a taxing master, by name, and not merely as plaintiffs or petitioners, or the like; unless such payments, transfers, or deliveries are to be made to trustees or other persons in succession, or to representatives when no probate or letters of administration have been taken out at the date of such order or certificate: (Ch. F. R. 1874, r. 12.)

Bodies corporate, companies, or societies, shall be described by their proper titles or designations; and the Christian names and surnames or titles of honour of all other such persons shall be expressed in words at length and without abbreviations in such orders or certificates, the Christian names preceding the surnames: (Ch. F. R. 1874, r. 12.)

When a person, to whom payment of money in court, or transfer or

delivery of securities in court, is directed, shall appear to be entitled thereto as real estate, or as trustee, executor, or administrator, or otherwise than in his own right or for his own use, the fact that he is entitled to the same as real estate, or the character in which he is so entitled, shall be stated in the order or in the certificate of a chief clerk or of a taxing master . . . : (Ch. F. R. 1874, r. 53.)

When money in court is payable to the Receiver-General of Inland Revenue (in any case not provided for by rule 57), the National Debt Commissioners, the Ecclesiastical Commissioners for England, the official trustees of charitable funds, the official liquidator of any company, or any other official persons for whom an account is kept at the bank, the order shall direct the amount so payable to be transferred, upon the requisition of the official person to whom it is due, to the proper account (citing it), at the bank, of such official persons: (Ch. F. R. 1874, r. 41.)

9. DRAWING UP.

Every order . . . to be acted upon by the Chancery Paymaster (except reports of the Masters in Lunacy, confirmed by fiat, and orders drawn up by the Registrar in Lunacy), shall be drawn up by . . . the registrars of the court: (Ch. F. R. 1874, r. 15.)

Besides the documents usually left with the registrar on his making the order, whenever any fund in court is to be dealt with, the Paymaster-General's certificate, and if the funds are restrained by any order, the restraining order, or an office copy thereof (Ch. Reg. Mar. 15, 1860, r. 16); where payment out of court is ordered to legal representatives, the probate or letters of administration stamped for a sufficient amount (r. 17); if the order deals with any purchase money, a consent brief for the purchaser, or an affidavit of notice to him of the intended application of the purchase money, and that the conveyance has been executed and delivered to him (r. 30); where the order deals with any money paid into court by the promoters of any public undertaking to the credit of such undertaking not standing to any separate account, the Paymaster-General's certificate of the payment into court of the sum sought to be dealt with, and also the Paymaster-General's certificate of the payment into court of the sum sought to be dealt with, and also the Paymaster-General's certificate of the fund in court to the credit of the undertaking; and when the order directs the carrying over of the money to a separate account, or payment of the same out of court to any person entitled thereto, an affidavit of the petitioner verifying the petition, and negating any adverse right or claim, in the terms of the C. O. 34, r. 3, and any other evidence used at the hearing: (*Id.*, r. 34.)

10. PRINTING AND PASSING.

Every order to be acted upon by the Chancery Paymaster (except the said reports [see *sup.*]), shall either be wholly printed, or in cases in which printed forms can be used, may be partly printed and partly written; provided that the registrars may issue any such orders in writing, if of an urgent nature: (Ch. F. R. 1874, r. 15.)

Every order that may be left at the Chancery Pay Office, may be printed or written, and shall have printed or written thereon the name and address of a solicitor: (Ch. F. R. 1874, r. 93.)

The printing of orders shall be under the control of the registrars, and the orders shall be printed on cream wove, machine made, foolscap folio paper, 18lb. per mill ream, or thereabouts, in pica type leaded, with an inner margin about three-quarters of an inch wide, and an outer margin about two inches and a half wide, except as to the schedule or tabular statement in any such order contained or referred to, which shall be

printed in such smaller type as the registrars shall direct: (Ch. F. R., 1874, r. 15.)

The registrars shall cause a duplicate of every printed or partly printed order to be made at the same time with the original; and the original order shall be passed by a registrar in the usual way, and stamped with his official seal on every leaf thereof: (Ch. F. R. 1874, r. 18.)

11. ENTRY.

Every [such order] . . . shall be . . . entered with the registrars of the court: (Ch. F. R. 1874, r. 15.)

The original order . . . stamped with [the] seal [of the registrar, shall] be transmitted by him to the clerk of entries with the duplicate: (Ch. F. R. 1874, r. 18.)

12. FILING DUPLICATE.

The duplicate order shall be retained and filed by the clerks of entries as the record: (Ch. F. R. 1874, r. 18.)

13. DELIVERING OUT ORIGINAL.

The original order when examined and stamped by [the clerks of entries], and marked with a reference thereon to the duplicate or record so filed, shall be returned to the registrar to be delivered out to the solicitor of the party having the carriage of the order: (*Id.*)

14. AMENDMENT OF PRINTED ORDERS.

Clerical mistakes or errors arising from any accidental slip or omission in such printed orders may be amended in writing; but no amendment shall be made in any order, to provide for a new state of circumstances arising after the date of the order; nor shall any order be amended for the purpose of extending the time thereby limited for making any payment, or transfer into, or deposit in court of money or securities; and every such amendment shall be stamped by the clerks of entries, or by the [Masters of the Supreme Court], with their official seal, as evidence that the duplicate or record has been also amended: (Ch. F. R. 1874, r. 16; J. A. 1879.)

15. COPIES AND INDEXING.

The registrars may cause to be printed additional copies of printed orders, or printed portions of orders, according to the requirements of the parties or their solicitors, and such additional copies shall be transmitted to the report office; and when such printed or partly printed orders have been passed and entered, such additional copies upon being duly completed and signed or certified by one of the [Masters of the Supreme Court], and authenticated in the same manner as written office copies of orders, or copies certified pursuant to the Act of 14 & 15 Vict. c. 99, s. 14 . . . may be issued as office or certified copies: (Ch. F. R. 1874, r. 19.)

[And see *sup.*, V., 4.]

VIII. PAYMENT AND TRANSFER IN.

1. WHAT SECURITIES, &C., RECEIVED.

The [Masters of the Supreme Court] shall not receive into their custody effects of the suitors consisting of jewels or plate, or other articles of a like nature, or negotiable securities: (Ch. F. A. O. 1874, r. 16; J. A. 1879.)

The following securities may be brought in:

Those passing by delivery, as Exchequer Bills;

Those transferable in books, as Consols;

Those transferable by registered deed, as Railway Stock: (Seton, 84.)

Those passing by delivery are deposited; the others are transferred:

(*Id.*)

Foreign stocks and securities, plate or jewels, and other specific articles of value unascertained, are put in boxes indorsed with the short title of the cause to which they belong, and are deposited at the bank with the privity of the Chancery Paymaster, but neither the Chancery Paymaster nor the bank take any cognisance of the contents of such boxes; and it is not the practice of the bank to receive the interest on such securities: (Seton, 84.)

2. BRINGING MONEY IN WITHOUT DIRECTION (SUSPENSE ACCOUNT).

When it is desired to bring money into court without waiting the time necessary to obtain a direction for the bank to receive such money, it may be lodged at the bank to the credit of the Chancery Suspense Account: (Ch. F. R. 1874, r. 31.)

[The money is so lodged] upon a written application, signed by the person desiring to lodge the same, or his solicitor, and addressed to the bank, specifying the amount, and the title of the cause or matter . . . in respect of which it is desired to be lodged: (*Id.*)

Upon such lodgment being made one of the cashiers of the bank [gives] a certificate that the amount has been lodged to the credit of the Chancery Suspense Account: (*Id.*)

In every case the person making such lodgment, or his solicitor shall forthwith bespeak [a direction of the Chancery Paymaster to the bank to receive the money, and place the same to the credit of the Chancery Pay Office Account], and [must] produce such direction and certificate at the bank, for the purpose of having the money so previously lodged transferred to the Chancery Pay Office Account, and placed in the books at the Chancery Pay Office to the credit of the cause or matter mentioned in such direction, and [a] receipt . . . [is] thereupon . . . given for such money: (Ch. F. R. 1874, rr. 31, 28.)

3. BRINGING IN MONEY, &c., WITHOUT ORDER.

(a) *Where Allowed.*

Money and securities may [in certain cases] be paid or transferred into, or deposited in court, and be placed in the books at the Chancery Pay Office to the credit of a cause or matter . . . without an order: (Ch. F. R. 1874, r. 25.)

Where any action is brought to recover a debt or damages, any defendant may at any time after service of the writ, and before or at the time of delivering his defence . . . pay into court a sum of money by way of satisfaction and amends: (O. XXX., r. 1; and see PLEADING.)

[Payment, &c., may be] so made to a separate account [when] such separate account has been directed to be opened by an order: (Ch. F. R., 1874, r. 25.)

Payment, &c., may be so made to a security for costs account without any order: (*Id.*)

Dividends payable through default of obedience to an order for payment may be so made: (Ch. F. R. 1874, r. 27.)

[Rule 25] [does] not apply to money or securities directed by an order to be paid or transferred into, or deposited in court [or] to money or securities payable, or transferable into court, in pursuance of an Act of Parliament or a general order of the court, by which some particular authority is required to enable the payment, transfer, or deposit to be made: (Ch. F. R. 1874, r. 25.)

(b) *How Payment made.*

[Such payment is made] on a direction to be obtained from the Chancery Paymaster, upon the written request of the person desirous of so paying, transferring, or depositing, or of his solicitors: (*Id.*)

Every request for a direction for payment or transfer into, or deposit in, court, of money or securities to be placed to the credit of a cause commenced since 1st November, 1852, shall contain the title of the cause and the reference to the record as cited in rule 2 [see *sup.*, I.], and the correctness of such reference shall be authenticated by the official seal of the [Central Office] being impressed on such request: (Ch. F. R. 1874, r. 26; J. A., 1879).

(e) *Filing Request.*

[The] request shall be filed in the Report Office: (Ch. F. R., 1874, r. 25.)

(d) *Receipt.*

The bank receipt is given, as in other cases of payment in (Ch. F. R. 1874, r. 28 [see *post*]) and the direction endorsed with the bank's certificate is forwarded to the Chancery Pay Office: (Ch. F. R. 1874, rr. 28, 29; see *post*.)

[Where a sum is paid in by a defendant under Order XXX.], such sum of money shall be paid to the proper officer, who shall give a receipt for the same: (O. XXX., r. 2.)

(e) *Notice to Parties.*

A person making such transfer, payment, or deposit upon request to the credit of a cause or matter [must] forthwith give notice thereof to the solicitors on the record for the parties to the cause, or in case of a matter, to the persons interested, if known, or to their solicitors, if any, stating in such notice what the money or securities comprised in such transfer, payment, or deposit represent, and for what purpose such transfer, payment or deposit has been made, and such notices may be sent by post: (Ch. F. A. O. 1874, r. 4.)

If such payment be made [by a defendant] before delivering his defence [see *sup.* (a)] the defendant shall thereupon serve upon the plaintiff a notice that he has paid in such money and in respect of what claim, in the form No. 5 in the Appendix B. [to the Rules of 1875]: (O. XXX., r. 2.)

4. ORDER FOR PAYMENT, &C., IN.

(a) *Reference to Record.*

[See *sup.* VI.]

(b) *Titles of Cause and Account.*

[See Ch. F. R. 1874, rr. 7, 94, set out *sup.* VII. 2.]

(c) *Source from which Derived.*

If the money or securities, or the dividends on securities to be . . . dealt with under [the] order shall not be in court at the date thereof, the source from which such money, securities or dividends will be derived, shall be stated: (Ch. F. R. 1874, r. 8.)

(d) *Directions, Drawing up, &c.* [see *sup.*, VII. and JUDGMENT].

(e) *Providing for Investment.*

Usually application is made by some party interested that a direction may be inserted in the order authorising payment in for the investment of the money when paid in, and for the investment and accumulation of future income, if not otherwise disposed of: (Dan. 1639-40.)

5. PAYMENTS, &C., UNDER ORDERS.

(a) *May be Made before Service or After Time Limited.*

A person directed by any order to make a payment or transfer into, or deposit in, court, shall be at liberty to make the same without further order, notwithstanding the order may not have been served, or the time

thereby limited for making such payment, transfer, or deposit may have expired: (Ch. F. R. 1874, r. 27.)

(b) *Interest or Dividends through Default payable on Request.*

If any further sum of money has by reason of such default [in obedience to an order] become payable by [the person making default] for interest, or in respect of dividends, he shall be at liberty to pay into court such further sum upon [the written request of himself or his solicitor]: (Ch. F. R. 1874, r. 27.)

As to the request, see *sup.*, 3.

(c) *Notice to Parties.*

A person who [makes] a transfer or payment of money or securities into court, or a deposit of securities in court, as [aforesaid], shall forthwith give notice thereof to the solicitors of the persons upon whose application the order directing such transfer, payment, or deposit was made, or to such persons, if they have no solicitor; or if the order was made on the application of the person making such transfer or payment to the solicitor of the other parties appearing on the application: (Ch. F. A. O. 1874, r. 4.)

(d) *Consequences of Default not Prejudiced.*

Any such subsequent payment, transfer, or deposit shall not affect or prejudice any liability, process, or other consequences which such person may have become subject to by reason of his default in making the same within the time so limited: (Ch. F. R. 1874, r. 27.)

(e) *Extending Time.*

The time for making any such payment, transfer, or deposit, may be, also, if necessary, extended by a supplemental order, referring to the former order, but without repeating the directions for such payment, transfer, or deposit: (Ch. F. R. 1874, r. 27.)

Such supplemental order may be made on an application to the judge at chambers: (*Id.*)

(f) *Where Order necessary for Defendant Pleading Payment in.*

Where any action is brought to recover a debt or damages any defendant may . . . by leave of the court or a judge at any later time [than delivery of his defence] pay into court a sum of money by way of satisfaction or amends: (O. XXX., r. 1; and see PLEADING.)

(g) *How Payment to be made under Orders Generally.*

(1) To be with Paymaster's Privity.

When money or securities are to be paid into or deposited in court, such payment or deposit shall be made with the privity of the Chancery Paymaster: (Ch. F. R. 1874, r. 28.)

(2) Direction to Bank.

The Chancery Paymaster [issues] a direction to the bank to receive and place the [moneys or securities] to the credit of the Chancery Pay Office account: (*Id.*)

Such direction shall specify the title of the cause or matter to which [the] money or securities are to be placed in the books at the Chancery Pay Office: (*Id.*)

(3) Receipt.

Upon [the] money or securities being paid or deposited, the bank shall cause a receipt to be given for the same: (*Id.*)

[Where a defendant pays in under O. XXX., see *sup.* (f)] such sum of money shall be paid to the proper officer, who shall give a receipt for the same: (O. XXX., r. 2.)

(4) Bank Certificate.

[The bank] . . . send [the Chancery Paymaster's] directions to the

Chancery Pay Office, with a certificate thereon, that the money or securities therein specified have been received and placed to the credit of the Chancery Pay Office account: (Ch. F. R. 1874, r. 28.)

(5) Filing Paymaster's Certificate.

When [the] direction with [the] certificate thereon [is] received at the Chancery Pay Office, the Chancery Paymaster [files] a certificate of such payment [stating] the title of the cause or matter to which such amount of money has been placed in the books at the Chancery Pay Office; and an office copy of such certificate [is] evidence of the payment: (Ch. F. R. 1874, r. 30.)

(h) *How Transfer made under Order.*

(1) To be with Paymaster's Privy.

When securities are to be transferred into court, such transfer shall be made with the privy of the Chancery Paymaster: (Ch. F. R. 1874, r. 29.)

(2) Direction for Transfer.

The Chancery Paymaster [issues] a direction for the transfer to be made to the account of the Paymaster-General, and on behalf of the court: (*Id.*)

Such direction shall specify the title of the cause or matter to which [the] securities are to be placed in the books at the Chancery Pay Office: (*Id.*)

(3) Bank Certificate

Upon such securities being so transferred the bank body corporate, or company in whose books the transfer [has been] made or registered, sends [the Chancery Paymaster's] direction to the Chancery Pay Office, with a certificate thereon that the securities therein specified have been transferred to the said account: (*Id.*)

(4) Filing Chancery Paymaster's Certificate.

Where the certificate of the bank, body corporate, or company, that the amount of money or securities has been so paid, transferred, or deposited, is received by the Chancery Pay Office, the Chancery Paymaster files a certificate of such payment, transfer, or deposit [stating] the title of the cause or matter to which such amount of money or securities has been placed in the books at the Chancery Pay Office; and an office copy of such certificate of the Chancery Paymaster shall be received as evidence of the payment or transfer into, or deposit in court, therein mentioned, having been made: (Ch. F. R. 1874, r. 30.)

(i) *Unascertained Money.*

Money, dividends, or interest directed by an order to be paid into court, the amount of which cannot be ascertained at the date of the order, may be ascertained [like interest on money in court (see *post*, XV.) or by production of an affidavit or statutory declaration ascertaining the amount]: (Ch. F. R. 1874, rr. 8, 86.)

The statutory declaration must be filed in the Central Office, when the Chancery Paymaster considers it necessary: (*Id.*)

6. CREDIT OF MONEY, &C.

Stock should be transferred to "the account of the Paymaster-General for the time being on account of the Court of Chancery:" (Seton, 84.)

All securities from time to time transferred, standing or deposited into, in, or to the account of the Paymaster-General [are] held by [him] in trust in the several causes and matters in which such securities are transferred, standing, or deposited respectively: (Ch. F. A. 1872, s. 10.)

The bank [is to] receive all dividends accruing due on all

securities standing to the credit of the Paymaster-General, of which a certificate has been sent to them by [him], and any principal money payable in respect of any such securities: (Ch. F. A. 1872, s. 10.)

The certificate [is] a sufficient authority: (*Id.*)

All [such] money [is placed] to the credit of the Paymaster-General for the time being, on behalf of the court: (*Id.*)

The bank's receipt is a good discharge: (*Id.*)

Any principal money or dividends received by the bank in respect of securities standing to the Chancery Pay Office account shall be placed in the books at the Chancery Pay Office in the case of principal moneys to the credit of which the securities whereon such money arose were standing at the time of the receipt thereof, and in the case of dividends to the credit to which the securities whereon such dividends accrued were standing at the time of the closing of the transfer books of such securities previously to the dividends becoming due: (Ch. F. R. 1874, r. 35.)

7. PAYMENT, &c., IN UNDER PARTICULAR STATUTES.

(a) *Judicature Acts (Defendant Pleading Payment)* [see *sup.*, 3, 4].

(b) *Trustee Relief Act* [see TRUSTEES].

(c) *Lands Clauses Act* [see LANDS CLAUSES ACT].

(d) *Copyhold Acts* [see COPYHOLD ACTS].

(e) *Parliamentary Deposit Act.*

(1) Warrant.

[Where] any sum of money is required by any standing order of either House of Parliament to be deposited by the subscribers to any work or undertaking which is to be executed under the authority of an Act of Parliament, if the director or person, or directors or persons having the management of the affairs of such work or undertaking, not exceeding five in number, shall apply to one of the clerks of the Parliaments as to money required by any standing order of the [House of Lords], or to one of the clerks of the Private Bill Office ([as to] money required by any standing order of the Commons), ... to be deposited, [such clerk may], by warrant or order under his hand, ... direct that such sum of money shall be paid into the Bank of England in the name and with the privity of the Paymaster-General: (9 & 10 Vict. c. 20, s. 2.)

(2) Payment in.

The person or persons named in such warrant or order, or the survivors or survivor of them, [may] pay the sum mentioned in such warrant or order in the name and with the privity of the officer or person in whose name such sum shall be directed to be paid by such warrant or order, to be placed to his account there, *ex parte* the work or undertaking mentioned in such warrant or order pursuant to the method prescribed by any Act [and rules] regulating moneys paid into [court]: (9 & 10 Vict. c. 20, s. 3.)

(3) Transfer of Stock in Lieu of Payment in.

[If such directors, &c.] have previously invested in the Three per Centum Consolidated or the Three per Centum Reduced Bank Annuities, Exchequer Bills or other Government securities, the sum or sums of money [so] required to be deposited, ... the person or persons named in such warrant or order, or the survivors or survivor of them, [may] deposit [or transfer] such securities in the bank in lieu of payment of so much of the money required to be deposited as the same Exchequer bills, &c. . . . will extend to satisfy at the price at which the same were originally purchased by [such] persons, ... such price to be proved by .

production of the broker's certificate of such original purchase: (9 & 10 Vict. c. 20, s. 3.)

(4) How long Money, &c., to remain in.

Every such sum so paid in, or the securities in or upon which the same may be invested . . . or the stocks, funds, or securities authorized to be transferred or deposited in lieu thereof . . . shall . . . remain [in court] until the same, with all interest and dividends, if any, accrued thereon, shall be paid out of such bank, in pursuance of [the] Act: (9 & 10 Vict. c. 20, s. 3.)

(f) *Railway and Tramway (Private) Bills.*

Where a Railway or Tramway Bill is promoted by an existing company, a clause is to be inserted in the bill, providing that a penalty of 50*l.* a day on non-completion within the time limited until the line is opened for traffic, or until the penalty amounts to 5*l.* per cent. on the estimated cost of construction, is to be paid into court, except in certain cases provided for in the standing orders of the Houses of Parliament: (*Seton*, 1457-8, citing S. O. H. L. (1876), 114, 117; S. O. H. C. (1877) 158.)

(g) *Tramways Act.*

After a provisional order is ready, and before the same is delivered by the Board of Trade, the promoters, unless they are a local authority, shall . . . pay . . . as a deposit . . . not less than 4*l.* per centum on the amount of the estimate by the promoters of the expense of the construction of the tramway, or deposit . . . any security of the prescribed nature the then value of which is not less than such sum of money: (33 & 34 Vict. c. 78, s. 12.)

The Board of Trade may issue their warrant to the promoters for . . . payment into court, which warrant shall be a sufficient authority for the persons therein named, or the majority or survivors of them, to pay the money therein mentioned into . . . court . . . or into the bank therein mentioned, in the name and with the privy of the officer therein mentioned (if any): (Board of Trade Rules, 24th July, 1873, r. 22.)

The warrant [authorizes] the [Paymaster-General] to issue directions to [the] bank to receive the [money] to be placed to his account there according to the method prescribed by statute, or general rules or orders of court, or otherwise, for the time being in force . . . and without fee or reward: (B. T. R. 22.)

[When securities are brought in] the Board of Trade shall vary their warrant accordingly, by directing the transfer or deposit of such amount of stocks, funds, securities, or Exchequer bills, by the persons therein named: (B. T. R. 22.)

After the provisional order is ready, and before the same is delivered by the Board of Trade, the promoters, if they are not a local authority, shall pay, as a deposit, a sum of money not less than 5*l.* per centum on the amount of their estimate of the expenses of the construction of the tramway . . . when the tramway, or any part thereof, will be situate in England, into the [Chancery Division] to the credit of the particular tramway: (B. T. R. 21.)

In lieu, wholly or in part, of the payment of money, the promoters may bring into court, as a deposit, an equivalent sum of Bank Annuities, or of any stocks, funds, or securities on which cash, under the control of the . . . court, is, for the time being, permitted to be invested, or of Exchequer bills, the value thereof being taken at the price at which the promoters originally purchased the same, as appearing by the broker's certificate of that purchase: (B. T. R. 22.)

(h) *Legacy Duty Act.*
 [See LEGACY DUTY ACT.]

(i) *Railway Construction Facilities Act.*

After the certificate is ready to be issued, and before the same is issued the promoters, unless they are a previously existing company possessed of a railway open for public traffic shall . . . pay as a deposit a sum of 8l. per cent. on the estimate of construction: (27 & 28 Vict. c. 121, s. 34.)

The Board of Trade may issue their warrant to the promoters (to be varied in case securities are brought in) which is a sufficient authority for the persons therein named, or the survivors to pay the money in, and for the officer to receive the same to be placed to his account there, *ex parte* the railway therein mentioned, and without fee or reward: (ss. 35, 36.)

In lieu wholly or in part of payment of money, the promoters may bring into court an equivalent sum of bank annuities, or of any stocks, funds or securities on which cash under the control of the court is for the time being permitted to be invested, or of Exchequer bills (the value thereof being taken at the price at which the promoters originally purchased the same, as appearing by the broker's certificate of that purchase): (s. 36.)

IX. PLACING MONEY IN COURT ON DEPOSIT.

1. WHERE MONEY PLACED ON DEPOSIT.

Save as otherwise provided by [the rules] all money in court [will, subject to the Act and Rules], be placed on deposit: (Ch. F. A., 1872, s. 14.) [In the case of money paid in under the Trustee Relief Act by the affidavit requested to be invested in Three per cent. Consols, Annuities, or Reduced Annuities, and amounting to 10l., but under 40l.] the Chancery Paymaster shall . . . as soon as conveniently may be, place such money on deposit without a request for that purpose, unless such affidavit contains a statement that it is deemed unnecessary to place such money on deposit, or unless notice in writing be left at his office of an order having been made, or of an intended application to the court affecting such money securities or dividends: (Ch. F. R., 1874, r. 66.)

Money will not be placed on deposit:

- (a) If a direction in an order dealing with money in court otherwise than by directing it to be placed on deposit (whether such money has been paid in before or since the commencement of the Court of Chancery Funds Act, 1872) is brought under the notice of the Chancery Paymaster: (Ch. F. R., 1874, r. 69.)
- (b) If a request in writing by a solicitor acting on behalf of a person claiming to be entitled to or interested in money in court, paid in after commencement of the same Act, that such money may not be placed on deposit, is left at the Chancery pay office: (*Id.*)
- (c) Money in court, paid in pursuant to 9 & 10 Vict. c. 20, [the Parliamentary Deposit Act], or of any Act amending the same shall not be placed on deposit: (Ch. F. R. 1874, r. 72.)
- (d) Moneys in court paid into the Appeal Deposit Account, shall not be placed on deposit: (*Id.*)
- (e) Sums under 10l.

A less sum of money than 10l. shall not remain or be placed on deposit; and if the amount of money on deposit to the credit of a cause or matter at the commencement of these rules is less than 10l. it shall be withdrawn from deposit at or as soon as conveniently may be after such commencement, without a request for that purpose: (Ch. F. R., 1874, r. 73.)

The person making such request may at any time withdraw the same,

and by a like request in writing require the money to be placed on deposit : (Ch. F. R. 1874, r. 69.)

2. WHERE REQUEST NECESSARY.

An application or request is not generally necessary in the case of money paid in after the commencement of the Chancery Funds Act : (Ch. F. A. 1872, s. 14.)

Subject to any exceptions in [the] rules, money,

In court paid in before the [7th Jan. 1873], and not already placed on deposit (other than money paid in pursuant to the Copyhold Acts, or the 69th section of the L. C. C. A. 1845).

Arising by the sale, conversion or payment off of securities in court, Dividends accruing on securities in court.

Money brought over from the credit of some other cause or matter, or otherwise placed, either before or after such [date], to the credit of a cause or matter in the books at the Chancery Pay Office, shall be placed on deposit on request . . . and, subject as aforesaid, all money hereafter to be paid into court shall be placed on deposit without a request for that purpose : (Ch. F. R. 1874, r. 68.)

When an order . . . directs the . . . placing on deposit subject to rule 71 [as to which see *post*, 5], of money in court, or dividends to accrue on securities in court, the Chancery Paymaster may defer giving effect to such direction until a request in writing to give effect thereto has been left at the Chancery Pay Office, but it shall be the duty of the solicitor for the person having the carriage of such order . . . to leave it, and such request at the Chancery Pay Office without unnecessary delay : (Ch. F. R. 1874, r. 37.)

No request is needed in case of moneys paid in under the Trustee Relief Act, under the circumstances mentioned in rule 66 : (see Ch. F. R. 1874, r. 66, *sup.*, 1.)

[The request must be] signed by [the] person claiming to be interested in such money, or his solicitor : (Ch. F. R. 1874, r. 68.)

3. WHEN DEPOSIT MADE.

The placing on deposit [is not to] be deferred beyond the 15th or the last day of the month in which it [is] paid into court, whichever day shall first happen after such payment, or in the case of money paid into court on the last day of the month, the placing on deposit [is not to] be deferred beyond the 15th day of the following month; and when a request to place money in court on deposit [is] left at the Chancery Pay Office, the money [is] [except in the case of conversion of 3*l.* per Cent. Consols Reduced, or New 3*l.* per Cents. of not less than 1000*l.*] to be so placed on the day succeeding the day on which such requests shall be so left (which last named day shall be the date inserted in such request) : (Ch. F. R. 1874, r. 70.)

4. MONEY FROM CONVERSION OF GOVERNMENT SECURITIES.

When an order directs the conversion into cash of [3*l.* per Cent. Consols Reduced, or New Annuities of not less than 1000*l.*], and the whole of the money arising thereby to be placed on deposit, such money shall be deemed to have been placed on deposit (without a request for that purpose) on the day on which such conversion shall be effected : (Ch. F. R. 1874, r. 71.)

Applications . . . for placing such cash on deposit . . . may be made to [a judge] at chambers : (Ch. F. A. O. 1874, r. 13.)

5. STAYING DEPOSIT ON REQUEST.

In all cases, upon a request in writing by a solicitor acting on behalf of any person claiming to be entitled to or interested in money or securities

in court, that such money or the dividends or interest accruing on any specified securities, or on any specified sum of money on deposit, may not be placed on deposit, . . . being at any time left at the Chancery Pay Office, the Chancery Paymaster shall not place such money on deposit, or shall be at liberty to cease to place on deposit . . . any more dividends or interest accruing on such securities or sum of money on deposit, until he has had notice that the court has made some order in that behalf: (Ch. F. R. 1874, r. 67.)

6. WITHDRAWING MONEY FROM DEPOSIT.

When an order containing directions dealing with money on deposit, or with money which after the date of the order has been placed and still remains on deposit, is brought to the Chancery Pay Office, to have such directions acted on, such money, or so much thereof as may be sufficient to meet the requirements of the order, may, on a request in writing signed by a person claiming to be entitled thereto or interested therein, or by a solicitor acting on his behalf, be withdrawn from deposit and applied as directed by the order, subject, as to the investment of money, to rule 64: (Ch. F. R. 1874, r. 74.)

Rule 64 only prohibits deposit of sums under 40*l.* except in cases under the Legacy Duty Act, or the Trustee Relief Act: (see *post*, X.)

When money on deposit is by an order directed to be dealt with, such money shall be withdrawn from deposit as soon as may be after a request in writing for such withdrawal has been left at the Chancery Pay Office, and such withdrawal shall not be deferred beyond a week after the leaving of such request: (Ch. F. R. 1874, r. 75.)

7. INTEREST ON DEPOSITS.

(a) *On what Sums Computed.*

Interest . . . [will] not be computed on a fraction of one pound: (Ch. F. R. 1874, r. 76.)

(b) *Rate.*

[Money when] placed on deposit [bears] interest at the rate of 2 per cent. per annum, together with any income tax chargeable thereon: (Ch. F. A. 1872, s. 14.)

(c) *Periods for which Computed.*

Except as in this rule otherwise provided, interest upon money on deposit shall accrue by half calendar months, and shall not be computed for any less period. The periods from the 1st to the 15th of a month, both days inclusive, and from the 16th to the last day of a month, both days inclusive, shall, for the purpose of computing such interest, be reckoned as half calendar months; and such interest shall begin on the first day of the half calendar month next succeeding that in which the money is placed on deposit, and shall cease from the last day of the half calendar month next preceding the withdrawal of the money from deposit: Provided that when a sum of money in court amounting to not less than 500*l.* shall be hereafter placed on deposit, pursuant to a request in writing by or on behalf of a person claiming to be interested therein, and [remains] on deposit undrawn until the 1st April or the 1st Oct. next succeeding the day on which it is placed on deposit, interest shall begin on the day inclusive next succeeding such day of placing on deposit: (Ch. F. R. 1874, r. 77.)

(d) *Crediting.*

Interest which has accrued for or during the half years ending respectively the 31st March and the 30th Sept. in every year on money then on deposit shall, on or before the 20th days of the months

respectively following, be credited by the Chancery Paymaster to the cause or matter to the credit of which such money shall be standing, on every such half-yearly day. And when money on deposit is withdrawn from deposit, except as to money withdrawn during the first fifteen days of the months of April and October respectively, the interest thereon which has accrued and has not been credited shall, at the time of withdrawal, be credited to the cause or matter to the credit of which the money is then standing: (Ch. F. R. 1874, r. 78.)

(e) *Calculation when Part Withdrawn.*

When money on deposit to the credit of a cause or matter consists of sums which have been placed on deposit at different times, and an order is made dealing with the money to the credit of such cause or matter, and part of such money has to be withdrawn from deposit for the purpose of executing such order, the part or parts of the money dealt with by such order last placed and remaining on deposit at the time of such withdrawal shall, for the purpose of computing interest, be treated as so withdrawn, unless the order otherwise directs: (Ch. F. R. 1874, r. 79.)

(f) *Placing Interest on Deposits.*

Until a direction in an order dealing with interest on money on deposit, credited to a cause or matter as having become due on [the 1st April or 1st October] has been brought under the Chancery Paymaster's notice, such interest shall, when or so soon as it amounts to or exceeds 10*l.*, be placed on deposit, and for the purpose of computing interest upon it, it shall be treated as having been placed on deposit on the last half-yearly day on which any such interest became due: (Ch. F. R. 1874, r. 80.)

As to staying the placing of interest on deposit, see *sup.* 5.

Applications . . . for dealing with interest on money on deposit may be made to [a judge] at chambers: (Ch. F. A. O. 1874, r. 13.)

8. DIVIDENDS.

Dividends on securities in court . . . directed or requested to be invested . . . when amounting to less than 40*l.* half-yearly are [subject as mentioned *post*, X.] to be placed on deposit: (*Id.*, r. 64.)

A request may be required: (see Ch. F. R. 1874, r. 37, *sup.*)

9. MONEYS ON DEPOSIT AFTER ORDER DEALING THEREWITH.

When subsequently to the date of an order dealing with money in court such money shall have been placed on deposit, or when dividends accruing subsequently to the date of an order under which such dividends are applicable shall have been placed on deposit, the same when withdrawn from deposit, and any interest credited in respect thereof, shall, unless the order otherwise directs, be applied in the same manner as such money or dividends would have been applied had the same not been so placed on deposit: (Ch. F. R. 1874, r. 50.)

When an order directs money in court to be invested, and subsequently to the date of such order the money shall have been placed on deposit, interest accruing in respect of such money shall be applied in the same manner as the dividends arising from such investment are directed to be applied: (Ch. F. R. 1874, r. 51.)

X. INVESTMENT.

1. MONEY IN COURT TO BE INVESTED.

Money in court . . . which under any general order of the Court of Chancery or rule under [the Chancery Funds Act, 1872] or under an order of the Court of Chancery [or Chancery Division] is required to be laid out in any particular investment [is, subject to the rules, to] be so laid out: (Ch. F. A., 1872, s. 15.)

2. APPLICATION.

Where investment is not directed by the order for payment in, and an order is necessary (see *post*, 3), (a), an application by summons should be made: (Dan. 1640.)

As to marking the reference to the record, see *sup.*, VI.

The summons must generally be served on all other parties interested in the money: (Dan. 1640.)

A petition is necessary under the Parliamentary Deposit Act [see *post*, 8 (d)]; and under 23 & 24 Vict. c. 38 [see *post*, 6].

3. ORDER.

(a) *Where necessary.*

Subject to rules 46, 47, 48, 49, 62, 65, 66 . . . money in court shall not be invested in securities . . . unless in pursuance of an order: (Ch. F. R. 1874, r. 36.)

Rules 46, 47, 48, 49, relate only to the application of dividends accruing on securities after an order for transfer or delivery out (or realisation and payment out) of proceeds, and the investment of such dividends: (see *post*, XII., XIV.)

Rules 62, 65, 66 will be found in a subsequent part of this heading.

A sum of money amounting to or exceeding 40*l.* paid into court . . . in pursuance of . . . 36 Geo. 3, c. 52, s. 32 [The Legacy Duty Act] shall, upon a written request of the person paying it in or of his solicitor, or upon a written request made by or on behalf of a person claiming to be entitled thereto or interested therein, be invested (without an order) in Consolidated 3*l.* per Cent. Annuities . . . If such money [has been placed on deposit before such request . . . left at the Chancery Pay Office, such money and any interest to be credited in respect thereof, if amounting to 40*l.*, shall upon a like request, be withdrawn from deposit and invested as before-mentioned: (Ch. F. R. 1874, r. 65.)

[In the case of dividends in respect of such Consols (see *infra*), investment only takes place] if so requested either in the original request or any subsequent request: (*Id.*)

[Where an affidavit, under the Trustee Relief Act, states a desire that the money to be paid in, or dividends, on the securities to be transferred or deposited, and the accumulations shall be invested in Consols, 3*l.* per Cent. Annuities, or New 3*l.* per Cent. Annuities], the Chancery Paymaster shall (if, or so soon, as such money shall amount to or exceed 40*l.*, or such dividends shall amount to or exceed 10*l.*) invest the same in [one of such annuities] without any order or further request for that purpose: (Ch. F. R. 1874, r. 66.)

As to proceeds or income of Exchequer bills or bonds being invested without request, see Ch. F. R. 1874, r. 62, *post*.

(b) *Reference to Record.*

[See *sup.* VI.]

(c) *Title of Cause and Account, Preparation, &c.*

[See *sup.* VII.]

4. WHERE REQUEST NECESSARY.

When an order . . . directs . . . the investment . . . of money in court, or of dividends to accrue on securities in court the Chancery Paymaster may defer giving effect to such direction unless a request in writing to give effect thereto has been left at the Chancery Pay Office; but it shall be the duty of the solicitor for the person having the carriage of such order . . . to leave it and such request at the Chancery Pay Office without unnecessary delay: (Ch. F. R. 1874, r. 37.)

5. WHAT SUMS INVESTED.

A sum of money in court less than 40*l.* shall not be invested in securities except in the cases provided for by Rules 65 and 66 [given below]. This rule shall extend to the investment of dividends accruing on securities in court which have been, or may be, directed or requested to be invested: (Ch. F. R. 1874, r. 64.)

But dividends accruing on securities purchased as mentioned in C. O. 1, r. 11 (now abrogated, and relating to the Legacy Duty Act), before 7th Jan. 1873, may, when they amount to 10*l.*, be invested by the Paymaster-General (unless he shall have received, on behalf of some person claiming to be entitled, notice in writing of an intended application to the court or to a judge in chambers, for disposing of the fund, or for otherwise applying the dividends thereof) without any formal request for that purpose, as the same shall accrue due in the purchase of like stock in trust in the same matter and account to which the original sum of stock stands: (Ch. F. R. 1874, r. 65; C. O. 1, r. 11); and dividends accruing in respect of Consols, in which, after the 7th Jan. 1873, money paid in under the Legacy Duties Acts has been invested, when they amount to 10*l.*, shall be from time to time invested in like annuities; (Ch. F. R. 1874, r. 65.)

As to the amounts which may be invested under the Trustee Relief Act, see Ch. F. R. 1874, r. 66, *sup.*

Dividends in respect of moneys under the Trustee Relief Act, amounting to 10*l.*, which might, before 7th Jan. 1823, be invested, may be invested as formerly: (Ch. F. R. 1874, r. 66; C. O. 41, r. 3.)

6. IN WHAT SECURITIES.

(a) Generally.

[General orders may from time to time be made] as to the investment of cash under the control of the court, either in the 3*l.* per Cent. Consolidated, or Reduced, or New Bank Annuities, or in . . . other Stocks, funds, or securities, [and the court may make such orders as it] shall deem proper for the conversion of any 3*l.* per Cent. Bank Annuities standing in the name of the Paymaster-General of the court, in trust in any cause or matter, into any such other stocks, funds, or securities upon which, by any such general order as aforesaid, cash under the control of the court may be invested: (23 & 24 Vict. c. 38, s. 10.)

Cash under the control of the court may be invested in Bank Stock, East India Stock, Exchequer Bills, and 2*l.* 10*s.* per Cent. Annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales, as well as in Consolidated 3*l.* per Cent. Annuities, Reduced 3*l.* per Cent. Annuities, and New 3*l.* per Cent. Annuities: (Ch. O. 1st Feb. 1861, r. 1.)

Every petition for the purpose of the conversion of any 3*l.* per Cent. Bank Annuities into any other of the stocks, funds, or securities hereinbefore mentioned, shall be served upon the trustees, if any, of such Bank 3*l.* per Cent. Annuities, and upon such other persons, if any, as the court shall think fit: (Ch. O. 1st Feb. 1861, r. 2.)

(b) Under Particular Statutes.

[See *post*, 8.]

7. GENERAL PROCEDURE AFTER REQUEST.

(a) Direction to Broker.

When money in court is, in pursuance of an order, to be invested in specified securities, the Chancery Paymaster directs the money to be paid to the broker conditionally upon his causing such securities to be trans-

ferred or deposited to the account of the Paymaster-General for the time being on behalf of the court . . . : (Ch. F. R. 1874, r. 60.)

(b) *Cheque.*

The cheque or authority or direction for payment of such money shall specify the title of the cause or matter to the credit of which the securities purchased are to be placed in the books at the Chancery Pay Office: (*Id.*)

(c) *Certificate of Transfer.*

The bank, or body corporate, or company, in whose books or with whom the transfer or deposit of such securities shall be made or registered, shall cause a certificate of such transfer or deposit to be issued, and such a certificate purporting to be issued by the bank, or body corporate, or company aforesaid shall be sufficient evidence for all purposes that such transfer or deposit as therein mentioned has been actually made: (Ch. F. R. 1874, r. 60.)

Credit to which Securities Placed.

The securities transferred or deposited shall be placed in the books at the Chancery Pay Office to the same credit as that to which the said money was standing at the time of such investment, unless the order authorising such investment otherwise directs: (*Id.*)

(d) *Staying Investment.*

In all cases, upon a request in writing by a solicitor acting on behalf of any person claiming to be entitled to or interested in moneys or securities in court, that such money or the dividends or interest accruing on any specified securities or on any specified sum of money on deposit may not be . . . invested, being at any time left at the Chancery Pay Office, the Chancery Paymaster [may] cease to . . . invest any more dividends or interest accruing on such securities or sum of money on deposit until he has had notice that the court has made some order in that behalf: (Ch. F. R. 1874, r. 67.)

(e) *As to Exchequer Bills and Bonds.*

When money in court is by an order directed to be invested in exchequer bills or exchequer bonds, and when exchequer bills or exchequer bonds are, in pursuance of an order, deposited in court to the credit of any cause or matter, any principal money or interest which may thereafter be received and paid into the bank in respect of such bills or bonds, or of any such bills or bonds to be purchased with principal money or interest in pursuance of this rule, or in respect of any such bills or bonds for which the same may be exchanged, shall from time to time, as the same [is] so received and paid into the bank, be so also invested by the Chancery Paymaster, without any further request, unless such order otherwise directs, or until he receives a request or notice of a further order to the contrary, in exchequer bills or exchequer bonds [to be] placed to the same credit: (Ch. F. R. 1874, r. 62.)

When and so often as any exchequer bills or other securities now or hereafter to be deposited at the bank to the credit of the Chancery Pay Office account are in course of payment, the bank, . . . without any direction from the Chancery Paymaster, causes all such bills or other securities so in course of payment to be delivered to one of the cashiers of the bank, who receives the interest due thereon, and in case of Exchequer bills exchanges the same for new bills, if new bills are issued, or otherwise receives the principal money and interest due on such of the said bills so in course of payment as cannot be exchanged, and pays such interest or principal and interest (as the case may be) into, and deposits all such new

bills in the bank to the Chancery Pay Office account: (Ch. F. R. 1874, r. 63.)

And the bank is forthwith after every such exchange or receipt of principal or interest to certify to the Chancery Paymaster, without any direction from him for that purpose, the numbers, dates, and amounts of the exchequer bills so exchanged or paid off, and also the numbers, dates, and amounts of the new bills taken in exchange, and the amount of the interest, or the principal money and interest (as the case may be), received on each bill or set of bills; and upon receiving such certificate the Chancery Paymaster places such new bills and such principal money and interest to the credit in the books at the Chancery Pay Office of the cause or matter to which the bills so exchanged or paid off were placed: (Ch. F. R. 1874, r. 63.)

(f) *Accruing Dividends.*

When an order directing the investment from time to time of dividends accruing on securities in court, or to be transferred into court, or directed to be purchased with money in court, or to be paid into court, is left at the Chancery Pay Office, together with a request for the purpose of having such direction for investment of dividends carried into effect, the Chancery Paymaster . . . without any further request, from time to time, until he [receives] a request or notice of an order to the contrary, invests such dividends, if amounting to or exceeding 40*l.* half yearly, together with all accumulations of dividends thereon, as soon as conveniently may be after they . . . accrue due and have been received, in the particular description of securities named in the order directing such investment: (Ch. F. R. 1874, r. 61.)

But a sum under 40*l.* will not be invested: (see r. 64.)

(g) *Application of Money on Deposit.*

[See Ch. F. R., 1874, r. 50, 51, *sup.* IX.]

8. INVESTMENT UNDER PARTICULAR STATUTES.

(a) *Trustee Relief Act.*

[See TRUSTEES.]

(b) *Lands Clauses Act.*

[See LANDS CLAUSES ACT.]

(c) *Copyhold Acts.*

[See COPYHOLD ACTS.]

(d) *Parliamentary Deposit Act.*

If the person or persons named in such warrant or order [as mentioned *sup.*, VIII., 7, (e)] or the survivors or survivor of them, desire to have invested any sum so paid into the bank, or any interest or dividend which may have accrued on any stocks or securities so transferred or deposited as aforesaid, the court . . . may, on a petition presented to such court in a summary way by him or them, order that such sum or such interest or dividends shall, until the same be paid out to the parties entitled to the same in pursuance of [the] Act, be laid out in the Three per Centum Consolidated or Three per Centum Reduced Bank Annuities, or any Government security or securities, at the option of the aforesaid person or persons, or the survivor or survivors of them: (9 & 10 Vict. c. 20, s. 4.)

In one case the money was invested, as cash under the control of court, in East India Stock (*Re Southwold Railway Company*, L. Rep. 1 Ch. Div. 697); in another case it was held not to be such cash: (*Ex parte Great Northern Railway*, L. Rep. 9 Eq. 274.)

And see *post*.

(e) *Tramways Act.*

Where any money is so paid into court the court may, on the application of the persons named in the warrant or of the majority or survivors of them, order that the same be invested in such stocks, funds, or securities as the applicants desire, and the court thinks fit: (B. T. R. 23.)

Any application shall be made in a summary way by petition: (B. T. R. 30.)

(f) *Legacy Duty Act* [see LEGACY DUTY ACT].(g) *Railway Construction Facilities Act.*

When money is paid into court [under the Act] the court may, on the application of the persons named in the warrant of the Board of Trade, or of the majority or survivors order that the same be invested in such stocks, funds, or securities, as the applicants desire, and the court thinks fit: (27 & 28 Vict. c. 121, s. 38.)

XI. CARRYING OVER.

1. GENERALLY.

(a) *Where Money, &c., Carried Over.*

Where practicable funds ought always to be paid or carried over to separate accounts, so as to avoid the expense of service on unnecessary parties: (Seton, 94.)

(b) *Order.*

Money or securities in court shall not be carried over unless in pursuance of an order: (Ch. F. R. 1874, r. 36.)

The rules applicable to the form, &c., of orders for transfer, &c., out of court, apply generally to orders for carrying over: (Seton, 94, and see *sup.* VII.; *post*, XIII., XIV.)

There must be a direction to carry over the dividends: (Seton, 95.)

Cash or money on deposit in court to the credit of a cause or matter may be invested to the credit of a separate account or of another cause or matter without being previously carried over, but as the money on deposit must be withdrawn from deposit before it is carried over, the order must provide for any interest to be credited: (*Id.*)

(c) *Request.*

When an order directs the carrying over of money or securities in court the Chancery Paymaster may defer giving effect to such direction until a request in writing to give effect thereto has been left at the Chancery Pay Office; but it shall be the duty of the solicitor for the person having the carriage of such order to leave it and such request at the Chancery Pay Office without delay: (Ch. F. R. 1874, r. 37.)

(d) *Certificate of Carrying Over.*

When money or securities have been carried over in the books at the Chancery Pay Office, the Chancery Master may in his discretion issue a certificate thereof, upon a request in writing made by or on behalf of any person claiming to be interested in such money or securities: (Ch. F. R. 1874, r. 89.)

2. OF TAXATION FEES.

When costs are directed to be paid out of money in court, or out of the proceeds of securities in court, the taxing master shall certify the amount of the fees of taxation payable in respect of such costs, unless he shall certify that such fees are included in the costs as taxed. The Chancery Paymaster shall carry over the amount so certified to be payable from the account to which such money or proceeds are placed to a

separate account in the book at the Chancery Pay Office for fees of taxation, and the amount so carried over shall from time to time as the Treasury may direct, be paid to the account of Her Majesty's Exchequer: (Ch. F. R. 1874, r. 58.)

3. OF BALANCES UNDER £5.

As soon as conveniently may be after the 1st of Sept. 1875, and the same day in each succeeding year, the Chancery Paymaster shall carry over to a separate account in his books for causes and matters on which the balances do not exceed 5*l.* the balances of money and securities standing in such books to the credit of the causes or matters on which such balances of money and securities do not together amount to 5*l.* and on which the money or securities shall not have been dealt with during the preceding five years. When an order dealing with money or securities carried over under this rule is brought to the Chancery Pay Office to be acted upon, the Chancery Paymaster shall carry back such money or securities and any dividends accrued thereon to the credit of the cause or matter from which they were so carried over, and shall deal therewith as directed by such order: (Ch. F. R. 1874, r. 92.)

XII. SALE OF SECURITIES.

1. APPLICATION.

Applications . . . for the conversion into cash of Government securities in court of any of the three descriptions mentioned in rule 44 . . . may be made to [a judge] at chambers: (Ch. F. A. O. 1874, r. 13; see *post*, 2.)

In other cases the application seems to be the same as in case of payment or transfer out: (see *post*, XIII., XIV.)

2. ORDER.

[Securities] shall not be . . . sold, except in pursuance of an order: (Ch. F. A. 1872, s. 10.)

The general rules as to orders seem to apply: (see *sup.*, VII.; *post*, XIII., XIV.)

When a specific amount of Government securities in court, consisting of either Consolidated 3*l.* per Centum Annuities, or Reduced 3*l.* per Centum Annuities, or new 3*l.* per Centum Annuities, of not less than 1000*l.* is required to be realised, the order, instead of directing a sale of such securities, shall direct the same to be converted into cash, unless the court, on pronouncing such order, otherwise directs; and a Registrar of the Court, . . . shall issue a certificate for the transfer of such securities to the account of the National Debt Commissioners on behalf of the Court: (Ch. F. R. 1874, r. 44.)

3. CERTIFICATE OF ORDER.

The certificate of a Registrar . . . counter-signed by the Paymaster-General, [is] sufficient evidence of the order referred to in the certificate, and of the directions contained in such order, and . . . a sufficient authority to the Bank: (Ch. F. R. 1874, r. 42.)

Every certificate for the sale, transfer, or delivery of securities in court, shall express the exact amount of money to be raised by sale, or the exact amount and description of securities to be sold, transferred, or delivered out; and no such certificate shall be issued . . . by a registrar of the court, except on the production of the original order, or an office copy thereof, if the absence of the original order shall be accounted for to the satisfaction of such registrar: (Ch. F. R. 1874, r. 42.)

4. PAYMASTER'S DIRECTION TO BANK.

When securities in court are to be sold, and a registrar of the court

has issued a certificate authorising the sale, the Chancery Paymaster shall issue a direction to the Bank to receive the proceeds of such sale, and to place them to the Chancery Pay Office account; and shall specify in such direction the title of the cause of the matter to the credit of which such proceeds are to be placed in the books at the Chancery Pay Office; and such title shall be the title of the cause or matter to the credit of which the securities were standing at the time of such sale; and the Bank, or body corporate, or company, in whose books, or with whom, the securities to be sold are standing or deposited, shall, upon the production of the receipt from the Bank for the proceeds of the sale, and of the certificate of a Registrar of the court authorising such sale, countersigned by the Chancery Paymaster, cause the transfer or delivery of the securities necessary to complete the sale to be made by their proper officer: (Ch. F. R. 1874, r. 43.)

5. DIVIDENDS.

When securities in court are directed to be realised, and the whole of the proceeds paid out or carried over in one sum, or in aliquot or proportionate parts (except when the realisation is to raise a specific sum of money), any dividends accruing on such securities subsequent to the date of the order directing the realisation (if the amount of such securities is specified in the order, or, if not so specified, then subsequently to the time when such amount shall be ascertained) shall be added to such proceeds, and applied in like manner therewith, unless such order otherwise directs: (Ch. F. R. 1874, r. 46.)

As to when dividends have been invested, see rr. 48, 49, *post*, XIV.

XIII. PAYMENT OUT.

1. OF INCOME.

(a) *Application.*

Applications for payment to any person of the dividends or interest of any stocks, funds, or securities standing to the credit of any cause or matter depending to the separate account of such person [may be made by summons]: (C. O. 35, r. 1.)

This does not apply where there are large arrears of income: (Seton, 92; Dan. 1649.)

As to marking the petition or summons with the reference to the record: (see Ch. F. A. O. 1874, r. 17; *sup.* VI.)

(b) *Service and Evidence* [see *post*, 2].

(c) *Order.*

(1) *Where Necessary.*

Money in court shall not be paid out unless in pursuance of an order: (Ch. F. R. 1874, r. 36.)

(2) *Reference to Record* [see *sup.*, VI.]

(3) *Title of Cause and Account* [see *sup.*, VII.]

(4) *Directions.*

As to the ordinary directions: (see *sup.*, VII.)

Every order directing the payment of dividends, annuities, or other periodical payments to be made by the Chancery Paymaster shall (except in the case of dividends directed to be paid as they accrue due) specify the time when the first of such payments, and when all subsequent periodical payments, whether quarterly, half-yearly, yearly, or otherwise, shall be made: (Ch. F. R. 1874, r. 13.)

A prospective order for payment of income may be made: (Dan. 1650.)

The court may provide for payment of an annuity by directing prospective sales of sufficient corpus from time to time : (*Id.*)

Payment to one of several private trustees may be ordered : (Seton, 88, where the usual form is given.)

For form of order in case of charity trustees, see Seton, 89.

In case of a corporation aggregate with a treasurer or other financial officer, payment to him will be directed : (Seton, 92.)

In the case of a corporation sole, the practice is to order payment to him and his successors for the time being : (Seton, 92.)

Where a person is absolutely entitled to corpus, the court will not allow the money to remain in, and order payment of the income only : (Seton, 92.)

Where several persons are entitled to interest for life in succession, the court usually only directs payment to the first for life, with liberty to apply on his death, when a further order must be obtained ; but if husband and wife are so entitled the court will order payment in succession : (Seton, 92.)

(5) Sums, Dates, Amounts, Times of Payment, &c. [see *sup.*, VII.]

(6) Description of Persons.

In the case of trustees, the persons filling the office at the date of the order must be named in it : (Seton, 91.)

A woman, to whom payment is directed, must be described as "spinster," "the wife of, &c.," or "widow" : (*Id.*)

See also *sup.*, VII., 8.

(7) Drawing-up, Printing, Copies, &c. [see *sup.*, VII.]

(d) *How Payment out made generally.*

(1) Request.

Where an order . . . directs payment out of money in court, or of dividends to accrue on securities in court, the Chancery Paymaster may defer giving effect to such direction until a request in writing to give effect thereto has been left at the Chancery Pay Office, but it shall be the duty of the solicitor for the person having the carriage of such order or certificate to leave it and such request at the Chancery Pay Office without unnecessary delay : (Ch. F. R. 1874, r. 37.)

In practice a request is not required : (Dan. Forms, 1075.)

(2) Withdrawing Deposits.

[See Ch. F. R. 1874, rr. 50, 74, 75, *sup.*, IX.]

(3) Withdrawing Investments.

[See Ch. F. R. 1874, rr. 47-49, *post*, XIV.]

(4) Cheque.

For the first dividend an order must be left at the Chancery Pay Office : (Dan. Forms, 1075 ; see Ch. F. R. 1874, r. 38.)

Cheques for subsequent dividends are paid without being bespoken : (Dan. Forms, 1075.)

In acting on orders directing any annuity or maintenance to be paid, or other periodical payments to be made, out of the dividends which have accrued since the 5th day of April, 1871, or which may hereafter accrue on securities in court, or hereafter to be in court, and in respect of which dividends income tax shall have been deducted, the Chancery Paymaster shall draw only for so much of the sums directed by such orders respectively, to be paid as shall remain after making a deduction therefrom at the same rate as the bank shall certify to, except in cases in which such sums shall be directed to be paid, without making any such deduction : (Ch. F. R. 1874, r. 59.)

(5) Under Power of Attorney.

In the case of a corporation dividends are usually received under a power of attorney: (Seton, 92.)

In case of a person entitled to dividends being unable to attend, a special power of attorney prepared in the Chancery Pay Office must be bespoken by a solicitor, who must sign the request in his own name for himself, or if acting for his firm for the firm: (Dan. Forms, 1080.)

On each occasion the existence of the payee's life on the day when payment became due must be proved, by means of a request signed by the payee, under which is written a certificate from the minister and one of the churchwardens, or in the minister's absence from both churchwardens of the parish where the party lives, or if he is abroad a certificate from the ambassador, secretary of embassy, consul-general, or a notary, or by affidavit or statutory declaration: (Dan. Forms, 1081.)

(6) Partners.

When money in court is by an order directed to be paid to any persons described in an order or a certificate of a chief clerk or of a taxing master as co-partners, such money may be paid to any one or more of such co-partners: (Ch. F. R. 1874, r. 53.)

When money in court is payable to any persons as co-partners such money, or any portion thereof, for the time being remaining unpaid may, upon proof of the death of any of such co-partners, ... whether on or after the date of the order directing such payment, ... be paid to the survivors or survivor of them: (*Id.* r. 54.)

(7) Representatives or Survivors of Absolute Owner.

When the money in court is payable to any person named or described in an order or in a certificate of a chief clerk (except to a person therein expressed to be entitled to such money as real estate, or as trustee, executor, or administrator, or otherwise than in his own right or for his own use). Such money or any portion thereof for the time being remaining unpaid may, unless the order otherwise directs, on proof of the death of such person, whether on or after the date of such order, be paid to the legal personal representatives of such deceased person, or to the survivors or survivor of them: (Ch. F. R. 1874, r. 53.)

No money under rule 53 shall be paid to the legal personal representative of any person under any probate or letters of administration purporting to be granted at any time subsequent to the expiration of six years in case such money consists of dividends from the date of the last receipt of such interest or dividends under [the order directing payment]: (Ch. F. R. 1874, r. 56.)

(8) To Surviving Representatives.

When money in court is payable to any persons as legal personal representatives, such money or any portion thereof, for the time being remaining unpaid may, upon proof of the death of any such representatives, whether on or after the date of the order directing such payment be paid to the survivors or survivor of them: (Ch. F. R. 1874, r. 54.)

No money shall, under rule 54, be paid to the legal personal representative of any person under any probate or letters of administration purporting to be granted at any time subsequent to the expiration of six years in case such money consists of interest or dividends from the date of the last receipt of such interest or dividends under [the order directing payment]: (*Id.* r. 56.)

As to dividends on securities transferred or delivered out, see CH. F. R. 1874, rr. 46, 47, 48, 49, *post*, XIV.

(9) To Married Women.

When money in court is directed to be paid to a woman who is not married at the date of the order, and such woman [marries] before payment of such money, such money if it does not in the whole exceed 10*l.* in annual payments, may be paid to such woman and her husband, upon proof of the marriage, and upon an affidavit of such woman and her husband, that no settlement or agreement for a settlement whatsoever has been made or entered into, before, upon, or since their marriage, or in case any such settlement or agreement for a settlement has been made or entered into, then upon an affidavit of such woman and her husband, identifying such settlement or agreement for a settlement, and stating that no other settlement or agreement for a settlement has been made or entered into as aforesaid, and an affidavit of the solicitor of such woman and her husband, that such solicitor has carefully perused such settlement or agreement for a settlement, and that, according to the best of his judgment, such money is not, nor is any part thereof, subject to the trusts of such settlement or agreement for a settlement, or in any manner comprised therein or affected thereby: (Ch. F. R. 1874, r. 52.)

As to where money will be paid out without examination, see MARRIED WOMEN, II.

(e) *Income under Particular Statutes.*

(1) Trustees Relief Act [see TRUSTEES].

(2) Lands Clauses Act [see LANDS CLAUSES ACT].

(3) Copyhold Acts [see COPYHOLD ACTS].

(4) Parliamentary Deposit Act [see *post*, 2].

(5) Railway and Tramway (Private) Bills.

Bills for construction of any new line of railway or tramway, or extending the time for construction, are to contain a clause providing that until repayment on application of the deposit, but not of the penalty, dividends are to be paid to, or on the application of the depositors: (Seton, 1448, citing S. O. H. L. (1876) 116; H. C. (1877) 158.)

(6) Tramways Act.

The depositors shall be entitled to receive payment of the interest or dividends from time to time accruing on the deposit fund while in court; and the court in which the deposit is made may from time to time on the application of the depositors, make such order as seems fit respecting the payment of the interest or dividends respectively: (B. T. R. 27.)

As to the meaning of "depositors," see r. 24, cited *post*, 2.

The application is by petition: (R. 30.)

(7) Legacy Duty Act [see LEGACY DUTY ACT].

(8) Railway Construction Facilities Act.

The depositors [as defined by sect. 39, are] entitled to receive payment of the interest or dividends; and the court may, from time to time, on the application of the depositors, make such order as seems fit respecting the payment of the interest or dividends accordingly (27 & 28 Vict. c. 121, s. 43); and the application is to be made in a summary way: (s. 46.)

2. OF PRINCIPAL.

(a) *Application.*

Application for payment out is by petition or summons: (Dan. 1648.)

The application may only be made by summons when leave to apply at chambers is expressly given, or the fund is small: (Dan. 1648-9.)

As to marking the reference to the record, see *sup.*, VI.

(b) *Service.*

The petition or summons must be served on all the parties to the suit, or if the fund has been carried to a separate account, on all the persons appearing by the heading of the account to be interested therein: (Dan. 1649.)

Where the parties are numerous, and it may be presumed that all are informed, service on all is dispensed with: (*Id.*)

Where shares have been ascertained at a former stage of the cause, one share may be paid out or transferred, without serving persons interested in the other shares: (*Id.*)

As to tendering 42s. costs see Add. R. Aug. 1875, Sp. All. r. 17.

Until a fund is carried to a separate account the representative of the deceased person whose estate is being administered, is a necessary party to any application respecting it: (Wms. on Petitions, 20.)

As to petitions relating to funds undealt with for fifteen years: (see *sup.*, IV.)

Where a married woman entitled to the fund as separate estate petitions, service must be effected on her husband: (*Re Croughton*, L. Rep. 8 Ch. Div. 460.)

(c) *Evidence.*

Besides the evidence afforded by the chief clerk's certificate and previous orders in the cause, and such other evidence as would be needed on other applications, the Paymaster-General's certificate of the amount should be obtained: (see Dan. 1650.)

On a petition for payment out, when the evidence is complicated, or the persons representing a class or family are numerous, to save time, the whole matter is usually adjourned for consideration in chambers: (Seton, 54.)

A summons to proceed is then taken out, and the order may be made in chambers: (*Id.*)

A minute of the order and of the evidence is written on the fold of the original petition, and sent to the registrar who draws up the order: (*Id.*)

(d) *Order.*

(1) *Where Necessary.*

Money in court shall not be paid out . . . , unless in pursuance of an order: (Ch. F. R., 1874, r. 36.)

(2) *Reference to Record* [see *sup.*, VI.]

(3) *Title of Cause and Account* [see *sup.*, VII.]

(4) *Directions.*

As to the ordinary directions, see *sup.*, VII., 3.

A prospective order dealing with the purchase money of an estate contracted to be sold will not be made: (Dan. 1650.)

But a prospective order was made for payment to an infant on his attaining his majority in the Long Vacation: (*Fielden v. Hornby*, W. N., 1870, p. 213.)

Payment out of the assets of a testator will not be ordered until the rights have been ascertained by taking accounts, or the executors undertake the responsibility: (Williams on Petitions, 21.)

Payment to one of several trustees may be ordered: (Seton, 88, where the usual form is given.)

[See also *sup.*, I.]

- (5) Sums, Dates, Amounts, &c. [see *sup.*, VII.]
- (6) Description of Persons [see *sup.*, VII.; XIII., 1.]
- (7) Drawing up, Printing, Copies, &c. [see *sup.*, VII.]

(e) *How Payment out Made Generally.*

- (1) Request [see *sup.*, I. (d) (1).]

In practice the request is not required, it being sufficient to leave the order at the Chancery Pay Office : (Dan. Forms, 1082.)

- (2) Withdrawing Deposit [see *sup.*, IX.]
- (3) Withdrawing Investment [see *post*, XIV.]
- (4) Ascertaining Residues and Aliquot Parts.

In the case of residues, and aliquot or proportionate parts, of moneys, securities, dividends, or interests, the amount of which cannot be ascertained at the date of the order, the amounts may be ascertained in manner provided by rules 10 and 86 : (Ch. F. R. 1874, r. 8 ; see *sup.*, VII., *post*, XV.)

When evidence is required by the Chancery Paymaster for the purpose of ascertaining the amounts of any residue or aliquot or proportionate part of money or securities dealt with by an order, or for otherwise carrying into effect the directions of an order, he may, without any direction in such order for that purpose, receive and act upon an affidavit, or upon a statutory declaration under the Act of 5 & 6 Will. 4, c. 62, instead of an affidavit, and every such statutory declaration shall be filed in the [Central] Office when the Chancery Paymaster shall consider it necessary : (Ch. F. R., 1874, r. 86.)

(5) *Cheque and Directions for Payment.*

When money in court is to be paid out (except in the cases provided for by rules 41 [see *infra*], 57, and 58, the Chancery Paymaster shall cause a cheque or other sufficient authority or direction for the payment of the same to be issued. Such cheque or authority or direction for payment shall state the title of the cause or matter in the books at the Chancery Pay Office to which the money paid is to be debited, the date of the order or other authority in pursuance of which, and the name of the person to whom, the payment is to be made, or so much of the particulars of such payment as the Chancery Paymaster may deem necessary ; and such cheque or authority or direction, duly endorsed by the payee named therein or his lawful attorney, or an acknowledgement of receipt signed by such payee or his attorney, shall be a good discharge to the Chancery Paymaster for the amount therein mentioned : (Ch. F. R., 1874, r. 38.)

Rule 41 relates to payment to official persons only, in which case, on receiving a requisition the Chancery Paymaster directs the bank to write off the amount from the court account, and to place it to the account of the official person at the bank.

The Chancery Paymaster, before acting upon an order for the payment, transfer, or delivery of money or securities in respect of which legacy or succession duty is stated to be payable [requires] the production of the official receipt for such duty, or a certificate from the proper officer of the payment thereof : (Ch. F. R., 1874, r. 57.)

The rest of the rule relates only to transferring sums payable for duty to the account of the Inland Revenue.

Rule 58 relates only to carrying over fees of taxation : (see *sup.*, XI.)

- (6) Under Power of Attorney [see *sup.*, I. (d) (5).]

(7) *To Partners.*

And where money in court is by an order directed to be paid to any persons described in an order or a certificate of a chief clerk, or of a

taxing master, as co-partners, such money may be paid to any one or more of such co-partners: (Ch. F. R. 1874, r. 53.)

When money in court is payable to any persons as co-partners such money, or any portion thereof for the time being remaining unpaid, ... may upon proof of the death of any such co-partners whether on or after the date of the order directing such payment be paid to the survivors or survivor of them: (Ch. F. R. 1874, r. 54.)

(8) To Representatives or Survivors of Absolute Owner.

When the money in court is payable, or securities in court are transferable, or deliverable to any person named or described in an order, or in a certificate of a chief clerk, or of a taxing master, ... (except to a person therein expressed to be entitled to such money or securities as real estate, or to be entitled thereto as a trustee, executor, or administrator, or otherwise than in his own right, or for his own use), such money or securities or any portion thereof for the time being remaining unpaid or untransferred or undelivered may, unless the order otherwise directs, on proof of the death of such person, whether on or after the date of such order, be paid or transferred, or delivered to the legal personal representatives of such deceased person, or to the survivors or survivor of them: (Ch. F. R. 1874, r. 53.)

No money or securities shall, under rule 53 be paid, transferred, or delivered out of court to the legal representatives of any person under any probate or letters of administration, purporting to be granted at any time subsequent to the expiration of six years from the date of the order directing such payment, transfer, or delivery: (Ch. F. R. 1874, r. 56.)

When the fund is small, production of letters of administration is sometimes dispensed with: (Wms. Pet. 28.)

A person is presumed to be dead at the end of seven years after he has last been heard of, and the onus of proving that he survived to any particular time after his disappearance lies on those who allege it: (*Re Phené's Trust*, L. Rep. 5 Ch. App. 139; *Re Lewes Trusts*, L. Rep. 6 Ch. App. 356.)

As to the evidence required to enable the court to arrive at the date, see *Hickman v. Upsall*, L. Rep. 4 Ch. Div. 144; 35 L. T. Rep. N. S. 919; 46 L. J. 245, Ch.; 25 W. R. 175.

Where a trust is declared by deed in favour of a named person, such person must, until the contrary is shown, be taken to have been in existence at the date of the deed; and the onus of proving his death before that date lies on the representatives of the settlor: (*Re Corbishley's Trusts*, L. Rep. 14 Ch. Div. 846; 49 L. J. 266, Ch.; 28 W. R. 536.)

(9) To Surviving Representatives.

When money in court is payable, or securities in court are transferable or deliverable to any persons as legal personal representatives, such money or securities, or any portion thereof for the time being remaining unpaid, untransferred, or undelivered, may, upon proof of the death of any of such representatives, whether on or after the date of the order directing such payment, transfer, or delivery, be paid, transferred, or delivered to the survivors or survivor of them: (Ch. F. R. 1874, r. 54.)

No money or securities shall, under rule 54, be paid, transferred, or delivered out of court to the legal personal representatives of any person under any probate or letters of administration purporting to be granted at any time subsequent to the expiration of six years from the date of the order directing such payment, transfer, or delivery: (Ch. F. R. 1874, r. 56.)

(10) To Married Women.

Where money in court is directed to be paid . . . to a woman who is not married at the date of the order, and such woman [marries] before payment of such money, . . . such money if it does not in the whole exceed 200*l.* of principal money . . . may be paid . . . to such woman and her husband, upon proof of the marriage, and upon an affidavit of such woman and her husband that no settlement or agreement for a settlement whatsoever has been made or entered into, before, upon, or since their marriage; or in case any such settlement or agreement for a settlement has been entered into, then upon an affidavit of such woman and her husband, identifying such settlement or agreement for a settlement, and stating that no other settlement or agreement for a settlement has been made or entered into as aforesaid, and an affidavit of the solicitor of such woman and her husband, that such solicitor has carefully perused such settlement or agreement for a settlement, and that, according to the best of his judgment, such money is not, nor is any part thereof, subject to the trusts of such settlement or agreement for a settlement, or in any manner comprised therein or affected thereby: (Ch. F. R. 1874, r. 52.)

A sum has been paid out to a married woman, although she was restrained from anticipation: (*Re Croughton's Trusts*, L. Rep. 8 Ch. Div. 460; 38 L. T. Rep. N. S. 447; 26 W. R. 574.)

As to when money will be paid out to a married woman without her separate examination, see MARRIED WOMEN, II.

No examination is necessary where a married woman is entitled for her separate use: (Dan. 94.) The practice for her is to petition alone by her next friend, and for payment to be made to her on her separate receipt: (Seton, 667.)

But whether the married woman is entitled for her separate use or not, an affidavit of no settlement by husband and wife is required, unless the amount is small. If there is a settlement; the settlement must be identified by the affidavit of husband and wife as the only settlement, and the court or, in chambers the chief clerk, will inspect the deed. In court, a certificate of counsel will satisfy the court without inspection: (see Seton, 660-1; *Hamilton v. Arrowsmith*, W. N. 1877, p. 261.)

The affidavit of the woman alone will be taken as sufficient if:

The husband is abroad;

The wife has a protection order;

The husband refuses to make the affidavit: (Seton, 671.)

Where the woman is a widow: (*Id.*)

Where both husband and wife were abroad, the affidavit of the solicitor was allowed: (*Id.*)

Where the fund is very small, the affidavit will be dispensed with altogether: (*Veal v. Veal*, L. Rep. 4 Eq. 115.)

Where a woman will be absolutely entitled if she has no children, the court will order payment out to her when she is of a certain age, generally fifty, and is either unmarried, or married for many years without any children: (see cases cited in *Croxtan v. May*, L. Rep. 9 Ch. Div. 388; 39 L. T. Rep. N. S. 461; 27 W. R. 325.)

The court refused to make an order for the payment of money out of court on the presumption that the woman aged fifty-four years and six months, and who had never had any children, but had only cohabited with her husband three years, was past childbearing: (*Croxtan v. May*, *sup.*; *Archer v. Dowsing*, W. N. 1879, p. 43.)

Where a wife is entitled to money in court as administratrix or executrix, payment is directed to be made "to B., the wife of A., as the legal

personal representative of C., deceased," but the Chancery Paymaster requires the husband to join in the receipt: (Seton, 669.)

(d) *Payment of Principal under Particular Statutes.*

(1) *Judicature Acts.—Defendant Pleading Payment.*

Money paid into court [by a defendant pleading payment into court] may, unless otherwise ordered by a judge, be paid out to the plaintiff, or to his solicitor on the written authority of the plaintiff. No affidavit shall be necessary to verify the plaintiff's signature to such written authority unless specially required by the officer of the court: (O. XXX., r. 3.)

The Paymaster-General requires an order of court before he will pay out the money: (Dan. Forms, 1082.)

The plaintiff, if payment into court is made before delivering a defence, may, within four days after receipt of notice of such payment, or if such payment is first stated in a defence delivered, then may, before reply, accept the same in satisfaction of the causes of action in respect to which it is paid in; in which case he shall give notice to the defendant in the form No. 6 in Appendix (B) [to the Rules of 1875], and shall be at liberty, in case the sum paid in is accepted in satisfaction of the entire cause of action, to tax his costs, and, in case of nonpayment within forty-eight hours, to sign judgment for his costs so taxed: (O. XXX., r. 4.)

(2) *Trustee Relief Act.*

[See TRUSTEES].

(3) *Lands Clauses Act.*

[See LANDS CLAUSES ACT].

(4) *Copyhold Acts.*

[See COPYHOLD ACTS].

(5) *Parliamentary Deposit Act.*

On the termination of the session of Parliament in which the petition or bill for . . . making or sanctioning [the] work or undertaking, [has] been introduced into Parliament, or if such petition or bill [is] rejected or finally withdrawn . . . or . . . not . . . allowed to proceed, or if the person or persons by whom the . . . money was paid or security deposited fails to present a petition, or if an Act [is] passed authorising the . . . work or undertaking, and if in any of the foregoing cases the person or persons named in [the] warrant or order, or the survivors or survivor of them, or the majority of such persons, apply by petition to the court, the court shall by order direct the . . . money paid, or the stocks, funds, or securities, in or upon which the same may have been invested, and the interest or dividends thereof, or the Exchequer bills, stocks, or funds so deposited or transferred [in lieu of payment in], and the interest and dividends thereof to be paid or transferred to the party or parties . . . applying, or to any other person or persons whom they may appoint in that behalf: (9 & 10 Vict. c. 21, s. 5.)

It is sufficient if the majority of the depositors petition; (Dan. 1859.)

The signatures of the petitioners, verified by affidavit, are sufficient authority for a payment to their nominee: (*Id.*)

When the signatures were attested by the solicitor, the affidavit was dispensed with: (*Ex parte Brompton Waterworks*, 8 W. R. 636 n.)

Where the common seal of a public company is affixed to the original petition, payment will be ordered to its nominee without the seal being verified: (Dan. 1859.)

Payment out will not be ordered on the withdrawal of part of a bill: (Dan. 1859; but see *Re Wigan Junction Railway*, L. Rep. 10 Ch. App. 541.)

No such order shall be made in the case of any such petition or bill.

being rejected or not allowed to proceed, or being withdrawn or not being presented, or of an Act being passed authorising the making of such work or undertaking, unless upon the production of the certificate of the chairman of committees of the House of Lords with reference to any proceeding in the House of Lords, or of the Speaker of the House of Commons with reference to any proceeding in the House of Commons, that the petition or bill was rejected or not allowed to proceed, or was withdrawn during its passage through one of the Houses of Parliament, or was not presented, or that such Act was passed, which certificate the said chairman or speaker shall grant on the application in writing of the person or persons, or the majority of the persons named in such warrant, or the survivor or survivors of them: (9 & 10 Vict. c. 20, s. 5.)

The certificate may be signed by the Deputy-Speaker: (*Re Stocksbridge Railway Bill*, L. Rep. 2 Eq. 364.)

(6) Railway and Tramway (Private) Bills.

Where the bill is promoted by persons not incorporated, or by an existing company, if the capital to be raised under the bill is greater than its existing authorised capital, a clause is to be inserted providing that notwithstanding anything contained in the Parliamentary Deposit Act (see *sup.*, 5) the deposit shall not be paid or transferred out, unless the company shall complete the work within the time limited, or prove to the satisfaction of the Board of Trade that the company have paid up one half of the capital, and expended an equal sum for the purposes of their Act: (Seton, 1458, citing S. O. H. L. (1876) 115; S. O. H. C. (1877) 158); and further, that on the opening of a portion of the line within such time (as certified by the Board of Trade) a proportionate part of the deposit may be paid or transferred out: (*Id.* citing S. O. H. C. (1877) 158.)

In all bills for the construction, or extending time for construction, of railways or tramways, a clause is to be inserted, providing that on non-compliance with the above provisions the deposit and penalty money is to be applied in compensating landowners, and (in the case of tramways) road authorities, and, subject thereto, is either to be forfeited to the Crown, or in the discretion of the court, if the company is insolvent, and has been ordered to be wound-up, or a receiver has been appointed, shall wholly or in part be paid or transferred to such receiver, or to the liquidator or liquidators of the company, or to be otherwise applied as part of the assets of the company for the benefit of the creditors thereof: (Seton, 1458, citing S. O. H. L. (1876) 116; S. O. H. C. (1877), 158.)

A clause is to be inserted in every railway bill, under which money is to be raised, prohibiting payment thereout of any other railway parliamentary deposit: (Seton, 1449, citing S. O. H. L. (1876), 129; S. O. H. C. (1877), 168.)

(7) Tramways Act.

In the subsequent provisions of [the Board of Trade] Rules, the term "the deposit fund" means the money deposited, or the stocks, funds, or securities in which the same is invested, or the bank annuities, stocks, funds, securities, or Exchequer bills transferred or deposited, as the case may be; and the term "the depositors" means the person named in the warrant of the Board of Trade authorising the deposit, or the majority or survivors of those persons, their executors, administrators, or assigns: (B. T. R. 24.)

The court in which the deposit is made shall, on the application of the depositors, order the deposit fund to be paid or transferred to the applicants, or as they direct, if, within the time by the provisional order

prescribed, and if none is prescribed, then within two years from the commencement of the operation of the provisional order, the promoters thereby empowered to make the tramway, complete it, and open it for public traffic: (B. T. R. 25.)

If within such time as aforesaid any portion of a line of tramway authorised by a provisional order is opened for public traffic, the said court shall, on production of a certificate purporting to be signed by a secretary or assistant secretary of the Board of Trade, that such portion has been opened, and specifying the proportion of the deposit fund to be so paid, order a proportionate amount of the deposit fund to be paid to the depositors, or as they direct: (B. T. R. 25.)

If the promoters empowered by the provisional order to make the tramway do not, within the time in the provisional order prescribed, and if none is prescribed, then within two years from the commencement of the operation of the provisional order, complete the tramway and open it for public traffic, then and in every such case the deposit fund, or so much thereof as shall not have been repaid to the depositors, shall, from and after the expiration of the time aforesaid, be applicable, and after due notice in the *London Gazette*, shall be applied towards compensating all road authorities for the expense incurred by them in taking up any tramway or material connected therewith placed by the promoters in or on any road vested in or maintainable by such road authorities respectively, and in making good all damage caused to such roads by the construction or abandonment of such tramway, and shall be distributed in satisfaction of such compensation in such manner and in such proportions as to the [Chancery Division] may seem fit: (B. T. R. 26.)

If no such compensation [to road authorities] shall be payable, or if a portion of the said deposit fund shall have been found sufficient to satisfy all just claims in respect of such compensation, then the said deposit fund, or such portion of it as may not be required as aforesaid, shall either be forfeited to Her Majesty, and shall accordingly be paid or transferred to or for the account of Her Majesty's Exchequer in such manner as the court in which the deposit is made thinks fit to order, on the application of the solicitor of Her Majesty's Treasury, on notice to parties (if any) as the court thinks fit; and the deposit fund when so paid or transferred, or the proceeds thereof, shall be carried to and form part of the Consolidated Fund of the United Kingdom; or, in the discretion of the court, if the promoters are a company, and such company is insolvent or has been ordered to be wound up, or a receiver has been appointed, shall wholly or in part be paid or transferred to such receiver, or to the liquidator or liquidators of the company, or be otherwise applied as part of the assets of the company for the benefit of the creditors thereof: (B. T. R. 26.)

If either House of Parliament refuse to confirm any provisional order in respect whereof a deposit has been made under [these] rules, or authorise a portion only of any tramway comprised in such order, or if any such provisional order be withdrawn before the same is confirmed by Parliament, the court shall, upon production of a certificate to that effect purporting to be signed by a secretary or assistant secretary to the Board of Trade, order the deposit fund or a proportionate part thereof, as the case may be, to be paid to the depositors, or as they shall direct: (B. T. R. 28.)

Any application under these rules to the court . . . shall be made in a summary way by petition: (B. T. R. 30.)

The intention of the Board of Trade regulations under the Tramways Act, 1870, relative to the ultimate disposal of the deposits made by a

tramway company on obtaining a provisional order authorising the construction of their tramway, is (1) that the promoters of the company are not, by any subterfuge or device, to get back the deposit, either directly or indirectly, if the tramway is not completed; (2) That, on an application under the 28th rule for application of the deposit, the creditors only are to be considered, and not the shareholders; and (3), that the only creditors to be considered are meritorious creditors coming with a *bonâ fide* case, otherwise the deposit will be forfeited to the Crown: (*Re Lowestoft, Yarmouth, and Southwold Tramways Company*, L. Rep. 6 Ch. Div. 484; 36 L. T. Rep. N. S. 578; 46 L. J. 393, Ch.; 25 W. R. 525.)

The deposit is to be resorted to so far only as is necessary for paying creditors, and no order can be made for applying any part of it as assets of the company, until it is ascertained that in the winding-up there are debts which cannot be paid by means of calls: (*Re Bradford Tramways Company*, L. Rep. 4 Ch. Div. 18; 46 L. J. 89, Ch.; 25 W. R. 88.)

(8) Railway Construction Facilities Act.

In the subsequent provisions of [the] Act the term "the deposit fund" means the money deposited, or the stocks, funds, or securities in which the same is invested, or the bank annuities, stocks, funds, securities, or Exchequer bills deposited as the case may be; and the term "the depositors" means the persons named in the warrant of the Board of Trade authorising the deposit, or the majority or survivors of those persons, their executors, administrators, or assigns: (27 & 28 Vict. c. 121, s. 40.)

The court . . . shall, on the application [in a summary way] of the depositors, order the deposit fund to be paid, transferred, or delivered out to the applicants, or, as they direct, in any of the following events:

[First] If within the time in the certificate prescribed, and if none is prescribed, then within five years from the commencement of the operation of the certificate, the company or persons thereby empowered to make the railway, complete it and open it for public traffic.

[Secondly] If, within the same time, they (being a company) prove to the satisfaction of the Board of Trade that a half of their nominal capital authorised by the certificate is paid, and that they have expended a like amount for the purposes of the certificate; or,

[Thirdly] If at any time after the issuing of the certificate they execute and deliver to the solicitor of Her Majesty's Treasury a bond [as mentioned in the Act]: (s. 40.)

If the company or persons do not, within the times mentioned in sect. 40, do one of the acts there mentioned the deposit fund is forfeited to Her Majesty: (see s. 41.)

The certificate of the Board of Trade . . . respecting . . . capital . . . and expenditure . . . and the certificates of the [Treasury] solicitor . . . that such bond . . . has . . . been prepared [&c., are] sufficient evidence: (s. 44.)

XIV. TRANSFER AND DELIVERY OUT.

1. APPLICATION.

[See *sup.*, XIII., 2, (a).]

As to marking the reference to the record, see *post*, VI.

2. SERVICE.

[See *sup.*, XIII., 2, (b).]

3. EVIDENCE.

[See *sup.*, XIII., 2, (c).]

4. ORDER.

(a) *Where necessary.*

Securities in court shall not be transferred or delivered out and a certificate shall not be issued for the transfer or delivery out of securities in court, unless in pursuance of an order: (Ch. F. A. 1872, s. 10; Ch. F. R. 1874, r. 36.)

(b) *Reference to Record* [see *sup.*, VI.](c) *Title of Cause and Account* [see *sup.*, VII.](d) *Directions.*

As to the ordinary directions, see *sup.*, VII., 3; XIII., 2, (d) (4).

A fund may be ordered to be transferred from one cause to another upon a petition or summons entitled only in the former cause: (Dan. 1658.)

A transfer may be ordered to the High Court of Justice in Ireland: (*Id.*)

A transfer may be ordered to the Lancaster Palatine Court, or the Court of Bankruptcy: (Seton, 99.)

(e) *Sums, Dates, Amounts, &c.* [see *sup.*, VII.](f) *Descriptions of Persons* [see *sup.*, VII; XIII., 1].(g) *Drawing up, Printing, Copies, &c.* [see *sup.*, VII.]

5. HOW TRANSFER OR DELIVERY MADE GENERALLY.

(a) *Certificate of Order.*

The certificate of the registrar countersigned by the Paymaster-General [is] sufficient evidence of the order referred to in the certificate, and of the directions contained in such order, and a sufficient authority to the Bank: (Ch. F. R. 1874, r. 42.)

No certificate shall be issued by a registrar of the court, except on the production of the original order, or an office copy thereof, if the absence of the original order shall be accounted for to the satisfaction of such registrar: (Ch. F. R. 1874, r. 42.)

Every certificate for the transfer or delivery of securities in court shall express the exact amount and description of securities to be transferred or delivered out: (Ch. F. R. 1874, r. 42.)

When the amount at the time of issuing the certificate does not appear by any document which can be referred to, the amount must be referred to as "at the date of the order in court, &c.": (Seton, 105.)

A certificate cannot be granted to raise a sum of money and transfer the residue of the securities, or to sell certain securities, and so much of another amount as, with the produce of the first sale, will make up a given sum: (Seton, 105.)

No two descriptions of stock can be included in one certificate, but any number of transfers and sales of the same, whether standing to the same or different accounts, may be included in one certificate: (Seton, 105.)

Where stock is directed to be sold or transferred out when transferred into court or carried over subsequently to the date of the order, the office copy of the certificate of the transfers in or carrying over must be produced and referred to in the certificate of sale or transfer: (*Id.*)

When any cash to be paid in after the date of the order is to be taken in aid, an office copy of such payment in must be produced and referred to in the certificate of sale or transfer: (*Id.*)

When so much stock is ordered to be sold, as with an ascertained amount of cash, will raise a sum of money, the actual balance to be raised ought to be stated in the order and certificate: (*Id.*)

The language of the order is to be followed as nearly as may be.

Dates to be inserted in figures, sums in words, and no abbreviations are to be used. The short title of the cause or matter, thus: "*A. v. B.*, 1876, A. 100," or "*In re C. D.*," with the folio of entry in the registrar's books, are to be written at the head of the certificate, and the reference to the record is to be added from the order. The certificate is to be marked by the registrar's clerk as examined before being signed by the registrar: (Ch. Reg., 15th March, 1860, r. 39.)

A memorandum of the issuing of the certificate is written in the margin of the order, and initialled by the registrar: (Seton, 105.)

If the person to whom the stock is to be transferred is a party, he is described as "the plaintiff or defendant A.," or if not a party, as "in the said order named": (*Id.*)

As to evidence required on granting certificates, after death, see *post*.

(b) *Dividends.*

When securities in court are directed to be transferred or delivered out, dividends accruing thereon subsequently to the date of the order directing the transfer or delivery (when the amount of the securities to be transferred or delivered is specified in such order, or if not so specified then subsequently to the time when the amount of such securities shall be ascertained), shall be paid to the persons to whom the securities are to be transferred or delivered, unless such order otherwise directs: (Ch. F. R., 1874, r. 46.)

When, under an order directing the transfer or delivery of securities, dividends accruing thereon would be payable to the persons to whom such securities are directed to be transferred or delivered, and pursuant to a general or other previous order such dividends have been invested, the securities purchased with such dividends shall, unless otherwise directed, be transferred or delivered, and any dividends accrued in respect thereof shall be paid to such persons: (Ch. F. R., 1874, r. 47.)

In every case (other than that provided for by the last preceding rule), when by an order dividends are directed to be dealt with so that the same ought not to be invested, and subsequently to the date of such order such dividends or any part thereof shall have been invested, the securities purchased with such dividends shall, unless otherwise directed, be sold, and the proceeds of such sale and any dividends accrued in respect of such securities shall be applied in the same manner as the dividends so invested would have been applied under such order, if they had not been so invested: (Ch. F. R. 1874, r. 48.)

In the cases provided for by the last two preceding rules, the registrars of the court . . . may, upon production to them of a certificate of such investment as therein mentioned, issue certificates for transfer, delivery, or sale, according to the provisions of the said rules: (Ch. F. R., 1874, r. 49.)

(c) *Ascertaining Residue or Aliquot Shares* [see *sup.*, XIII.; *post*, XV.]

(d) *Direction.*

When securities in court are to be transferred or delivered out, and a registrar of the court . . . has issued a certificate authorising such transfer or delivery, the Chancery Paymaster shall issue a direction for such transfer or delivery, and specify in such direction the title of the cause or matter to the credit of which such securities are standing in the books at the Chancery Pay Office, and the amount and description of the securities to be transferred or delivered, and the name of the person to whom the transfer or delivery is to be made: (Ch. F. R. 1874, r. 45.)

(e) *Bank Certificate.*

Upon the receipt of such direction, and of the certificate of a registrar

of the court authorising such transfer or delivery, countersigned by the Chancery Paymaster, the bank, or body corporate, or company, in whose books, or with whom, such securities shall be standing or deposited, shall cause such transfer or delivery to be made by their proper officer, and shall send such direction to the Chancery Pay Office, with a certificate thereon that the transfer or delivery therein mentioned has been made to the person named therein : (Ch. F. R. 1874, r. 45.)

(f) *To Partners* [see the parts of rr. 53, 54, set out *sup.*, XIII., 2, (e) (7)].

(g) *To Representatives or Survivor of Absolute Owner.*

[See the parts of rr. 53, 56, set out *sup.*, XIII., 2, (e) (8)].

On granting a certificate the registrar requires an affidavit of identity (for form of which see Seton, 106), a certificate of burial, or an official extract from the register of deaths; and, where the transfer is to be made to representatives of a sole owner, the probate or letters of administration : (Ch. Reg. 15th March, 1860, r. 40.)

(h) *To Surviving Representatives.*

[See the parts of rr. 54, 56, set out *sup.*, XIII., 2, (e) (9).]

In the case of securities transferable or deliverable [to representatives under r. 53 or 54] the registrar may (upon proof of the death of any of such representatives) issue a certificate authorising the transfer or delivery of such securities, or to the survivors or survivor of them : (Ch. F. R. 1874, r. 55.)

If the order direct transfer or delivery to the representatives when constituted of a deceased person, and any of such representatives be dead, the registrar before granting his certificate requires the probate or letters of administration, an affidavit of identity, and a certificate of burial of the deceased representative, or an official extract from the register of deaths : (Ch. Reg. 15th March, 1860, r. 40.)

If the order direct transfer or delivery to any persons named in the order as representatives of a deceased person, an affidavit of identity, and certificate of burial, or extract from register of death only, are required : (*Id.*)

Forms of affidavits of identity are given in Seton, 106.

(i) *To Married Women.*

When securities in court are directed to be transferred or delivered to a woman who is not married at the date of the order, and such woman shall marry before transfer or delivery of such securities, ... such securities, if they or the aggregate of such securities do not exceed in value 200*l.* sterling, may be transferred or delivered to such woman and her husband, upon proof of the marriage, and upon an affidavit of such woman and her husband that no settlement or agreement for a settlement whatsoever has been made or entered into before, upon, or since their marriage; or, in case any such settlement or agreement for a settlement has been made or entered into, then, upon an affidavit of such woman and her husband, identifying such settlement or agreement for the settlement, and stating that no other settlement or agreement for a settlement has been made or entered into as aforesaid, and an affidavit of the solicitor of such woman and her husband, that such solicitor has carefully perused such settlement or agreement for a settlement, and that according to the best of his judgment such securities are not, nor is any part thereof, subject to the trusts of such settlement or agreement for a settlement, or in any manner comprised therein or affected thereby; and upon proof of the marriage and production of such affidavit, the registrar may issue a certificate

authorising the transfer or delivery of such securities to such woman and her husband: (Ch. F. R. 1874, r. 52.)

And see *sup.*, XIII., 2, (e), (10).

6. TRANSFER AND DELIVERY UNDER PARTICULAR STATUTES.

[See *sup.*, XIII., 2, (f).]

XV. ASCERTAINING SHARES AND COMPUTING INTEREST.

In the case of residues and aliquot or proportionate parts, of money, securities, dividends, or interest, the amount of which cannot be ascertained at the date of the order, the amounts may be ascertained in manner provided by rules 10 and 86: (Ch. F. R. 1874, r. 8.)

Money, dividends, or interest directed by an order to be paid into court, the amount of which cannot be ascertained at the date of the order, may be ascertained in like manner: (*Id.*)

If the day to which interest is to be computed cannot be fixed by the order, the day from which (exclusive) such interest is to be computed shall (except in the case of a computation of subsequent interest from the foot of the certificate of a chief clerk) . . . be stated in the order, and such interest may be directed to be computed and certified by a chief clerk . . . or (where the computation is dependent upon the taxation of costs) by a taxing master: (Ch. F. R. 1874, r. 10.)

When interest is certified by a chief clerk . . . or a taxing master, such interest may, unless the order otherwise directs, be computed to a day subsequent to the date of the certificate and to be named therein as the day for payment, so as to allow a reasonable time for doing all necessary acts to enable the payment to be made: (Ch. F. R. 1874, r. 10.)

The chief clerk . . . or taxing master, may, if he thinks fit, require a statement in writing of such computation, authenticated by the signature of the solicitor of the person having the carriage of the order, to be produced before preparing the certificate, but no affidavit verifying such computation shall be required: (Ch. F. R. 1874, r. 10.)

When the day for payment cannot be fixed by the order, and the interest is not directed to be certified in manner aforesaid, the order may direct the interest to the day for payment to be ascertained by an affidavit, or by a statutory declaration, in which case such interest shall be computed to a day (inclusive) to be named in such affidavit or declaration, as the day for payment, and which day shall not be more than ten days after the day of swearing such affidavit, or making such declaration: (Ch. F. R. 1874, r. 10.)

Such affidavit or declaration shall be a sufficient authority to the Chancery Paymaster to pay or apply the amount of interest so ascertained in the manner directed by such order: (Ch. F. R. 1874, r. 10.)

And in every case in which interest is to be computed, income tax (if any) shall, in making such computation, be deducted therefrom at the rate payable during the time such interest accrues, unless the order otherwise directs; and it shall be stated in every such affidavit or declaration as aforesaid that income tax, if any, has been deducted: (Ch. F. R. 1874, r. 10.)

When evidence is required by the Chancery Paymaster for the purpose of ascertaining the amounts of any residue or aliquot or proportionate part of money or securities dealt with by an order, or for otherwise carrying into effect the directions of an order, he may, without any directions in such order for that purpose, receive and act upon an affidavit; and every

such statutory declaration shall be filed in the report office when the Chancery Paymaster shall consider it necessary: (Ch. F. R. 1874, r. 86.)

XVI. VERIFYING DOCUMENTS.

The execution of such document shall be certified by a master in lunacy or by a chief clerk, or may be verified by affidavit if the order by which such execution is required shall so direct: (Ch. F. R. 1874, r. 11.)

XVII. PROVISIONS AS TO LEGACY AND SUCCESSION DUTY.

The Chancery Paymaster, on receiving notice from the proper officer that [legacy or succession] duty is payable [causes] a memorandum to be made in his books in conformity with such notice: (Ch. F. R. 1874, r. 57.)

Every petition for dealing with money or securities in court, chargeable with duty payable to the revenue under the Acts relating to legacy or succession duty, or the dividend on such securities, shall contain a statement whether such duty or any part thereof has or has not been paid: (Ch. F. A. O. 1874, r. 11.)

When an order [has] been left at the Chancery Pay Office, for the purpose of giving effect to any direction for the transfer of any [legacy or succession] duty to the account of the Receiver-General of Inland Revenue at the bank, together with the requisition of the Commissioners of Inland Revenue for such transfer, and such other evidence as may be necessary for verifying the amount of such duty, the Chancery Paymaster [directs] the bank to transfer the amount of such duty to the said account in, and [debts] such amount to the proper account in the books at the Chancery Pay Office: (Ch. F. R. 1874, r. 57; and see Seton, 113; *sup.*, VII.)

XVIII. CERTIFICATES OF DEALING WITH FUNDS.

When securities have been purchased, sold, transferred or delivered out, or money or securities have been carried over, or otherwise dealt with in the books at the Chancery Pay Office, the Chancery Paymaster may in his discretion issue a certificate thereof, upon a request in writing made by or on behalf of any person claiming to be interested in such money or securities: (Ch. F. R. 1874, r. 89.)

The registrars of the court shall not, without a special direction of a judge, be required to issue certificates for the sale, transfer, or delivery of securities in court during any vacation in their office: (Ch. F. A. O. 1874, r. 12.)

PENDING PROCEEDINGS.

[See JURISDICTION.]

PERPETUATING TESTIMONY.

[See EVIDENCE.]

PETITION.

- I. INTERPRETATION.
- II. WHERE PROPER MODE OF APPLYING.
- III. PETITIONS OF COURSE.
- IV. SPECIAL PETITIONS.
 1. PREPARATION.
 - (a) *Address and Title.*
 - (b) *Reference to Record.*
 - (c) *Name and Address of Petitioner.*
 - (d) *Paragraphs, &c.*
 - (e) *Statement as to Service.*
 2. HOW DISABLED PERSONS PETITION.
 3. HOW PAUPERS PETITION.
 4. HOW COMPANIES PETITION.
 5. PRESENTING AND ANSWERING.
 6. SERVICE.
 - (a) *On whom.*
 - (b) *Time.*
 - (c) *How Effected.*
 - (d) *Substituted Service.*
 - (e) *Service out of Jurisdiction.*
 7. GUARDIAN AD LITEM.
 8. SETTING DOWN.
 9. HEARING.
 10. EVIDENCE.
 11. AMENDMENT.
 12. CHANGE OF PARTIES [see PARTIES, VI.]
 13. ADJOURNMENT.
 14. RESTORATION TO PAPER.
 15. FILING.
- V. ORDER ON PETITION.
 1. OF COURSE [see *sup.*, III.]
 2. ON SPECIAL PETITION.
 - (a) *Drawing Up, &c.*
 - (b) *Enforcing* [see EXECUTION.]
- VI. COSTS.

I. INTERPRETATION.

In the construction of the [Acts and Rules] unless there is anything in the subject or context repugnant thereto :

- “Plaintiff” shall include every person asking any relief (otherwise than by way of counter-claim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.
- “Petitioner” shall include every person making any application to the court, either by petition, motion, or summons, otherwise than as against any defendant.
- “Defendant” shall include every person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings.
- “Matter” shall include every proceeding in the court not in a cause.
- “Pleading” shall include any petition or summons: (J. A., 1873, s. 100; O. LXIII., r. 1; *Id.*, r. 2, April, 1880.)

II. WHERE PROPER MODE OF APPLYING.

Besides the cases in which applications are, under special statute, to be

made by petition; as a general rule, where any long or intricate statement of facts is required, the application should be by petition, and all applications for orders which partake more of the nature of judgments than of interlocutory proceedings should be by petition: (see Dan. 1434.)

III. PETITIONS OF COURSE.

Orders on petitions of course are forthwith granted without any attendance being ordered: (Dan. 1451.)

Most things which may be moved for of course may be obtained on petition of course: (*Id.*)

Orders of course may be made by any judge: (Dan. 1436.)

Petitions of course are usually presented to the Master of the Rolls, though the cause is not attached to his court: (Dan. 1451.)

[Every petition of course at the Rolls must be left at the office of the secretary, who will,] upon any such petitions of course . . . which shall be presented [to the High Court and marked with the name of] his [Lordship], instead of answering such petitions, draw up the orders thereon in such form as the Master of the Rolls shall from time to time direct, every such order to be signed as passed with the initials of such secretary; and . . . enter, or cause to be entered, every such order in a book to be kept at the secretary's office at the Rolls for that purpose, and . . . then mark and sign such order with his initials, as entered; and the suitors of the court and their solicitors shall have access to the said book, during office hours, without the payment of any fee. And every such order so to be made as aforesaid, shall have the same force and effect as orders of course passed by the registrars have: (C. O. 23, r. 17.)

No notice need be given of the application. If there is any irregularity in the order, or it has been obtained upon any false suggestion, or by the suppression of any material fact, it will be discharged on motion (Dan. 1436) to the judge to whom special applications in the cause or matter ought to be made: (C. O. 6, r. 10.)

If an order has been irregularly obtained, the party who has obtained it should take the earliest opportunity of discharging it, or any party affected by it may procure its discharge, at the cost of the person who obtained it: (Dan. 1436.)

No subsequent order to the same effect can be obtained until it has been discharged: (*Id.*)

An order of course ought to be served, as soon as possible, upon the party intended to be effected by it, or his solicitor: (*Id.*)

If the other party takes a regular step before the order is served, the order of course not served cannot afterwards be acted upon, so as to interfere with the step so taken: (*Id.*)

IV. SPECIAL PETITIONS.

1. PREPARATION.

(a) *Address and Title.*

Every petition must be addressed—

“In the High Court of Justice.

Chancery Division.

Vice-Chancellor ——— [or Master of the Rolls].

To Her Majesty's High Court of Justice:” (20 S. J. 24.)

Subject to the power of transfer, every person by whom any . . . matter may be commenced in the High Court of Justice which would have been within the non-exclusive cognisance of the High Court of Admiralty, if the said Act had not passed, shall assign such . . . matter . . . by marking the document by which the same is commenced

with the name of the division, and giving notice thereof to the proper officer of the court. If so marked for the Chancery Division the same shall be assigned to one of the judges of such division by marking the same with the name of such of the said judges as the . . . petitioner (subject to such power of transfer) may think fit: (O. V., r. 4.)

Petitions presented under any Act of Parliament must also be intituled in the particular matter in respect of which they are presented, and of such Act of Parliament.

Save as [thereinafter] provided, all petitions and further proceedings in causes shall be had before the judge to whose court such causes are or shall be attached, unless removed therefrom: (C. O. 6, r. 5.)

All applications for orders of course to be obtained on petition or motion shall and may be made in the same manner, in all respects, as if the above rule . . . had not been made: (C. O. 6, r. 9.)

(b) *Reference to Record.*

[See PLEADING; PAYMENT INTO AND OUT OF COURT.]

(c) *Name and Address of Petitioner.*

A petition must state by whom it is presented, and if presented in a matter, or by a person not a party to the action, his residence and description: (Dan. 1452.)

(d) *Paragraphs, &c.*

Every pleading [including a petition, see *sup.*, l.] shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved, such statement being divided into paragraphs, numbered consecutively, and each paragraph containing, as nearly as may be, a separate allegation. Dates, sums, and numbers shall be expressed in figures and not in words. Signature of counsel shall not be necessary: (O. XIX., r. 4.)

No petition need be printed: (*Id.*, r. 5.)

(e) *Statement as to Service.*

At the foot of every petition (not being a petition of course) . . . and of every copy thereof, a statement shall be made of the persons, if any, intended to be served therewith; and if no person is intended to be served with such petition, a statement to that effect shall be made at the foot of the petition, and of every copy thereof: (C. O. 34, r. 1.)

The respondents must be mentioned by name and not simply as plaintiffs and defendants: (*Meyrick v. Laws*, W. N. 1877, p. 223.)

2. HOW DISABLED PERSONS PETITION.

An infant, married woman without her husband, or other person under disability, petitions by her next friend: (Dan. 1452.)

As to making the husband co-petitioner, see *Re Osborne*, W. N. 1878, p. 179.

A lunatic, so found, petitions by his committee, or if he has no committee, by his next friend: (Dan. 80; Wm. Pet. 4.)

3. HOW PAUPERS PETITION.

Unless it is for the removal of the solicitor, a petition by a person suing *in formâ pauperis* must be signed by his solicitor: (see C. O. 7, r. 11; PARTIES, I., 20.)

4. HOW CORPORATE BODIES PETITION.

The seal of a corporate body should be annexed to a petition for payment out: (*Ex parte Corporation of London*, W. N. 1878, p. 238.)

5. PRESENTING AND ANSWERING.

Any petition to the Chancery Division, other than a petition of course,

naming any other judge than the Master of the Rolls must be left, with a fair copy for the use of the judge, with the secretary of the Lord Chancellor.

Petitions intituled in the Rolls must be left with his secretary : (Dan. 1453-4.)

In each case the petition is answered by the secretary writing and signing a memorandum in the margin, directing all parties concerned to attend on the next day of petitions, unless upon previous application permission has been given to have the petition answered for an earlier day : (Dan. 1454-5.)

6. SERVICE.

(a) *On Whom.*

All petitions, except those which are of course, require service upon the adverse party, unless there is no other party interested in the matter, as in the case of petitions for the transfer or sale of stock, or the payment out of court of money standing to the separate account of the petitioner, in which case no service is necessary : (Dan. 1454-5.)

(b) *Time.*

The service of a petition (unless the court give special leave to the contrary) must be at least two clear days before the day appointed for hearing : (C. O. 34, r. 2.)

Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such . . . time : (O. LVII., r. 2; and see TIME.)

(c) *How Effected.*

Service is effected on the solicitor of the respondent, if any, or on the respondent in person as in the case of notices of motion : (see MOTION.)

The service is effected by delivery of a copy of the petition and memorandum thereon, and at the same time showing the original petition answered : (Dan. 1455.)

If the petition is in an action, and is required to be served on a defendant who has not appeared, it shall be delivered by being filed with the proper officer : (O. XIX., r. 6.)

(d) *Substituted Service.*

Substituted service may be ordered on motion, *ex parte*, supported by affidavit : (Dan. 1456; *Re Blackwood*, W. N., 1867, p. 114.)

The order directing such service must be served with the petition : (Dan. 1456.)

(e) *Service out of Jurisdiction.*

Service out of the jurisdiction may be ordered on motion, *ex parte*, supported by affidavit showing the residence : (Dan. 1455-6.)

The copy order must be served with the petition : (*Id.*)

7. GUARDIAN AD LITEM.

After service on an infant, lunatic not so found, or a lunatic so found who has no committee, or whose committee has an adverse interest, a guardian *ad litem* must be appointed on motion or petition of course, supported by affidavit of service and fitness, consent of the proposed guardian, and that he has no adverse interest : (Dan. 1456; Wms. Pet. 7.)

8. SETTING DOWN.

Petitions which are not of course are set down by the secretary of the Lord Chancellor or Master of the Rolls; and a list is sent to the registrar who puts the petitions in the paper : (Seton, 52.)

Keeping out of Paper.

When a petition is not ready for hearing application should be made to the officer of the court before petition day, so that it may not appear in the paper : (W. N., 1875, p. 104.)

9. HEARING.

On the day appointed the petition will appear in the daily printed list of the judge, and will be called on in its turn, the course being generally to hear all the unopposed petitions before calling on those which are opposed: (Jarm. 868.)

Those undisposed of are placed in an adjourned list, and are taken on the next petition day before the new opposed petitions: (Dan. 1456.)

If the petitioner does not appear the petition will be dismissed with costs.

If a respondent does not appear an order may be made against him: (*Id.*)

Under the former practice an affidavit of service was required to be filed before the rising of the court, but, having regard to the decisions as to judgment on non-appearance at the hearing of an action, no affidavit seems now to be necessary. (see JUDGMENT, I., 5.)

If on the hearing . . . the court or judge shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the court or judge may either dismiss the . . . application, or adjourn the hearing thereof, in order that such notice may be given upon such terms, if any, as the court or judge may think fit to impose: (O. LIII., r. 5.)

10. EVIDENCE.

Upon any . . . petition, evidence may be given by affidavit: (O. XXXVII., r. 2.)

The court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit: (O. XXXVII., r. 2.)

[And see EVIDENCE.]

A petitioner intending to use evidence previously filed in the cause, should give notice thereof to the respondents: (Seton, 53.)

Where the title of a petition is amended, the affidavits may be made evidence, without being resworn, by a short affidavit referring to them and making them exhibits: (*Id.*)

11. AMENDMENT.

[See AMENDMENT; PLEADING.]

Leave to amend is almost of course, and facts may be inserted which have occurred after presentation of the petition or after order for amendment: (Seton 52, citing *Re Westbrook*, L. Rep. 11 Eq. 252.)

No formal order is usually drawn up: (Dan. 1459.)

The registrar will, if required, indorse the direction on the brief or petition as an authority to the secretary to make the amendment; but counsel's indorsement is generally sufficient: (Seton, 52.)

An amended petition does not, in general, require re-answering: (Seton, 52.)

Where persons have been joined as petitioners without their authority, their names will, on motion by them, be struck out as petitioners, and they will be treated as respondents who have been served: (*Re Savage*, W. N. 1880, p. 154.)

The application may be made though an order on the petition has been completed: (*Id.*)

12. CHANGE OF PARTIES.

[See PARTIES, VI.]

13. ADJOURNMENT.

As to the practice on adjournment of a petition to chambers, see INFANTS, II., 7; PAYMENT INTO AND OUT OF COURT, XIII., 2 (c).

14. RESTORATION TO PAPER.

Where an unopposed petition is directed to stand over without fixing a day for it to be again put into the paper, the registrar in attendance in court upon the written request of the solicitor, will direct the same to be restored to the paper for the following petition day: (Ch. Reg. 15th Mar. 1860.)

In other cases, where the further consideration of a petition is adjourned, or any portion of a petition is directed to stand over, the registrar will restore the petition to the paper for hearing, upon being satisfied that the object for which it was adjourned has been accomplished, on production of a written request of the solicitor having the conduct of the proceeding: (Dan. 1458.)

Notice that the petition has been restored must be given to the other parties entitled to appear: (*Id.*)

15. FILING.

Petitions whereon any order is founded are to be filed . . . under the direction of the [Masters]: (C. O. 1, r. 44.)

No order made on a petition . . . shall be passed until the original petition . . . shall have been filed in the Report Office, and a note thereof made on the . . . order by the clerk of reports: (C. O. 23, r. 23.)

Where the original petition was lost, the court allowed the copy left for the use of the judge in one case; and in another case a copy, certified by the under-secretary at the Rolls to be a true copy, to be filed instead: (Jarm. 869.)

Where the petitioner withheld the original from the respondents, the court allowed the copy served to be filed: (*Id.*)

V. ORDER ON PETITION.

1. OF COURSE.

[See *sup.*, III.]

2. ON SPECIAL PETITION.

(a) *Drawing up, &c.*

[See JUDGMENT.]

[There must be left with the registrar on bespeaking the order] the original petition and counsel's brief, with his endorsement of the order made, and any judgment, order, or the office copy of any certificate, on which the petition is founded, and office copies of any affidavits, and any exhibits, or other evidence used at the hearing: (Ch. Reg. 15th Mar. 1860, r. 32; and see JUDGMENT, XV., 2.)

(b) *Enforcing* [see EXECUTION].

VI. COSTS.

The effect of Order LV., giving discretion as to costs, is, with the exceptions mentioned in the order, to repeal all previous enactments as to costs, and where a previous statute is silent as to costs, to supply the omission: (*Ex parte Mercers' Company*, L. Rep. 10 Ch. Div. 481.)

But the old law may be looked at as a guide, and ought to be followed wherever practicable: (per Bramwell, L.J., *Myers v. Defries*, L. Rep. 5 Ex. Div. 180; 42 L. T. Rep. N. S. 137; 49 L. J. 266, Ex.; 28 W. R. 406.)

When a petition was of inordinate length, the court allowed a fixed sum for costs: (*Bull v. Jones*, W. N. 1880, p. 65.)

Where a petition in any cause or matter assigned to the Chancery division is served, and notice is given to the party served that in case of his appearance in court his costs will be objected to, and accompanied by a tender of costs for perusing the same, the amount to be tendered shall be 2*l.* 2*s.*: (Add. R. Aug. 1875, Sp. All. r. 17.)

The party making such payment shall be allowed the same in his costs, provided such service was proper, but not otherwise; but this order is without prejudice to the rights of either party to costs, or to object to costs where no such tender is made, or where the court or judge shall consider the party entitled, notwithstanding such notice or tender, to appear in court: (*Id.*)

In any other case in which a solicitor of a party served necessarily or properly peruses any such petition without appearing thereon, he is to be allowed a fee not exceeding 2*l.* 2*s.*: (*Id.*)

Where any party appears upon any application or proceeding in court or at chambers in which he is not interested, or upon which, according to the practice of the court, he ought not to attend, he is not to be allowed any costs of such appearance unless the court or judge shall expressly direct such costs to be allowed: (Add. R. Aug. 1875, Sp. All., r. 21.)

A solicitor joining persons as petitioners without their consent will be made to pay the costs of and incident to correcting the record, though the order has been completed: (*Re Savage*, W. N. 1880, p. 154.)

PETITION OF RIGHT.

- I. RIGHT TO PROCEED AS BEFORE THE ACT.
- II. INTERPRETATION.
- III. WHERE PROPER REMEDY.
- IV. IN WHAT DIVISION BROUGHT.
- V. THE PETITION.
 1. TITLE.
 2. TO BE ADDRESSED TO THE QUEEN.
 3. REQUISITES AS TO SUPPLIANT.
 4. STATEMENT OF FACTS.
 5. SIGNATURE.
 6. FIAT.
 7. FILING.
 8. SERVICE.
 - (a) *On Solicitor of Treasury.*
 - (b) *On Assignee of Property.*
- VI. APPEARANCE BY ASSIGNEE OF PROPERTY.
- VII. SUBSEQUENT PROCEEDINGS.
 1. GENERAL RULES.
 2. PLEADING.
 3. DISCOVERY.
- VIII. JUDGMENT.
 1. GENERALLY.
 2. BY DEFAULT.
- IX. COSTS.
 1. RECOVERABLE BY CROWN OR ASSIGNEE.
 2. RECOVERABLE BY SUPPLIANT.

X. CERTIFICATE OF RESULT.

XI. EFFECT OF JUDGMENT FOR SUPPLIANT.

I. RIGHT TO PROCEED AS BEFORE THE ACT.

Nothing in this Act contained shall prevent any suppliant from proceeding as before the passing of [the] Act: (The Petitions of Right Act, 1860, 23 & 24 Vict. c. 34, s. 18.)

II. INTERPRETATION.

"Her Majesty" [includes] Her Majesty's successors;

"Relief" [comprehends] every species of relief claimed or prayed for in any such petition of right, whether a restitution of any incorporeal right, or a return of lands or chattels, or a payment of money or damages, or otherwise;

Any word importing the singular number or masculine or feminine gender includes and [is] applicable to several persons and parties as well as one person or party, and to females as well as males, and males as well as females, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing, unless it [is] otherwise provided, or there is something in the subject or context repugnant to such construction: (23 & 24 Vict. c. 34, s. 16.)

III. WHERE PROPER REMEDY.

A petition of right will lie for—

Recovery of land (23 & 24 Vict. c. 34, s. 5);

Recovery of goods (*Id.*, s. 16);

Unliquidated damages for breach of contract (*The Banker's case*, 14 How. St. Tr. 1; *Thomas v. The Queen*, L. Rep. 10 Q. B. 31; and see *Churchward v. The Queen*, L. Rep. 1 Q. B. 173);

Enforcement of right to a grant of a privilege of mining (*James v. The Queen*, L. Rep. 5 Ch. Div. 153);

Relief against forfeiture of a grant (*Re Brain*, L. Rep. 18 Eq. 389).

A petition of right will not lie for—

Unliquidated damages for tort (*Tobin v. The Queen*, 16 C. B. N. S. 31; 33 L. J. 199, C. P.);

Recovery of money paid by another sovereign State in respect of war losses occasioned to British subjects (*Rustomjee v. The Queen*, L. Rep. 2 Q. B. Div. 69; 24 W. R. 428; and see *Burnand v. Rodocanachi*, L. Rep. 5 C. P. Div. 424);

Compensation for wrongful dismissal of a military surgeon (*Re Tufnell*, 34 L. T. Rep. N. S. 838; L. Rep. 3 Ch. Div. 164);

Compensation on abolition of civil office (*Cooper v. The Queen*, L. Rep. 14 Ch. Div. 311; 42 L. T. Rep. N. S. 617; 49 L. J. 490, Ch.; 28 W. R. 611);

Recovery of land not in England (*Reiner v. Salisbury*, L. Rep. 2 Ch. Div. 378; *Re Holmes*, 2 J. & H. 527; 31 L. J. 38, Ch.; 5 L. T. Rep. N. S. 548; *Doss v. Secretary of State for India*, L. Rep. 19 Eq. 509);

Claims against the Indian Government (*Frith v. The Queen*, 26 L. T. Rep. N. S. 774).

IV. TO WHAT DIVISION BROUGHT.

A petition of right may, if the suppliant think fit, be intitled in any one of the [Divisions of the High Court of Justice] in which the subject-matter of such petition or any material part thereof would have been

cognizable if the same had been a matter in dispute between subject and subject: (23 & 24 Vict. c. 34, s. 1.)

V. THE PETITION.

1. TITLE.

Every such petition, or the printed copy thereof, so filed, shall be marked with the [name of the judge] before whom it is intended to be prosecuted: (*Id.*, r. 2; Ch. O., 1st Feb. 1860, r. 2.)

2. TO BE ADDRESSED TO THE QUEEN.

Such petition shall be addressed to Her Majesty in the form or to the effect in the schedule to [the] Act: (23 & 24 Vict. c. 34, s. 1.)

3. REQUISITES AS TO SUPPLIANT.

Such petition . . . shall state the Christian and surname and usual place of abode of the suppliant and of his [solicitor] if any, by whom the same shall be presented: (23 & 24 Vict. c. 34, s. 1.)

Any person who might be admitted to prosecute a suit in [the] court *in formâ pauperis* may be admitted to prosecute *in formâ pauperis* a petition of right intituled in [the] court. And any person who might, if defendant to an ordinary suit in [the] court, have been admitted to defend *in formâ pauperis*, may be admitted to make his defence *in formâ pauperis* to any petition of right instituted in [the] court which he may be required to plead . . . to. But no person shall be admitted to prosecute any petition *in formâ pauperis* without a certificate of counsel that he conceives the case to be proper for relief in [the] court: (Ch. O., 1st Feb. 1862, r. 5.)

The same orders and rules shall apply with regard to any person admitted to sue or defend *in formâ pauperis* under these orders as are applicable with regard to paupers in suits between subject and subject: (Ch. O., 1st Feb. 1862, r. 6.)

4. STATEMENT OF FACTS.

Such petition . . . shall set forth with convenient certainty the facts entitling the suppliant to relief: (23 & 24 Vict. c. 34, s. 1.)

No one should be joined as respondent with the Queen: (*Kirk v. The Queen*, L. Rep. 14 Eq. 558.)

5. SIGNATURE.

Such petition . . . shall be signed by such suppliant, his counsel or [solicitor]: (23 & 24 Vict. c. 34, s. 1.)

6. FIAT.

The said petition shall be left with the Secretary of State for the Home Department, in order that the same may be submitted to Her Majesty for Her Majesty's most gracious consideration, and in order that Her Majesty, if she shall think fit, may grant her fiat that right be done, and no fee or sum of money shall be payable by the suppliant on so leaving such petition, or upon his receiving back the same: (23 & 24 Vict. c. 34, s. 2.)

The Secretary of State must submit the petition to Her Majesty, but it is his duty to advise Her Majesty whether she should grant or withhold her fiat thereto, and he cannot be required to state what advice he has given: (*Irwin v. Grey*, 3 F. & F. 635.)

7. FILING.

Upon Her Majesty's fiat being obtained to any petition of right presented in pursuance of the said Act, and intituled in the [Chancery Division] such petition, with the fiat thereon, together with a printed copy of such petition and fiat (if the petition is in writing) shall be filed [in the central office]: (Ch. O., 1st Feb. 1862, r. 1; J. A., 1879.)

8. SERVICE.

(a) *On Solicitor of Treasury.*

Upon Her Majesty's fiat being obtained to such petition, a copy of such petition and fiat shall be left at the office of the Solicitor to the Treasury, with an indorsement thereon in the form or to the effect in the schedule (No. 2) to [the] Act, praying for a plea or answer on behalf of Her Majesty within twenty-eight days, and it shall thereupon be the duty of the said solicitor to transmit such petition to the particular department to which the subject-matter of such petition may relate, and the same shall be prosecuted in the court in which the same shall be intitled, or in such other court as the Lord Chancellor may direct: (23 & 24 Vict. c. 34, s. 3.)

Every copy of a petition of right left at the office of the solicitor of the Treasury in pursuance of the said Act, and every copy of a petition of right served upon or left at the last, or usual, or last known place of abode of any person under the provisions of that Act, shall be a printed copy, sealed with the seal of the [Central Office] in the same manner as copies of [writs] are now sealed. And the leaving or serving of any copy not printed or not sealed with the office seal shall be of no effect for any of the purposes of the said Act: (Ch. O., 1st Feb. 1862, r. 3; J. A., 1879.)

(b) *On Assignee of Property.*

In case any such petition of right shall be presented for the recovery of any real or personal property, or any right in or to the same, which shall have been granted away or disposed of by or on behalf of Her Majesty or her predecessors, a copy of such petition, allowance, and fiat shall be served upon or left at the last or usual or last known place of abode of the person in the possession, occupation, or enjoyment of such property or right, endorsed with a notice in the form set forth in the schedule (No. 3), requiring such person to appear thereto within eight days, and to plead or answer thereto in the court in which the same shall be prosecuted within fourteen days after the same shall have been so served or left as aforesaid; and it shall not be necessary to issue any *scire facias* or other process to such person for the purpose of requiring him to appear and plead or answer to such petition: (23 & 24 Vict. c. 34, s. 5; and see *sup.* (a).)

VI. APPEARANCE BY ASSIGNEES OF PROPERTY.

[Where the petition is served on the assignee of property as mentioned, *sup.* V., 8, (b)] he shall, within the time . . . limited, if it be intended by him to contest such petition, enter an appearance to the same in the form set forth in schedule (No. 4) to [the] Act annexed, or to the like effect: (23 & 24 Vict. c. 34, s. 5.)

VII. SUBSEQUENT PROCEEDINGS.

1. GENERAL RULES.

So far as the same may be applicable, and except in so far as may be inconsistent with [the] Act, the laws and statutes in force as to pleading, evidence, hearing, and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set-off, appeal, and proceedings in error in suits in equity, and personal actions between subject and subject, and the practice and course of procedure of the courts . . . for the time being in reference to such suits and personal actions, shall, unless the court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right: Provided always, that nothing in [the] statute shall be construed to give to the subject any remedy against the Crown in any case in which

he would not have been entitled to such remedy before the passing of [the] Act: (23 & 24 Vict. c. 34, s. 7.)

So far as the same may be applicable, and except in so far as may be inconsistent with the said Act and with the preceding orders, the Orders from time to time in force as to proceedings in suits in the [Chancery Division], and the practice and course of proceeding [therein] in reference to such suits, shall be applicable, and apply and extend to proceedings [therein] in petitions under the said Act, which are, for the purposes of this order, to be considered as [statements of claim]: (Ch. O. 1st Feb. 1862, r. 7.)

2. PLEADING.

[Any assignee of property served, as mentioned *sup.*, with the petition] shall plead, or demur to the said petition within the time specified in such notice, or such further time as shall be allowed by the court or a judge: (23 & 24 Vict. c. 34, s. 5.)

The time for pleading or demurring to such petition, on behalf of Her Majesty, shall be the said period of twenty-eight days after the same, with such prayer of a plea or answer as aforesaid, shall have been left at the office of the Treasury, or such further time as shall be allowed by the court or a judge: Provided always, that it shall be lawful for the Lord Chancellor, on the application of the Attorney-General or of the suppliant, to change the court in which such petition shall be prosecuted, or the venue for the trial of the same: (s. 4.)

Such petition may be answered by way of plea, or demurrer or by both pleas and demurrer, by or in the name of Her Majesty's Attorney-General on behalf of Her Majesty, and by or on behalf of any other person who may in pursuance [of the Act] be called upon to plead or answer thereto, in the same manner as if such petition were a [statement of claim], and without the necessity for any inquisition finding the truth of such petition or the right of the suppliant, and such and the same matter as would be sufficient ground of defence in point of law or fact to such petition on the behalf of Her Majesty, may be alleged on behalf of any such other person as aforesaid called on to plead thereto: (23 & 24 Vict. c. 34, s. 6.)

A statement of defence is now the proper mode of pleading: (*Tomline v. The Queen*, 27 W. R. 651.)

The Crown may plead and demur together without leave: (*Tobin v. The Queen*, *sup.*)

3. DISCOVERY.

A suppliant in any petition under the said Act desiring to file interrogatories for the examination of any person or persons who may be required to plead or answer thereto (other than Her Majesty's Attorney-General), shall file such interrogatories at the same time as such petition. And a copy, examined and marked by the [Master], of the interrogatories which any respondent is required to answer shall be served upon such respondent, together with the copy of the petition: (Ch. O. 1st Feb. 1862, r. 4; J. A. 1879.)

The Crown is entitled to discovery of documents from the suppliant: (*Tomline v. The Queen*, 27 W. R. 651.)

The suppliant is not entitled to discovery of any kind from the Crown: (*Thomas v. The Queen*, L. Rep. 10 Q. B. 44.)

VIII. JUDGMENT.

1. GENERALLY.

Upon every such petition of right the decree or judgment of the court,

whether given upon demurrer upon the pleadings or upon a default to plead in time, or after hearing or verdict, or [on appeal], shall be that the suppliant is or is not entitled either to the whole or to some portion of the relief sought by his petition, or such other relief as the court may think right, and such court may give a decree or judgment that the suppliant is entitled to such relief, and upon such terms and conditions (if any) as such court shall think just: (s. 9.)

In all cases in which the judgment commonly called a judgment of *amoveas manus* has heretofore been pronounced or given upon a petition of right, a judgment that the suppliant is entitled to relief as hereinbefore provided shall be of such and the same effect as such judgment of *amoveas manus*: (s. 10.)

2. BY DEFAULT.

In case of a failure on the behalf of Her Majesty, or of any such other person as aforesaid called upon to answer or plead to such petition, to plead or demur in due time, either to such petition or at any subsequent stage of the proceedings thereon, the suppliant shall be at liberty to apply to the court or a judge for an order that the petition may be taken as confessed, and it shall be lawful for such court or judge, on being satisfied that there has been such failure to plead or demur in due time, to order that such petition may be taken as confessed as against Her Majesty or such other party so making default; and in case of default on the behalf of Her Majesty and any other such person (if any) called upon as aforesaid to answer or plead thereto, a decree may be made by the court, or leave may be given by the court, on the application of the suppliant, to sign judgment in favour of the suppliant: provided always that such decree or judgment may afterwards be set aside by such court or a judge, in their or his discretion, on such terms as to them or him shall seem fit: (s. 8.)

IX. COSTS.

1. RECOVERABLE BY CROWN OR ASSIGNEE.

Upon any such petition of right, the Attorney-General or other person appearing on behalf of Her Majesty, and every such other person as aforesaid who shall appear and plead to such petition shall be entitled respectively to recover costs against the suppliant, in the same manner, and subject to the same restrictions and discretion, and under the same rules, regulations, and provisions, so far as they are applicable, as are or may be usually adopted or in force touching the payment or receipt of costs in proceedings between subject and subject: (s. 11.)

Costs were given against the suppliant, the petition being dismissed, in *Re Brain*, L. Rep. 18 Eq. 389; *Re Tufnell*, L. Rep. 3 Ch. Div. 164; *Re Cooper*, *sup.*

The Court of Appeal recently refused to make any order as to costs, where the Crown succeeded, and the decision was important as affecting other disputes between the Crown and persons claiming similar rights to those claimed by the suppliant: (*James v. The Queen*, L. Rep. 5 Ch. Div. 153.)

Any costs recovered on behalf of Her Majesty shall be paid into the Exchequer, and shall become part of the consolidated fund, except where such petition shall be defended on behalf of Her Majesty in her private capacity, in which case such costs shall be paid to the treasurer of Her Majesty's household, or such other person as Her Majesty shall appoint to receive the same: (s. 11.)

For the recovery of such costs such and the same remedies and writs of execution as are authorised for enforcing payment of costs upon judg-

ments in personal actions or decrees, rules or orders, shall and may be prosecuted, sued out, and executed respectively by or on behalf of Her Majesty and of such other person as aforesaid as shall appear and plead to such petitions : (s. 11.)

2. RECOVERABLE BY SUPPLIANT.

Upon any such petition of right the suppliant shall be entitled to costs against Her Majesty, and also against any other person appearing or pleading . . . to any such petition of right, in like manner, and subject to the same rules, regulations and provisions, restrictions, and discretion, as far as they are applicable, as are or may be usually adopted or in force touching the right to recover costs in proceedings between subject and subject : (23 & 24 Vict. c. 34, s. 12.)

Costs were given against the Crown in *James v. The Queen* (L. Rep. 17 Eq. 502).

For the recovery of any such costs from any such person, other than Her Majesty, appearing or pleading . . . in pursuance thereof, to any such petition of right, such and the same remedies and writs of execution as are authorised for enforcing payment of costs upon rules, orders, decrees, or judgments in personal actions between subject and subject shall and may be prosecuted, sued out, and executed on behalf of such suppliant : (23 & 24 Vict. c. 34, s. 12.)

X. CERTIFICATE OF RESULT.

Whenever, upon any such petition of right, a judgment, order, or decree shall be given or made that the suppliant is entitled to relief, and there shall be no . . . appeal, or in case of an appeal . . . a judgment, order, or decree shall have been affirmed, given or made that the suppliant is entitled to relief, or upon any rule or order being made entitling the suppliant to costs, anyone of the judges of the court in which such petition shall have been prosecuted, shall and may, upon application in behalf of the suppliant, after the lapse of fourteen days from the making, giving, or affirming of such judgment or decree, rule, or order, certify to the Commissioners of Her Majesty's Treasury, or to the treasurer of Her Majesty's household, as the case may require, the tenor and purport of the same, in the form in the schedule (No. 5) to [the] Act annexed, or to the like effect ; and such certificate may be sent to or left at the office of the Commissioners of Her Majesty's Treasury, or of the treasurer of Her Majesty's household, as the case may be : (23 & 24 Vict. c. 34, s. 13.)

XI. EFFECT OF JUDGMENT FOR SUPPLIANT.

It shall be lawful for the Commissioners of Her Majesty's Treasury, and they are . . . required, to pay the amount of any moneys and costs as to which a judgment or decree, rule, or order shall be given or made that the suppliant in any such petition of right is entitled, and of which judgment or decree, rule, or order the tenor or purport shall have been so certified to them as aforesaid, out of any moneys in their hands for the time being legally applicable thereto, or which may be hereafter voted by Parliament for that purpose, provided such petition shall relate to any public matter ; and in case the same shall relate to any private property of or enjoyed by Her Majesty, or any contract or engagement made by or on behalf of Her Majesty, or any matter affecting Her Majesty in her private capacity. A certificate in the form aforesaid may be sent to or left at the office of the treasurer of Her Majesty's household, or such other person as Her Majesty shall from time to time appoint to receive the same, and the amount to which the suppliant is entitled,

shall be paid to him out of such fund or moneys as Her Majesty shall be graciously pleased to direct to be applied for that purpose: (s. 14.)

PLEADING.

I. MEANING OF "PLEADING."

II. GENERAL RULES.

1. TITLE, AND NAME AND ADDRESS OF PARTY DELIVERING.

2. ALLEGATIONS.

- (a) *How Facts stated.*
- (b) *Consistency with former Pleading.*
- (c) *Facts Presumed.*
- (d) *Effect of Documents.*
- (e) *Implied Contracts or Relations.*
- (f) *Malice, and other Conditions of Mind.*
- (g) *Notice.*

3. DENIALS.

- (a) *Generally.*
- (b) *Representative Capacity, or Constitution of Firm.*
- (c) *Contract Alleged.*

4. DEMURRING AND PLEADING TOGETHER [see post, XVII., 3].

5. PARAGRAPHS.

6. FIGURES.

7. SIGNATURE OF COUNSEL UNNECESSARY.

8. PRINTING.

9. MARKING DATE OF DELIVERY.

10. DELIVERY.

11. FILING.

12. AMENDMENT.

- (a) *Where Allowed.*
- (b) *Application for.*
- (c) *Time for Making.*
- (d) *Not made Pending Demurrer.*
- (e) *How Made.*
- (f) *Delivery of Amended Pleading.*
- (g) *Neglect to Amend and Deliver.*

13. ADMISSION OF OPPONENT'S PLEADING.

14. DEMURRER.

15. PARTICULARS.

III. STATEMENT OF CLAIM.

1. WHERE UNNECESSARY.

2. NOTICE IN LIEU OF.

3. TITLE AND NAME AND ADDRESS OF PLAINTIFF.

4. ALLEGATIONS.

- (a) *Conciseness.*
- (b) *Material Facts.*
- (c) *Facts Presumed* [see sup., II., 2 (c)].
- (d) *Effect of Documents.*
- (e) *Implied Contracts or Relations.*
- (f) *Malice and other Conditions of Mind* [see sup., II., 2 (f)].
- (g) *Notice* [see sup., II., 2 (g)].

5. PARAGRAPHS [see sup., II., 5.]

6. FIGURES [see sup., II., 6.]

7. CLAIMS FOR RELIEF.

8. STATEMENT AS TO VENUE.

9. SIGNATURE OF COUNSEL.

10. PRINTING.
11. MARKING DATE OF DELIVERY [see *sup.*, II., 9].
12. DELIVERY.
 - (a) *How Made* [see *sup.*, II., 10].
 - (b) *Where Made*.
 - (c) *Within what Time*.
 - (d) *Default* [see JUDGMENT, DISMISSAL OF ACTION].
13. FILING.
14. AMENDMENT.
 - (a) *What Allowed*.
 - (b) *By Plaintiff*.
 - (1) Without Leave.
 - (2) With Leave.
 - (3) Not made Pending Demurrer.
 - (4) How Made.
 - (5) Delivery of Amended Statement.
 - (6) Neglect to Amend and Deliver.
 - (c) *By Defendant*.
 - (d) *In Lieu of New Assignment*.
 - (e) *When Defendant Added*.
15. ADMISSION OF TRUTH OF [see *sup.*, II., 13].
16. STRIKING OUT.
17. WITHDRAWAL.
 - (a) *Before Defence*.
 - (b) *After Defence*.

IV. FURTHER STATEMENT OF CLAIM [see *sup.*, III., 2].

V. STATEMENT OF DEFENCE.

1. WHERE UNNECESSARY.
2. BY LEAVE.
3. TITLE, AND NAME AND ADDRESS OF DEFENDANT [see *sup.*, II., 1].
4. ALLEGATIONS.
 - (a) *Conciseness* [see *sup.*, II., 2 (a)].
 - (b) *Material Facts and Grounds of Defence*.
 - (c) *Facts Presumed*.
 - (d) *Effect of Documents*.
 - (e) *Implied Contracts or Relations*.
 - (f) *Malice and Other Conditions of Mind*.
 - (g) *Notice*.
5. DENIALS.
6. PLEADING NOT GUILTY.
7. PLEADING IN ABATEMENT.
8. PLEADING POSSESSION.
9. PLEADING PAYMENT INTO COURT.
10. PLEADING MATTERS ARISING AFTER ACTION BROUGHT.
11. PLEADING AND DEMURRING [see *post*, XVII.].
12. PARAGRAPHS [see *sup.*, II., 5].
13. FIGURES [see *sup.*, II., 6].
14. COUNSEL'S SIGNATURE.
15. PRINTING [see *sup.*, II., 8.]
16. MARKING DATE OF DELIVERY [see *sup.*, II., 9].
17. DELIVERY.
 - (a) *How made* [see *sup.*, II., 8, 10].
 - (b) *Within what Time*.
 - (c) *Consent for Further Time*.
 - (d) *Default* [see JUDGMENT].
18. AMENDMENT.
 - (a) *By Defendant*.
 - (1) Where Allowed.

- | | |
|--------------------------------------|------------------------------|
| (2) Application. | } [See <i>sup.</i> II., 12]. |
| (3) Time. | |
| (4) Not to be Made Pending Demurrer. | |
| (5) How Made. | |
| (6) Delivery of Amended Pleading. | |
| (7) Neglect to Amend and Deliver. | |

(b) *By Plaintiff* [see II., 12, (a).]

19. ADMISSION OF TRUTH OF [see *sup.*, II., 13].

20. STRIKING OUT.

21. WITHDRAWAL.

VI. FURTHER DEFENCE.

VII. SET-OFF AND COUNTER-CLAIM.

1. POWER TO GRANT RELIEF ON.

2. CLAIMS ALLOWED BY.

3. BY WHOM MADE.

4. AGAINST WHOM MADE.

5. TITLE AND NAME AND ADDRESS OF DEFENDANT.

(a) *Against Plaintiff only* [see *sup.*, II., 1].

(b) *Against Plaintiff and Another.*

6. ALLEGATIONS.

7. PARAGRAPHS.

8. FIGURES [see *sup.*, II., 5].

9. CLAIMS FOR RELIEF.

10. SIGNATURE BY COUNSEL [see *sup.*, II., 7].

11. PRINTING [see *sup.*, II., 8.]

12. MARKING DATE OF DELIVERY [see *sup.*, II., 9].

13. DELIVERY.

(a) *To Plaintiff Alone* [see *sup.*, II., 10; V., 17].

(b) *To Plaintiff and Another Person, Party.*

14. SERVICE ON PERSON NOT PARTY.

15. APPEARANCE TO [see APPEARANCE].

16. AMENDMENT.

(a) *Without Leave.*

(b) *With Leave.*

17. APPLICATION TO EXCLUDE.

18. STRIKING OUT.

19. EFFECT OF DISCONTINUANCE.

20. JUDGMENT ON COUNTER-CLAIM [see JUDGMENT].

VIII. NOTICE CLAIMING RELIEF AGAINST CO-DEFENDANTS.

IX. CONFESSION OF DEFENCE.

X. REPLY OF THE PLAINTIFF.

1. TITLE AND NAME AND ADDRESS OF PLAINTIFF.

2. ALLEGATIONS.

(a) *Conciseness* [see *sup.*, II., 2 (a)].

(b) *Material Facts and Grounds of Reply.*

(c) *Consistency with Statement of Claim.*

(d) *Facts Presumed.*

(e) *Effect of Documents.*

(f) *Implied Contracts or Relations.*

(g) *Malice and Other Conditions of Mind.*

(h) *Notice.*

} [See *sup.*, II., 2].

3. DENIALS.

4. REPLYING AND DEMURRING [see *post*, XVII.].

5. PARAGRAPHS.

6. FIGURES.

7. COUNSEL'S SIGNATURE.

8. PRINTING.

9. MARKING DATE OF DELIVERY.

10. FILING.
 11. DELIVERY.
 - (a) *How made.*
 - (b) *Within what Time.*
 - (c) *Default* [see *post*, XIV., 2].
 12. AMENDMENT.
 - (a) *By Plaintiff.*
 - (b) *By Defendant* [see *sup.*, II., 12 (a)].
 13. ADMISSION OF TRUTH OF [see *sup.*, II., 13].
 14. STRIKING OUT.
- XI. FURTHER REPLY BY PLAINTIFF.
- XII. REPLY TO COUNTER-CLAIM OF PERSON OTHER THAN PLAINTIFF.
1. TITLE AND NAME AND ADDRESS OF PARTY DELIVERING.
 2. ALLEGATIONS [see *sup.*, II., 2.]
 3. DENIALS [see *sup.*, II., 3.]
 4. PARAGRAPHS.
 5. FIGURES.
 6. COUNSEL'S SIGNATURE.
 7. PRINTING.
 8. MARKING DATE OF DELIVERY.
 9. DELIVERY.
 - (a) *How made* [see *sup.*, II., 10.]
 - (b) *When made.*
 10. AMENDMENT [see *sup.*, II., 12.]
 11. STRIKING OUT.
- XIII. PLEADINGS SUBSEQUENT TO REPLY.
1. WHERE ALLOWED.
 2. JOINING ISSUE BY.
 3. DELIVERY.
 - (a) *How made* [see *sup.*, II., 10.]
 - (b) *When made.*
- XIV. CLOSE OF THE PLEADINGS.
1. BY JOINING ISSUE.
 2. BY NOT PLEADING.
- XV. DIRECTING ISSUES.
- XVI. THIRD AND FOURTH PARTY NOTICES.
1. EXPLANATION OF PROCEDURE.
 2. CLAIMS BY DEFENDANT FOR CONTRIBUTION, INDEMNITY, OR RELIEF.
 - (a) *Notice.*
 - (1) Leave to Serve.
 - (2) Filing Copy.
 - (3) Form.
 - (4) Service.
 - (b) *Appearance.*
 - (c) *Directions for Determining Questions.*
 3. DETERMINING QUESTIONS SO AS TO BIND THIRD PARTY.
 - (a) *Notice.*
 - (b) *Directions for Determining Questions.*
 4. FOURTH PARTY NOTICES.
- XVII. DEMURRER.
1. WHERE ALLOWED.
 2. COMBINATION OF DEMURRER TO PART AND PLEADING TO OTHER PART.
 3. LEAVE TO DEMUR AND PLEAD TO WHOLE OR SAME PART.
 4. GROUNDS.
 5. FORM.

6. DELIVERY.
7. SETTING ASIDE.
8. ENTRY FOR ARGUMENT.
 - (a) *By Whom made.*
 - (b) *How made.*
 - (c) *When made.*
 - (d) *Form.*
 - (e) *Notice of Entry.*
9. DEFAULT OF ENTRY AND NOTICE.
10. EFFECT ON POWER OF AMENDMENT.
11. HEARING.
12. ALLOWING DEMURRER.
13. OVERRULING DEMURRER.
14. APPEAL FROM ORDER MADE.
15. AMENDMENT OF PLEADING [see *sup.*, 12.]

XVIII. JUDGMENT ON ADMISSIONS IN PLEADING [see JUDGMENT.]

I. MEANING OF "PLEADING."

[Where not repugnant to the subject or context] "pleading" shall include any petition or summons, and also shall include the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counter-claim of a defendant: (J. A., 1873, s. 100; O. LXIII.)

II. GENERAL RULES.

1. TITLE, AND NAME AND ADDRESS OF PARTY DELIVERING.

Every pleading in an action . . . shall be marked on the face . . . with the reference to the letter and number of the action, the division to which and the judge (if any) to whom the action is assigned, the title of the action, the description of the pleading, and the name and place of business of the solicitor and agent, if any, delivering the same, or the name and address of the party delivering the same if he does not act by a solicitor: (O. XIX., r. 7.)

If, during the action, an order is made in consequence of an assignment of a party's interest, a fresh title must be added in which the position of the person added and substituted as a party must be shown: (*Seear v. Lawson*, Ct. of App. Dec. 1st, 1880.)

2. ALLEGATIONS.

(a) *How Facts Stated.*

Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved: (O. XIX., r. 4; and see COSTS.)

Each party in any pleading, not being a petition or summons, must allege all such facts not appearing in the previous pleadings as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as if not raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings, as for instance, fraud, or that any claim has been barred by the Statute of Limitations, or has been released: (O. XIX., r. 18.)

Such statements shall be as brief as the nature of the case will admit: (O. XIX., r. 2.)

As to prolixity, see COSTS.

(b) *Consistency with Previous Pleading.*

No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim or contain any allegation of

fact inconsistent with the previous pleadings of the party pleading the same: (O. XIX., r. 19.)

(c) *Facts Presumed.*

Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied.

[*E.g.*—Consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration, as a substantive ground of claim]: (O. XIX., r. 24.)

(d) *Effect of Documents.*

Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof unless the precise words of the documents or any part thereof are material: (O. XIX., r. 24.)

(e) *Implied Contracts or Relations.*

Wherever any contract or any relation between any persons does not arise from an express agreement, but is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances, without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative: (O. XIX., r. 27.)

(f) *Malice, and other Conditions of Mind.*

Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred: (O. XIX., r. 25.)

(g) *Notice.*

Wherever it is material to allege notice to any person of any fact, matter, or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice be material: (O. XIX., r. 26.)

3. DENIALS.

(a) *Generally.*

When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And so when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along with those circumstances, but a fair and substantial answer must be given: (O. XIX., r. 22.)

See *Thorp v. Houldsworth*, L. Rep. 3 Ch. Div. 637.

Each party must deal specifically with each allegation of fact of which he does not admit the truth: (O. XIX., r. 20; and see *post*, XIV.)

Every allegation of fact in any pleading in an action, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition: (O. XIX., r. 17.)

(b) *Representative Capacity or Constitution of Firm.*

If either party wishes to deny the right of any other party to claim as executor, or as trustee, whether in bankruptcy or otherwise, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he shall deny the same specifically: (O. XIX., r. 14.)

(c) *Contract Alleged.*

When a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise: (O. XIX., r. 23.)

See *Clark v. Callow*, 46 L. J. 53, Q. B.

5. DEMURRING AND PLEADING TOGETHER.

[See *post*, XVII., 3.]

5. PARAGRAPHS.

Such statement [of facts in each pleading must be] divided into paragraphs, numbered consecutively . . . each paragraph containing, as nearly as may be, a separate allegation: (O. XIX., r. 4.)

6. FIGURES.

Dates, sums, and numbers shall be expressed in figures and not in words: (O. XIX., r. 4.)

7. SIGNATURE OF COUNSEL UNNECESSARY.

Signature of counsel shall not be necessary: (O. XIX., r. 4; but see *post*, III.)

8. PRINTING.

Every pleading which shall contain less than three folios of seventy-two words each (every figure being counted as one word) may be either printed or written, or partly printed and partly written, and every other pleading, not being a petition or summons, shall be printed: (O. XIX., r. 5.)

9. MARKING DATE OF DELIVERY.

Every pleading in an action . . . shall be marked on the face with the date of the day on which it is delivered: (O. XIX., r. 7.)

10. DELIVERY.

Every pleading in an action shall be delivered between parties: (O. XIX., r. 7.)

Every pleading or other document required to be delivered to a party, or between parties, shall be delivered in the manner now in use to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor: (O. XIX., r. 6.)

Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open: (O. LVII., r. 3.)

No pleading shall be . . . delivered in the Long Vacation, unless directed by a court or a judge: (O. LVII., r. 4.)

The time of the Long Vacation shall not be reckoned in the computation of the times appointed or allowed by these rules for . . . delivering any pleading unless otherwise directed by a court or a judge: (O. LVII., r. 5.)

A court or a judge shall have power to enlarge or abridge the time

appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed: (O. LVII., r. 6.)

11. FILING.

If no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer: (O. XIX., r. 6.)

The time of the Long Vacation shall not be reckoned in the computation of the times appointed or allowed . . . for filing . . . any pleading, unless otherwise directed by a court or a judge: (O. LVII., r. 5; and see TIME.)

Where an action proceeds in a district registry all pleadings and other documents required to be filed shall be filed in the district registry: (O. XIX., r. 29.)

When a cause in the Chancery Division is proceeding in a district registry, all certificates of the chief clerk and taxing masters, and all affidavits and other documents (required to be filed) used in London before the judge in chambers, or before any taxing master or referee of the court, and not already filed in the district registry, shall be filed in the same office as they would have been filed in if the proceedings had originally commenced in London; and if the court or judge shall so direct, office copies thereof shall be transmitted to the district registry: (O. XIX., r. 29a, March, 1879.)

12. AMENDMENTS.

(a) *Where Allowed.*

All such amendments shall be made as may be necessary for the purpose of determining the real question or questions in controversy between the parties: (O. XXVII., r. 1.)

[In case of non-compliance with the rules the] proceedings may be set aside either wholly or in part as irregular, or amended or otherwise dealt with in such manner and upon such terms as a court or a judge shall think fit: (O. LIX.)

(b) *Application for.*

In all cases not [otherwise] provided for by the preceding rules of this order—application for leave to amend any pleading may be made by either party to the court or a judge in chambers, or to the judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may seem just: (O. XXVII., r. 6.)

Leave to amend at the trial ought to be given where there has been a *bonâ fide* mistake in pleading (*Tildesley v. Harper*, L. Rep. 10 Ch. Div. 393; 39 L. T. Rep. N. S. 552.)

No affidavit as to the nature of the proposed amendment is necessary: (*Cargill v. Bower*, L. Rep. 4 Ch. Div. 781; 46 L. J. 175, Ch.)

A party will not at the trial be allowed to alter the substance of the case: (*Byrd v. Nunn*, L. Rep. 5 Ch. Div. 781; 25 W. R. 749, affirmed, L. Rep. 7 Ch. Div. 284; 47 L. J. 1, Ch.; 26 W. R. 101.)

No pleading can be amended after final judgment: (*Attorney-General v. Council of Birmingham*, L. Rep. 15 Ch. Div. 423; 43 L. T. Rep. N. S. 77.)

(c) *Time for Making.*

The amendment must be made within the time allowed by the order: (see *post*.)

No pleadings shall be amended in the long vacation, unless directed by a court or a judge: (O. LVII., r. 4.)

The time of the long vacation shall not be reckoned in the computation of the times appointed or allowed by these rules for amending any pleading, unless otherwise directed by a court or a judge: (O. LVII., r. 5.)

(d) *Not made pending Demurrer.*

While a demurrer to the whole or any part of a pleading is pending, such pleading shall not be amended, unless by order of the court or a judge; and no such order shall be made except on payment of the costs of the demurrer: (O. XXVIII., r. 7.)

(e) *How made.*

A pleading may be amended by written alterations in the pleading which has been delivered, and by additions on paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than 144 words in any one place, or are so numerous or of such a nature that the making them in writing would render the pleading difficult or inconvenient to read, in either of which cases the amendment must be made by delivering a print of the pleading as amended. (O. XXVII., r. 8.)

Whenever any pleading is amended, such pleading when amended shall be marked with the date of the order, if any, under which the same is so amended, and of the day on which such amendment is made, in manner following, viz.:—"Amended day of ": (O. XXVII., r. 9.)

(f) *Delivery of Amended Pleading.*

Whenever a pleading is amended, such amended pleading shall be delivered to the opposite party within the time allowed for amending the same: (O. XXVII., r. 10.)

(g) *Neglect to Amend and Deliver.*

If a party who has obtained an order for leave to amend a pleading delivered by him does not amend the same within the time limited for that purpose by the order, or if no time is thereby limited, then within fourteen days from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, or of such fourteen days, as the case may be, become *ipso facto* void, unless the time is extended by the court or a judge: (O. XXVII., r. 7.)

13. ADMISSION OF OPPONENT'S PLEADING.

Any party to an action may give notice, by his own statement or otherwise, that he admits the truth of the whole or any part of the case stated or referred to in the statement of claim, defence, or reply of any other party: (O. XXXII., r. 1.)

14. DEMURRER.

Any pleading may be demurred to: (O. XXVII., r. 1; and see *post*, XVII.)

15. PARTICULARS.

The Chancery Division has power to order a party to give particulars of pleading. If the action is a so-called common law action, as for money lent, particulars will be ordered almost as a matter of course, as in actions at common law before the Judicature Acts. But in so-called equity actions, as for moneys due under a partnership or a charge, a strong case must be shown on affidavit, or particulars will not be allowed to be asked for. The proper practice is, if a defence can be put in, to order that to be

done first, and then to allow interrogatories to be put: (*Benbow v. Low*, Ct. of App., Nov. 4th, 1880; *Augustinus v. Nerinckx*, 70 L. T. 24.)

A party ordered to give another particulars must give him such information as a reasonable man would require respecting the matters against which he is called on to defend himself: (*Rennie v. Beresford*, 15 M. & W. 78; *Harbord v. Monk*, 38 L. T. Rep. N. S. 411.)

A plaintiff may be ordered to give particulars of items which are in his claim placed to the defendant's credit: (*Godden v. Corsten*, L. Rep. 5 C. P. Div. 17; 41 L. T. Rep. N. S. 527.)

The application must, unless under special circumstances, be applied for before a subsequent pleading is delivered: (Ch. Archb., 11th edit. 1441.)

The application is by summons.

In applications by defendants in actions of tort, special grounds should be shown by affidavit: (*Horlock v. Lidiard*, 10 M. & W. 677.)

Where credit is given in the particulars for specific sums, such sums are not to be pleaded by way of payment or set-off by the other party, but it is otherwise when the claim is for a certain balance without stating the amount credited: (R. G. T. T. 1853, r. 13.)

Particulars have no other effect on pleadings, and cannot be looked at to explain them: (*Dempster v. Purnell*, 3 M. & G. 375; *Kilner v. Bailey*, 5 M. & W. 382.)

III. STATEMENT OF CLAIM.

1. WHERE UNNECESSARY.

The plaintiff need not deliver a statement of claim when the defendant has stated in his memorandum of appearance that he does not require one to be delivered: (see O. XIX., r. 2; O. XXI., r. 1; App. A. p. I., 6.)

[The plaintiff may, however, deliver his claim, though not required to do so, but in such case] the court or a judge shall make such order as to the costs occasioned thereby as shall seem just, if it appear that the delivery of a statement of claim was unnecessary or improper: (O. XXI., r. 1.)

In short causes in the court of Malins, V.C., a statement of claim, though not required by the defendant, must be delivered (*Breton v. Mockett*, W. N. 1875, p. 255; 33 L. T. Rep. N. S. 684; *Boyes v. Cook*, W. N. 1876, p. 280; 33 L. T. Rep. N. S. 778), but in the Rolls Court and the Court of Hall, V.C., it is unnecessary: (*Taylor v. Duckett*, W. N. 1875, p. 193; *Green v. Coleby*, L. Rep. 1 Ch. Div. 693; 45 L. J. 303, Ch.)

As to dispensing with a statement of claim in an action for administration, see *Re Huckwell*, W. N. 1879, p. 86.

2. NOTICE IN LIEU OF.

Where the writ is specially indorsed, and the defendant has not dispensed with a statement of claim, it shall be sufficient for the plaintiff to deliver as his statement of claim a notice to the effect that his claim is that which appears by the indorsement upon the writ, unless the court or a judge shall order him to deliver a further statement. Such notice may be either written or printed or partly written and partly printed, and may be in the form No. 3 in Appendix (B), . . . , and shall be marked on the face in the same manner as is required in the case of an ordinary statement of claim: (O. XXI., r. 4.)

A further statement was ordered in *Schomberg v. Zoebelli*, W. N. 1876, p. 106.

When application to sign judgment has been refused, and leave given to defend, no notice is necessary: (*Atkins v. Taylor*, W. N. 1876, p. 11; *Margate Pier and Harbour Company v. Perry*, *id.*, p. 52.)

Where the plaintiff's writ was indorsed for an injunction, and other relief, and for payment of a sum of 1000*l.*, alleged to have been received by the defendant as his solicitor, and the plaintiff was ordered to deliver a statement of claim on or before the 12th Jan., and on the 10th Jan. he delivered a statement of claim in person, and on the 12th his solicitor, who had been that day served with a summons to set aside the statement of claim for irregularity, delivered a notice that his claim appeared by the indorsement on the writ, it was held, that the writ was not specially indorsed within the meaning of O. III., r. 6, and that the statement of claim delivered by the solicitor must be set aside: (*Yeatman v. Snow*, 42 L. T. Rep. N. S. 502; 28 W. R. 574.)

The form is as follows:

18 . [Here put the letter and number.]

In the High Court of Justice,
Division.

Between A. B.

and

Plaintiff,

C. D.

Defendant.

The particulars of the plaintiff's complaint herein, and of the relief and remedy to which he claims to be entitled, appear by the indorsement upon the writ of summons.

(App. B.)

Where a plaintiff, the writ being specially indorsed, delivers a notice, the indorsement, coupled with the notice, is to be treated as a statement of claim for all purposes, and the defendant may therefore demur to it. An allegation in such indorsement, that the money claimed is "owing," where no consideration is disclosed, is not sufficient to support the defendant's alleged promise: (*Robertson v. Howard*, L. Rep. 3 C. P. Div. 288; 38 L. T. Rep. N. S. 715; 47 L. J. 480, C. P.)

When the plaintiff is ordered to deliver such further statement it shall be delivered within such time as by such order shall be directed, and if no time be so limited then within [six weeks from entry of appearance]: (O. XXI., r. 4.)

3. TITLE, NAME, AND ADDRESS OF PLAINTIFF.

[See the General Rule, *sup.*, II., 1.]

In an action by the Attorney-General at the relation of another person the title "information" or "information and statement of claim," is improper: (*Attorney-General v. Shrewsbury Bridge Company*, 42 L. T. Rep. N. S. 79; W. N. 1880, p. 23.)

4. ALLEGATIONS.

(a) *Conciseness* [see the General Rule, *sup.*, II., 2 (a).]

The statement of claim should be concise (*Herring v. Bischoffsheim*, W. N. 1876, p. 77; and see *Bartlett v. Roche*, *id.*, 214; *Harbord v. Monk*, 38 L. T. Rep. N. S. 411), *i.e.*, admissions should not be pleaded: (*Davy v. Garrett*, L. Rep. 7 Ch. Div. 473; 38 L. T. Rep. N. S. 77; 47 L. J. 218, Ch.; 26 W. R. 110.)

(b) *Material Facts*.

[See the General Rule, *sup.*, II., 2 (a).]

In an action for the recovery of land by an heir-at-law, it is not sufficient to say that the plaintiff is heir-at-law; his pedigree should be shown: (*Phillips v. Phillips*, L. Rep. 4 Q. B. Div. 27; 39 L. T. Rep. N. S. 556; 48 L. J. 125, Q. B.; 27 W. R. 436.)

The statement of claim in an action for the recovery of land, after alleging facts which would show a title in Frances Evelyn, contained a statement that "the said Frances Evelyn died intestate as to real estate

and leaving Sir Hugh Evelyn heir-at-law," and then stated facts which showed a title in the plaintiff to Sir Hugh Evelyn's estate. Held, on a summons to strike out the paragraph above stated, that it was not embarrassing, and was a sufficient statement of the facts on which the plaintiff relied under Order XIX., r. 4: (*Evelyn v. Evelyn*, L. Rep. 13 Ch. Div. 138; 42 L. T. Rep. N. S. 248; 49 L. J. 18, Ch.; 28 W. R. 531.)

In an action against a husband and wife, married after the 30th July 1874, to recover a debt contracted by the wife before marriage, it is not necessary that the statement of claim should allege that the husband has received any of the assets of the wife: (*Matthews v. Whittle*, L. Rep. 13 Ch. Div. 811; 43 L. T. Rep. N. S. 114; 28 W. R. 822.)

It is not sufficient, when an agreement is relied upon, for the party pleading it to state generally that "it was agreed to, &c." He should also state whether the agreement was in writing or not, and generally the facts which support the allegation of an agreement: (*Turquand v. Fearon*, L. Rep. 4 Q. B. Div. 280; 40 L. T. Rep. N. S. 543; 48 L. J. 341, Q. B.)

The averment that all conditions were performed is still material and proper: (*Jones v. Quinn*, 40 L. T. Rep. N. S. 135.)

As to using the forms under the old procedure, see also *Bartlett v. Roche*, W. N. 1876, p. 54; *Watson v. Rodwell*, L. Rep. 3 Ch. Div. 380.)

Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly: (O. XIX., r. 9.)

(c) *Facts presumed* [see the general rule, *sup.*, II., 2 (c)].

(d) *Effect of Documents.*

[See the general rules, *sup.*, II., 2 (d)]

The setting out of many documents is a ground for striking out: (*Davy v. Garrett*, 38 L. T. Rep. N. S. 77; 47 L. J. 218; 26 W. R. 110.)

(e) *Implied Contracts or Relations*

[See the general rule, *sup.*, II., 2 (e); *Bagot v. Easton*, L. Rep. 7 Ch. Div. 1; 37 L. T. Rep. N. S. 369; 26 W. R. 66.]

(f) *Malice and other Conditions of Mind.*

[See the general rule, *sup.*, II., 2 (f)]

(g) *Notice* [see the general rule, *sup.*, II., 2 (g)]

5. PARAGRAPHS.

[See the general rule, *sup.*, II., 5.]

6. FIGURES.

[See the general rule, *sup.*, II., 6.]

7. CLAIMS FOR RELIEF.

Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief: (O. XIX., r. 8.)

If the plaintiff's claim be for discovery only, the statement of claim shall show it: (*Id.*)

As to alternative and inconsistent relief, see *Ede v. Vyse* (W. N. 1877, pp. 98, 180); *Child v. Stenning* (L. Rep. 5 Ch. Div. 695; 38 L. T. Rep. N. S. 232; 47 L. J. 371, Ch.); *Bagot v. Easton* (L. Rep. 7 Ch. Div. 1; 37 L. T. Rep. N. S. 369; 47 L. J. 225, Ch.; 26 W. R. 66); *Hall v. Old Talargoch Company* (45 L. J. 775, Ch.); *Evans v. Davis* (L. Rep. 10 Ch. Div. 747), and WRIT OF SUMMONS.

Further relief only includes what is consistent with what is expressly asked: (*Cargill v. Bower*, L. Rep. 10 Ch. Div. 502.)

If the plaintiff omits from his statement of claim claims made by the writ, he will be deemed to have abandoned such claim : (*Id.*)

No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the court to make binding declarations of right without granting consequential relief : (15 & 16 Vict. c. 86, s. 50.)

This section is still in full vigour : (*Cox v. Barker*, L. Rep. 3 Ch. Div. 369 ; and see DECLARATION OF RIGHT.)

8. STATEMENT AS TO VENUE.

There shall be no local venue for the trial of any action ; but, when the plaintiff proposes to have the action tried elsewhere than in Middlesex, he shall in his statement of claim name the county or place in which he proposes that the action shall be tried, and the action shall, unless a judge otherwise orders, be tried in the county or place so named. Where no place of trial is named in the statement of claim, the place of trial shall, unless a judge otherwise orders, be the county of Middlesex : (O. XXXVI., r. 1.)

This applies to the Chancery Division : (*Redmayne v. Vaughan*, 24 W. R. 983.)

9. SIGNATURE OF COUNSEL.

It is unnecessary (see *sup.*, II., 7), but Malins, V.C., is favourable to the practice of signing : (W. N. 1876, pp. 17, 134.)

10. PRINTING.

[See the general rule, *sup.*, II., 8.]

The court cannot dispense with the printing : (*Attorney-General v. Moass*, 21 S. J. 631.)

11. MARKING DATE OF DELIVERY.

[See the general rule, *sup.*, II., 9.]

12. DELIVERY.

(a) *How made* [see general rule, *sup.*, II., 10].

(b) *When made.*

Unless the defendant in an action at the time of his appearance shall state that he does not require the delivery of a statement of complaint, the plaintiff shall within such time and in such manner as . . . prescribed, deliver to the defendant after his appearance a statement of his complaint and of the relief or remedy to which he claims to be entitled : (O. XIX., r. 2.)

(c) *Within what Time.*

. . . . The delivery of statements of claim shall be regulated as follows :—

If the defendant shall not state that he does not require the delivery of a statement of claim, the plaintiff shall, unless otherwise ordered by the court or a judge, deliver it within six weeks from the time of the defendant's entering his appearance.

The plaintiff may, if he think fit, at any time after the issue of the writ of summons, deliver a statement of claim, with the writ of summons, or at any time afterwards, either before or after appearance, and although the defendant may have appeared and stated that he does not require the delivery of a statement of claim : Provided that in no case where a defendant has appeared shall a statement be delivered more than six weeks after the appearance has been entered unless otherwise ordered by the court or a judge : (O. XXI., r. 1.)

See *sup.* II., 10, and TIME.

Where by a slip of a solicitor's clerk the claim was served two days too late, further time was given: (*Canadian Oil Works Corporation v. Hay*, 38 L. T. Rep. N. S. 599.)

Where an order has been made dismissing an action unless a statement of claim is delivered within a certain time, and default is made, an order cannot subsequently be made extending the time: (*Whistler v. Hancock*, L. Rep. 3 Q. B. Div. 83; 37 L. T. Rep. N. S. 639; 47 L. J. 152, Q. B.; 26 W. R. 211; followed in *Wallis v. Hepburn*, L. Rep. 3 Q. B. Div. 84 n.)

Where an order having been made on the 6th May dismissing the action for want of prosecution if the statement of claim were not delivered within fourteen days, on the 19th May the plaintiff took out a summons returnable the next day, the last of the fourteen days, for further time to deliver statement of claim, and the summons was, on the 20th, adjourned, by the consent of the parties in writing indorsed thereon, till the 21st, and on the 21st an order of a master giving seven days more for delivery of statement of claim was made, it was rescinded on the ground that the action was at an end on the 20th May: (*King v. Davenport*, L. Rep. 4 Q. B. Div. 402; 27 W. R. 798; but see *Burke v. Rooney*, L. Rep. 4 C. P. Div. 226; 48 L. J. 601, C. P.; 27 W. R. 915.)

(d) *Default* [see JUDGMENT; DISMISSAL OF ACTION.]

13. FILING.

If no appearance has been entered . . . [the statement of claim] shall be delivered by being filed with the proper officer [a master of the Supreme Court, or a district registrar]: (O. XIX., r. 6.)

In actions [specially] assigned to the Chancery Division [(see ACTION)] and in all other actions—not by the rules in [Order XIII.] otherwise specially provided for [viz. for debts or liquidated demands, for detention of goods and pecuniary damages or either of them, or for the recovery of land with or without a claim for mesne profits, arrears of rent, or damages for breach of contract] in case the party served with the writ does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service the action may proceed as if such party had appeared: (O. XIII., r. 9; *Menton v. Metcalf*, W. N. 1877, p. 142.)

Where a statement of claim is served personally on a defendant at the same time as the writ is served, and such defendant does not enter an appearance in the action, it is not necessary that the statement of claim shall be filed in order to obtain judgment by default against such defendant: (*Renshaw v. Renshaw*, 42 L. T. Rep. N. S. 353; 49 L. J. 127, Ch.; 28 W. R. 409.)

Where a defendant became bankrupt after service of notice of trial, and the common order of revivor was then made against and served on his trustee, who did not enter an appearance, and notice was served on him that the action was restored to the paper for trial, but he did not appear at the trial: It was held that it was not necessary for the plaintiff to file the pleadings or a notice of motion or judgment as against the trustee: (*Chorlton v. Dickie*, L. Rep. 13 Ch. D. 160; 41 L. T. Rep. N. S. 467; 49 L. J. 40, Ch.; 28 W. R. 228.)

14. AMENDMENT.

(a) *What allowed.*

[See *sup.*, II., 12].

Leave has been given, even at the hearing, to amend a bill in such a way as to raise an entirely new case: (*Budding v. Murdock*, L. Rep. 1 Ch. Div. 421; *Roe v. Davies*, L. Rep. 2 Ch. Div. 729.)

It is no objection that a case can be made much stronger by the amendment: (*Chesterfield Colliery Company v. Black*, W. N. 1877, p. 65.)

Leave has been given to amend the writ and claim so as to turn an action into an information and action, but without prejudice to a pending action, and on the Attorney-General's sanction having been obtained: (*Caldwell v. Pagham Harbour Reclamation Company*, L. Rep. 2 Ch. Div. 221.)

Where the defendant in an action for specific performance of a contract of sale was proved to be entitled only to a moiety of the property, leave was given to amend by claiming specific performance as to the moiety with compensation: (*Hardy v. Eckersley*, W. N. 1877, p. 199.)

[See also *King v. Corke*, L. Rep. 1 Ch. Div. 57; *Noad v. Murrow*, 40 L. T. Rep. N. S. 100; *Collett v. Goode*, L. Rep. 7 Ch. Div. 842; *Mozley v. Cowie*, 38 L. T. Rep. N. S. 908; 47 L. J. 271, Ch.; 26 W. R. 854; *Cargill v. Bower*, L. Rep. 10 Ch. Div. 502; 47 L. J. 649, Ch.; *Newby v. Sharpe*, L. Rep. 8 Ch. Div. 39; 38 L. T. Rep. N. S. 583; 47 L. J. 617, Ch.; *Blenhorn v. Penrose*, 70 L. T. 97-8.]

(b) *By Plaintiff.*

(1) Without Leave.

The plaintiff may, without any leave, amend his statement of claim once at any time before the expiration of the time limited for reply and before replying, or where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared: (O. XXVII., r. 2.)

[Where such amendment without leave has been made] the opposite party may, within eight days after the delivery to him of the amended pleading, apply to the court or a judge to disallow the amendment, or any part thereof, and the court or judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it, subject to such terms as to costs or otherwise as may seem just: (O. XXVII., r. 4.)

(2) With Leave.

Where any party has amended his pleading [without leave] the other party may apply to the court or a judge for leave to plead or amend his former pleading within such time and upon such terms as may seem just: (O. XXVII., r. 5.)

If a demurrer to the whole of a statement of claim is allowed [the court may] allow the statement of claim to be amended: (O. XXVIII., r. 9.)

The court or a judge may, at any stage of the proceeding, allow [the plaintiff] to alter his statement of claim . . . and all such amendments shall be made as may be necessary for the purpose of determining the real question or questions in controversy between the parties: (O. XXVII., r. 1.)

When a plaintiff claimed specific performance, and, after defence put in, struck out his claim for specific performance, and claimed a lien, his action was stayed till he had paid all costs up to the time of amendment: (*Blackmore v. Edwards*, W. N. 1879, p. 175.)

Application.

[See *sup.*, II., 12 (b).]

Time.

[See *sup.*, II., 12 (c).]

When the Secretary of State for War ought to have been joined, leave was given at the trial to amend the claim by making him a party: (*Hawley v. Steele*, W. N. 1877, p. 189.)

Leave was given at the hearing to amend a claim for the performance

of an agreement to settle into a claim for damages for wrongful dismissal: (*Dallinger v. St. Albyn*, 41 L. T. Rep. N. S. 406.)

Where, from facts elicited in the examination of witnesses, and which had been in the exclusive cognisance of the defendants, it appeared that the true point at issue between the parties was not raised by the pleadings as they stood, the plaintiffs obtained leave to amend their statement of claim, but without adducing fresh evidence; the defendants being allowed both to amend their defence and to adduce fresh evidence. The plaintiffs having succeeded on the issue thus raised, and the court being of opinion that the defect in the original pleadings arose from the defendants' default in withholding information, the whole of the costs, including those caused by the amendment, were awarded to the plaintiffs: (*Nobel's Explosive Company v. Jones*, 42 L. T. Rep. N. S. 754; 28 W. R. 653.)

See also as to amendments at the hearing, *Budding v. Murdoch*, *sup.*; *Roe v. Davis*, *sup.*; *Noad v. Murrow*, *sup.*; *Mozley v. Cowie*, *sup.*; *Newby v. Sharpe*, *sup.*; *Catgill v. Bower*, *sup.*; *Halsey v. Brotherhood*, L. Rep. 15 Ch. Div. 514; 43 L. T. Rep. N. S. 366.)

(3) Not made Pending Demurrer.

(4) How made.

(5) Delivery of Amended Statement.

(6) Neglect to Amend and Deliver.

[See the General Rules,
sup., II., 12.]

(b) *By Defendant* [see *sup.*, II., 12 (a)]

(c) *In lieu of New Assignment.*

No new assignment shall hereafter be necessary or used. But everything which has heretofore been alleged by way of new assignment may hereafter be introduced by amendment of the statement of claim: (O. XIX., r. 14.)

(d) *Where Defendant added.*

If a statement of claim has been delivered previously to [a] defendant being added, the same shall, unless otherwise ordered by the court or a judge, be amended in such manner as the making such new defendant a party shall render desirable, and a copy of such amended statement of claim shall be delivered to such new defendant at the time when he is served with the writ of summons or notice or afterwards, within four days after his appearance: (O. XVI., r. 16.)

15. ADMISSION OF TRUTH OF.

[See *sup.*, II., 13.]

16. STRIKING OUT.

The court, or a judge, may, at any stage of the proceedings . . . order to be struck out or amended any matter in such statement [of claim] . . . which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action: (O. XXVII., r. 1; see also *sup.* II., 12 (a).]

The power to strike out is in the discretion of the court, with which the Court of Appeal will not, as a rule, interfere (*Golding v. Wharton Salt Works Company*, L. Rep. 1 Q. B. Div. 375; *Watson v. Rodwell*, L. Rep. 3 Ch. Div. 380), though it has done so: (*Heap v. Morris*, L. Rep. 2 Q. B. Div. 630.)

The power of striking out has been exercised in the following cases:

When the pleading was prolix, where evidence was pleaded (*Marsh v. Mayor of Pontefract*, W. N. 1876, p. 6); where, in an action for fraudulent misrepresentation, allegations of the motives therefor, or the scheme thereof, were set out: (*Herring v. Bischoffsheim*, W. N. 1876, p. 77; and see W. N. 1876, p. 56.)

The whole of a claim was struck out in *Cashin v. Craddock*, L. Rep.

3 Ch. Div. 379; see also *Turquand v. Fearon*, L. Rep. 4 Q. B. Div. 285; 40 L. T. Rep. N. S. 543; 48 L. J. 341, Q. B.; *Smith v. Richardson*, L. Rep. 4 C. P. Div. 112; 40 L. T. Rep. N. S. 256; 48 L. J. 140, C. P.; 27 W. R. 230; *Harbord v. Monk*, 38 L. T. Rep. N. S. 411.)

How Application Made,

* An application to strike out may be by motion or summons: (*Coyle v. Cuming*, 40 L. T. Rep. N. S. 455; *Marriott v. Marriott*, 26 W. R. 416.)

17. WITHDRAWAL.

[See DISCONTINUANCE and WITHDRAWAL].

IV. FURTHER STATEMENT OF CLAIM.

[See *sup.*, III., 2.]

V. STATEMENT OF DEFENCE.

1. *Where Unnecessary.*

A defendant who has appeared in an action, and stated that he does not require the delivery of a statement of claim, and to whom a statement of claim is not delivered, may deliver a defence at any time within eight days after his appearance, unless such time is extended by the court or a judge: (O. XXII., r. 2.)

The defendant need not deliver a statement of defence: (*Hooper v. Giles*, W. N. 1876, p. 10.)

A statement of defence must be delivered where the writ is specially indorsed, if the defendant has not dispensed with a statement of claim: (*Atkins v. Taylor*, W. N. 1876, p. 11; *Margate Pier and Harbour Company v. Perry, Id.*, p. 52.)

2. BY LEAVE.

[Where the plaintiff has amended his statement of claim without leave] the other party may apply to the court or a judge for leave to plead . . . within such time and upon such terms as may seem just: (O. XXVII., r. 5.)

3. TITLE AND NAME AND ADDRESS OF DEFENDANT.

[See the General Rule, *sup.*, II., 1.]

4. ALLEGATIONS.

(a) *Conciseness.*

[See the General Rule, *sup.*, II., 2 (a).]

(b) *Material Facts and Grounds of Defence.*

[See the General Rule, *sup.*, II., 2 (a).]

In an action for the recovery of land the defendant, if he relies upon an equitable title, must in his statement of defence allege the nature of the deeds and documents upon which he relies, and it is not sufficient to allege that "by virtue of divers mesne acts and mesne assurances in the law all the estate and interest of the plaintiff's predecessor in title" is now vested in the defendant: (*Sutcliffe v. James*, 40 L. T. Rep. N. S. 875; 27 W. R. 750.)

Where the defendant relies upon several distinct grounds of defence [or] set off founded upon separate or distinct facts . . . they shall be stated, as far as may be, separately and distinctly: (O. XIX., r. 9.)

If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter,

the said courts respectively, and every judge thereof, shall give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that court for the same or the like purpose before the passing of this Act: (J. A., 1873, s. 24, sub-s. 2.)

Every matter of equity on which an injunction against the prosecution of any . . . cause or proceeding might have been obtained, if this Act had not been passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: (J. A., 1873, s. 24, sub-s. 5.)

Any defence which would, under the former procedure, have been an equitable defence, may be pleaded in the same manner as it might have been in an answer in Chancery: (*Heap v. Marris*, L. Rep. 2 Q. B. Div. 630.)

(c) *Facts Presumed.*

(d) *Effect of Documents.*

(e) *Implied Contracts or Relations.*

(f) *Malice and other Condition of Mind.*

(g) *Notice.*

} See the General Rules,
sup., II., 2.

5. DENIALS.

[See the General Rules, sup., II., 3.]

It shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the statement of claim . . . but [he] must deal specifically with each allegation of fact of which he does not admit the truth: (O. XIX., r. 20.)

Where in an action on a joint and several promissory note against husband and wife, their defence, so far as the husband was concerned, did not deny any allegation in the statement of claim, and raised no other defence for him, it was held to be an admission by him of all the statement of claim: (*Jenkins v. Davis*, L. Rep. 1 Ch. Div. 696.)

The following paragraph was held bad: "The defendant denies all and every the allegations in the several paragraphs of the statement of claim respectively contained:" (*Jones v. Quinn*, 40 L. T. Rep. N. S. 135.)

A denial that "the terms of the arrangement between the defendant and the plaintiffs were definitely agreed upon as alleged" was held evasive: (*Thorp v. Houldsworth*, L. Rep. 3 Ch. Div. 637.)

When the defence was that "the defendant denies that the song has been duly registered. The time of the first publication thereof is not truly entered on the register," the defendant was allowed to prove only that the time of first publication had been untruly entered, and not that the name of the publisher had been untruly stated: (*Collette v. Goode*, L. Rep. 7 Ch. Div. 842; 38 L. T. Rep. N. S. 504; 47 L. J. 371, Ch.)

Where by his statement of defence, a defendant simply "put the plaintiffs to proof of the several allegations in their statement of claim," he was held to have admitted the facts alleged in the statement of claim: (*Harris v. Gamble*, L. Rep. 7 Ch. Div. 877; 38 L. T. Rep. N. S. 253; 47 L. J. 344, Ch.)

Where the defendants in a foreclosure action "did not admit the correctness of the statements set forth in paragraphs 1, 2, 3, and 6 of the plaintiff's statement of claim, and required proof thereof," upon motion for judgment by the plaintiff upon admissions in the pleadings under O. XL., r. 11, it was held that this was not a sufficient denial of the statement of claim, and amounted to an admission of the allegation, so as to entitle

the plaintiff to judgment. But leave to amend was given upon payment of costs: (*Rutter v. Tregent*, L. Rep. 12 Ch. Div. 758; 41 L. T. Rep. N. S. 16; 48 L. J. 791, Ch.; 27 W. R. 902.)

Where the statement of claim alleged that the plaintiff's predecessor in title, lawfully authorised, signed an agreement with the defendant's predecessor in title, and the defence denied this in words following the words of the claim, and then alleged that the latter person was of unsound mind, and did not authorise anyone as his agent to sign the agreement, and denied that any agreement was signed by him or by any person by him lawfully authorised, it was held that the defendant could only enter into evidence to show the unsoundness of mind, not to show that the agent was not duly authorised: (*Byrd v. Nunn*, L. Rep. 7 Ch. Div. 284; 47 L. J. 1, Ch.; 26 W. R. 101.)

Where the statement of claim in an action against a lessee to set aside a lease granted under a power, stated that the donee of the power had received a specified sum as a bribe, and stated the circumstances . . . the statement of defence denied that that particular sum had been given, and denied each circumstance, but contained no general denial of a bribe having been given, it was held that the denial was evasive, and amounted to an admission that some bribe had been given; but the Court of Appeal gave leave to amend the statement of defence: (*Tildesley v. Harper*, L. Rep. 10 Ch. Div. 393; 39 L. T. Rep. N. S. 552; see also *Rossiter v. Miller*, L. Rep. 5 Ch. Div. 648.)

In an action for the price of goods, the defendant cannot rely on the Statute of Frauds unless it is expressly pleaded (*Clark v. Callow*, W. N. 1876, p. 262; 46 L. J. 53, Q. B.); see also *Johnsson v. Bonhote*, 34 L. T. Rep. N. S. 745; *Pullen v. Snelus*, 40 L. T. Rep. N. S. 363; 48 L. J. 394, C. P.; 27 W. R. 534.)

If matters are improperly denied, the court may make a special order as to costs: (see O. XXII., r. 4, and COSTS.)

6. PLEADING NOT GUILTY.

Nothing in these rules contained shall affect the right of any defendant to plead not guilty by statute. And every defence of not guilty by statute shall have the same effect as a plea of not guilty by statute has heretofore had. But if the defendant so plead he shall not plead any other defence without the leave of the court or a judge: (O. XIX., r. 16.)

In every case in which a defendant shall plead the general issue, intending to give the special matter in evidence, by virtue of an Act of Parliament, he shall insert in the margin of the plea the words, "By Statute," together with the year or years of the reign in which the Act or Acts of Parliament upon which he relies for that purpose were passed, and also the chapter and section of each of such Acts, and shall specify whether such Acts are public or otherwise, otherwise such plea shall be taken not to have been pleaded by virtue of any Act of Parliament; and such memorandum shall be inserted in the margin of the issue, and of the Nisi Prius record: (Reg. Gen. Tr. T. 1853.)

7. Pleading in Abatement.

No plea or defence shall be pleaded in abatement: (O. XIX., r. 13.)

As to joining defendants, see O. XVI., r. 13 (PARTIES); and *Kino v. Rudkin*, L. Rep. 6 Ch. Div. 160.

Although the form of objecting by means of a plea in abatement to the non-joinder of a defendant is abolished, the application to have such person included in the action ought to be granted or refused upon the same principles as those on which a plea in abatement would have succeeded or failed: (Per Cairns, L. C. *Kendall v. Hamilton*, 28 W. R. 97.)

8. PLEADING POSSESSION.

No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession. And he may nevertheless rely upon any ground of defence which he can prove, except as hereinbefore mentioned : (O. XIX., r. 15.)

9. PLEADING PAYMENT INTO COURT.

Payment into court shall be pleaded in the defence, and the claim or cause of action in respect of which such payment shall be made shall be specified therein : (O. XXX., r. 1.)

As to specifying the items for which the money is paid in, see *Paraire v. Loibl*, 43 L. T. Rep. N. S. 427.

A denial of the cause of action may generally be pleaded with such plea of payment: (*Berdan v. Greenwood*, L. Rep. 3 Ex. Div. 251; 39 L. T. Rep. N. S. 223; 47 L. J. 628, Ex.; 26 W. R. 902; questioning *Spurr v. Hall*, L. Rep. 2 Q. B. Div. 615; 37 L. T. Rep. N. S. 313; 46 L. J. 693, Q. B.; 26 W. R. 78.)

It has been held in the Court of Appeal, in an action of libel, that the defence of an apology and payment into court, and that of justification, can be legally pleaded together (*Hawkesley v. Bradshaw*, L. Rep. 5 Q. B. Div. 302; 42 L. T. Rep. N. S. 285; 28 W. R. 557.)

10. PLEADING MATTERS ARISING AFTER ACTION BROUGHT.

Any ground of defence which has arisen after action brought, but before the defendant has delivered his statement of defence, and before the time limited for his doing so has expired, may be pleaded by the defendant in his statement of defence, either alone or together with other grounds of defence : (O. XX., r. 1.)

11. PLEADING AND DEMURRING.

(See *post* XVII.)

12. PARAGRAPHS.

[See the General Rule, *sup.*, II., 5.]

13. FIGURES.

[See the General Rule, *sup.*, II., 6.]

14. COUNSEL'S SIGNATURE.

[See the General Rule, *sup.*, II., 7.]

15. PRINTING.

[See the General Rule, *sup.*, II., 8.]

16. MARKING DATE OF DELIVERY.

[See the General Rule, *sup.*, II., 9.]

17. DELIVERY.

The defendant shall within such time and in such manner as . . . prescribed deliver to the plaintiff a statement of his defence, set-off, or counter-claim, if any : (O. XIX., r. 2.)

(a) *How Made.*

[See *sup.*, II., 10.]

(b) *Within What Time.*

Where a statement of claim is delivered to a defendant he shall deliver his defence within eight days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless such time is extended by the court or a judge (O. XXII., r. 1.) Unless he demurs : (*Hodges v. Hodges*, L. Rep. 2 Ch. Div. 112; 45 L. J. 750, Ch.)

Where defendant has taken out a summons for particulars of the claim, the time for delivering the defence is suspended between the dates of the return of the summons and of delivery of the particulars, if the order is made. If the time expires pending the summons, and the order is made, the defence must be delivered on the day the particulars are delivered to the defendant. If the summons is dismissed, the defendant has the rest of the day in which to deliver his defence: (*Chitty's Archb. Pract.*, 11th ed., 96.)

Where the claim has been amended by order, before the defence has been delivered, such delivery is in time if made within two days of the delivery of the amended claim, unless otherwise ordered: (*C. L. P. A.* 1852, s. 90.)

Where leave has been given to a defendant to defend under O. XIV., r. 1 [in an action commenced by writ specially indorsed], he shall deliver his defence, if any, within such time as shall be limited by the order giving him leave to defend, or, if no time is thereby limited, then within eight days after the order: (*O. XXII.*, r. 3.)

As to the time where the defendant requires no statement of claim to be delivered: (see *sup.*, 1.)

(c) *Consent for Further Time.*

Where one of several defendants in an action has delivered his defence, and the time for the plaintiff to deliver his reply to such defence has expired, but the plaintiff has, without the knowledge of that defendant, agreed in writing with the other defendants to extend the time for delivering their defences, that defendant cannot move to dismiss the action as against him for want of prosecution. A defendant's proper course under such circumstances is to write to the plaintiff's solicitor, and inquire how the action stands as regards the other defendants: (*Ambroise v. Evelyn*, *inf.*)

If a plaintiff consents in writing to grant a defendant an extension of time for the delivery of his defence, an order for the purpose is unnecessary: (*Ambroise v. Evelyn*, *L. Rep.* 11 Ch. Div. 759; 27 W. R. 639.)

(d) *Default.*

[See JUDGMENT.]

18. AMENDMENT.

(a) *By Defendant.*

(1) Where allowed.

[Where the plaintiff has amended his statement of claim without leave, after the defence has been delivered, and within time (see *sup.* III., 14)] the other party [the defendant] may apply to the court or a judge for leave to . . . amend his former pleading [defence] within such time and upon such terms as may seem just: (*O. XXVII.*, r. 5.)

Where the plaintiff delivers an amended statement of claim, after defence delivered, the defendant ought to obtain leave to amend his defence or deliver a new one. If he proceeds with his original defence, he will be taken to have admitted the amendments in the claim: (*Boddy v. Wall*, *L. Rep.* 7 Ch. Div. 164; 47 L. J. 112, Ch.; 26 W. R. 348; see also *Planet Building Society v. Part*, W. N. 1878, p. 204.)

The court or a judge may, at any stage of the proceedings, allow [the defendant] to alter his statement of . . . defence . . . and all such amendments shall be made as may be necessary for the purpose of determining the real question or questions in controversy between the parties: (*O. XXVII.*, r. 1.)

- | | | |
|--------------------------------------|---|--|
| (2) Application. | } | [See the General Rules,
<i>sup.</i> , II., 12.] |
| (3) Time. | | |
| (4) Not to be Made Pending Demurrer. | | |
| (5) How Made. | | |
| (6) Delivery of Amended Pleading. | | |
| (7) Neglect to Amend and Deliver. | | |

(b) *By Plaintiff* [see *sup.*, II., 12, (a)].

19. ADMISSION OF TRUTH OF.

[See *sup.*, II., 13.]

20. STRIKING OUT.

The court or a judge may, at any stage of the proceedings . . . order to be struck out or amended any matter in [the defence] which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action: (O. XXVII., r. 1.)

[And see *sup.*, II., 12, (a).]

A defence was struck out as scandalous in *Coyle v. Cuming*, 40 L. T. Rep. N. S. 455.

"Embarrassing" means bringing forward a defence which the defendant is not entitled to make use of: (per Jessel, M.R., *Heugh v. Chamberlain*, W. N., 1877, p. 128; 25 W. R. 742.)

Allegations of matter of law, which might be raised by demurrer, will be struck out as embarrassing: (*Stokes v. Grant*, L. Rep. 4 C. P. Div. 25; 27 W. R. 397.)

Allegations in the defence in an action on an agreement, that it had been mutually rescinded by varying a term, that it was void as an agreement and as a lease, that a new lease had been granted, and that such lease was not granted on the terms of the agreement but at a higher rent, and that therefore if the defendant was not before released, he was released by that circumstance, were struck out: (*Menhinick v. Turner*, W. N., 1876, p. 55.)

A plea of payment into court, pleaded together with a plea denying the plaintiff's right of action, was struck out: (*Spurr v. Hall*, L. Rep. 2 Q. B. Div. 615; but see *sup.*, 9.)

A paragraph not specifically, but generally denying the allegation of the claim, was struck out. Also one alleging that a "puffer" had been employed: (*Jones v. Quinn*, 40 L. T. Rep. N. S. 135.)

A defence in an action for money lent, that it was never lent, or that if it was, the defendant repaid it, or has been released, is not embarrassing (*Barnicott v. Hann*, W. N. 1876, p. 24); nor is a defence that plaintiff is suing on his own behalf, having made the contract sued on as agent for a company: (*Golding v. The Wharton Salt Works Company*, L. Rep. 1 Q. B. Div. 374.)

Where to a claim for goods sold and delivered and for work and labour, the defendant pleaded that there was no balance due to the plaintiff, and also the following paragraph: "The defendant will further avail himself, if necessary, as an answer to this action, of the provisions of the Statute of Frauds," the paragraph was struck out as embarrassing: (*Pullen v. Snelus*, 40 L. T. Rep. N. S. 363.)

How Application made [see *sup.*, III., 16].

Costs.

If a paragraph is struck out as scandalous, the costs of the objectant will be given as between solicitor and client: (*Coyle v. Cuming*, *sup.*)

21. WITHDRAWAL.

The court or a judge may . . . upon the application of a defendant,

order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave : (O. XXIII., r. 1.)

[The order may be made] before, or at, or after the hearing or trial, and upon such terms as to costs, and as to any other action, and otherwise as may seem fit : (*Id.*)

One of two defendants in an action for recovery of land gave up possession after actively defending the action. The hearing of the action was postponed, and, before it came on again, he applied for leave to withdraw his defence. Held, that he should be allowed to do so on paying an occupation rent in respect of the premises, the costs occasioned by his defence, and the costs of the application. Semble, that a summons for such leave should state the terms offered : (*Real and Personal Advance Company Limited v. McCarthy and Smith*, 42 L. T. Rep. N. S. 48; L. Rep. 14 Ch. Div. 188; 28 W. R. 418.)

VI. FURTHER DEFENCE.

Where any ground of defence arises after the defendant has delivered a statement of defence, or after the time limited for his doing so has expired, the defendant may . . . within eight days after such ground of defence has arisen, and by leave of the court or a judge, deliver a further defence . . . setting forth the same : (O. XX., r. 2.)

This only applies to what is strictly a defence, not to a counter-claim : (*Original Hartlepool Collieries Company v. Gibb*, L. Rep. 5 Ch. Div. 713; 46 L. J. 311, Ch.)

The plaintiff may confess such defence and sign judgment for costs : (O. XX., r. 3; see *post*, IX.)

VII. SET-OFF AND COUNTER-CLAIM.

1. POWER TO GRANT RELIEF ON.

The . . . courts . . . and every judge thereof shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said court . . . or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of court or any order of the court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and [that] every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant : (J. A. 1873, s. 24, sub-s. 3.)

As to this part of the section, see *post*, 4, VIII., XVI.

2. CLAIMS ALLOWED BY.

A defendant in an action may set off, or set up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or

counter-claim shall have the same effect as a statement of claim in a cross-action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim: (O. XIX., r. 3.)

Generally, the defendant may make any claim against the plaintiff by way of counter-claim; which he might have made by separate action (see J. A. 1873, s. 24, sub-sect. 3); as for a penalty: (*Dicks v. Brooks*, L. Rep. 15 Ch. Div. 22; 43 L. T. Rep. N. S. 71; 28 W. R. 525.)

The right on which the counter-claim is founded must have accrued before the writ was issued (*Original Hartlepool Colliery Company v. Gibbs*, L. Rep. 5 Ch. Div. 713; 46 L. J. 311, Ch.), or it will not be allowed, except by way of amendment by leave of the court: (*Id.*; *Ellis v. Munson*, W. N. 1876, p. 253.)

Except as mentioned below, the claim need not relate to the subject-matter of the plaintiff's claim: (*Attwood v. Miller*, W. N. 1876, p. 16, where in an action for rent, a counter-claim for the price of butcher's meat, and for specific performance of an agreement to grant a lease, was allowed.)

The amount claimed by the counter-claim need not equal that claimed by the plaintiff: (*Mostyn v. West Mostyn Coal and Iron Company Limited*, L. Rep. 1 C. P. Div. 145.)

In an action by the assignee of a chose in action he cannot counter-claim for damages owing in respect thereof by the assignor, but he may set off: (*Young v. Kitchen*, L. Rep. 3 Ex. Div. 127.)

Counter-claims separately may be allowed against any plaintiffs suing jointly: (*Manchester, Sheffield, and Lincolnshire Railway Company and London and North-Western Railway Company v. Brooks*, L. Rep. 2 Ex. Div. 243; 46 L. J. 244, Ex.)

In an action by the assignee of a policy of a marine insurance, the insurers are not entitled to set off a debt incurred with them by the assured for premiums on policies effected with them by the assured after the date of the assignment, nor is the debt incurred by the assured the subject of "set-off" or "counter-claim" within the meaning of the rule: (*Pellas v. Neptune Marine Insurance Company*, L. Rep. 5 C. P. Div. 34; 42 L. T. Rep. N. S. 35; 49 L. J. 153, C. P.; 28 W. R. 405.)

Where the defendant counter-claims against the plaintiff jointly with a third person the relief claimed must be connected with the original subject of the cause or matter: (J. A. 1873, s. 24, sub-sect. 3; *Padwick v. Scott*, L. Rep. 2 Ch. Div. 736; *Harris v. Gamble*, L. Rep. 6 Ch. Div. 748; 46 L. J. 768, Ch.)

A third person made party to a counter-claim containing alternative inconsistent claims for relief in one of which he is not interested may demur: (*Evans v. Buck*, L. Rep. 4 Ch. Div. 432; 46 L. J. 157, Ch.)

3. BY WHOM MADE.

It may be made by the defendants, or some or one of them: (see *sup.*)

Persons who have been made co-defendants cannot counter-claim against the original defendants: (*McLay v. Sharp*, W. N. 1877, p. 216.)

Where a third person has been made defendant to a counter-claim, he cannot counter-claim against the defendant who has made him such defendant: (*Street v. Gover*, L. Rep. 2 Q. B. Div. 498.)

4. AGAINST WHOM MADE.

A defendant may counter-claim against (1.) The plaintiffs or some, or one of them (*Hodson v. Mochi*, L. Rep. 8 Ch. Div. 569; 38 L. T. Rep. N. S. 635; 47 L. J. 604, Ch.; 26 W. R. 590); (2.) All, or some, or one of the plaintiffs jointly with some third person or persons: (*Dear v. Swarder*,

L. Rep. 4 Ch. Div. 473; *Turner v. Hednesford Gas Company*, L. Rep. 3 Ex. Div. 145; 38 L. T. Rep. N. S. 8; 47 L. J. 296, Ex.; 26 W. R. 308.)

A counter-claim cannot be made against a third party alone, though the relief asked relates to and is connected with the original cause or matter, no rules having been made to give effect to the second part of 36 & 37 Vict. c. 66, s. 24, sub-sect. 3, given *sup.*: (*Trevelan v. Bray*, L. Rep. 1 Ch. Div. 176; 45 L. J. 113, Ch.; *Padwick v. Scott*, L. Rep. 2 Ch. Div. 736 *Furness v. Booth*, L. Rep. 4 Ch. Div. 586; *Bagot v. Easton*, 11 Ch. Div. 392; *Central African Trading Company v. Grove*, 40 L. T. Rep. N. S. 540; 48 L. J. 510, Ex.; 27 W. R. 933.)

A pleading which asks no cross relief against a plaintiff, either alone or with some other person, is not a counter-claim: (*Furness v. Booth*, *sup.*)

5. TITLE AND NAME AND ADDRESS OF DEFENDANT.

(a) *Against Plaintiff only* [see *sup.* II., 1].

(b) *Against Plaintiff and Another.*

Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other person or persons, he shall add to the title of his defence a further title similar to the title in a statement of complaint, setting forth the names of all the persons who, if such counter-claim were to be enforced by cross-action, would be defendants to such cross-action: (O. XXII., r. 5.)

6. ALLEGATIONS.

Where any defendant seeks to rely upon any facts as supporting a right of set-off or counter-claim, he shall, in his statement of defence, state specifically that he does so by way of set-off or counter-claim: (O. XIX., r. 10.)

A counter-claim is, strictly speaking, part of the statement of defence: (compare O. XIX., r. 8; O. XXII., rr. 5, 6, 8, 9.)

And subject to the rules below the general rules of pleading apply (see *sup.*, II., 2; V., 4.)

The counter-claim must be as specific as a statement of a claim in a cross-action (*Holloway v. York*, W. N., 1877, p. 112; 25 W. R. 627), and the facts relied on in support of the counter-claim must be distinguished from those constituting the defence: (per Jessel, M.R., *Crowe v. Burnicott*, L. Rep. 6 Ch. Div. 753; 37 L. T. Rep. N. S. 68; 46 L. J. 855; 25 W. R. 790; but compare the form App. C. No. 24.)

It is unnecessary to repeat *in extenso* or minutely facts in support of the counter-claim which have been already alleged in the defence. The practice is to refer to the allegations of the defence which are material to the counter-claim as if they were repeated in the latter portion of the pleading: (*Birmingham Estates Company v. Smith*, L. Rep. 13 Ch. Div. 506; 42 L. T. Rep. N. S. 111; 49 L. J. 251, Ch.; 28 W. R. 666.)

Where the defendant relies upon several distinct grounds of defence, set-off, or counter-claim founded upon separate and distinct facts [they shall be stated, as far as may be, separately and distinctly]: (O. XIX., r. 9.)

7. PARAGRAPHS.

[See the General Rule, *sup.*, II., 5.]

The paragraphs are generally numbered afresh, but it is not absolutely necessary: (*Lees v. Patterson*, L. Rep. 7 Ch. Div. 866; 38 L. T. Rep. N. S. 451; 26 W. R. 39; 47 L. J. 616, Ch.)

8. FIGURES.

[See the General Rule, *sup.*, II., 6.]

9. CLAIMS FOR RELIEF.

[Every counter-claim] shall state specifically the relief claimed either simply or in the alternative, and may also ask for general relief: (O. XIX., r. 8.)

The claim is good if made in a separate paragraph of the defence numbered consecutively with the others, though not headed separately: (*Lees v. Patterson*, *sup.*)

Damages claimed must be limited to the time when the writ was issued: (*Original Hartlepool Colliery Company v. Gibb*, L. Rep. 5 Ch. Div. 713.)

10. COUNSEL'S SIGNATURE.

[See the General Rule, *sup.*, II., 7.]

11. PRINTING.

[See *sup.*, II., 8.]

12. MARKING DATE OF DELIVERY.

[See *sup.*, II., 9.]

13. DELIVERY.

(a) *To Plaintiff Alone* [see *sup.*, II., 10; V., 15.]

(b) *To Plaintiff and other Person, Party.*

Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other person or persons, he . . . shall deliver his defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff: (O. XXII., r. 5; and see *sup.*, V., 17.)

14. SERVICE ON PERSON NOT PARTY.

Where any such person as in the last preceding rule mentioned is not a party to the action, he shall be summoned to appear by being served with a copy of the defence, and such service shall be regulated by the . . . rules . . . with respect to the service of a writ of summons, and every defence so served shall be indorsed in the form [following] or to the like effect: (O. XXII., r. 6.)

To the within-named X.Y.

Take notice that, if you do not appear to the within counter-claim of the within-named C.D. within eight days from the service of this defence and counter-claim upon you, you will be liable to have judgment given against you in your absence.

Appearances are to be entered at

(App. B. No. 4.)

Service out of the jurisdiction has been ordered: (*Re Luckie*, W. N. 1880, p. 11.)

15. APPEARANCE TO.

[See APPEARANCE.]

16. AMENDMENT.

(a) *Without Leave.*

A defendant who has set up in his defence any set-off or counter-claim may, without any leave, amend such set-off or counter-claim at any time before the expiration of the time allowed him for pleading to the reply, and before pleading thereto, or in case there be no reply, then at any time before the expiration of twenty-eight days from the filing of his defence: (O. XXVII., r. 3.)

Where any party has amended his [counter-claim without leave] the opposite party may, within eight days after the delivery to him of the amended pleading, apply to the court, or a judge, to disallow the amendment, or any part thereof, and the court or judge may, if satisfied that

the justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may seem just: (O. XXVI., r. 4.)

(b) *With Leave* [see *sup.*, II., 12].

17. APPLICATION TO EXCLUDE.

The court or a judge may, on the application of the plaintiff before trial, if in the opinion of the court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof: (O. XIX., r. 3.)

Where a defendant by his statement of defence sets up a counter-claim, if the plaintiff or any other person named in manner aforesaid as party to such counter-claim contends that the claim thereby raised ought not to be disposed of by way of counter-claim, but in an independent action, he may at any time before reply, apply to the court or a judge for an order that such counter-claim may be excluded, and the court or a judge may, on the hearing of such application, make such order as shall be just: (O. XXII., r. 9.)

The court has a discretion which will not generally be interfered with on appeal: (*Huggons v. Tweed*, L. Rep. 10 Ch. Div. 359; 40 L. T. Rep. N. S. 284; 27 W. R. 495.) Counter-claims have been excluded in the following cases:

For breach of an agreement to repair in an action for assault (*Lea v. Colyer*, W. N. 1876, p. 8); for damages for loss sustained in respect of shares bought on false representations, in an action for libel charging conspiracy and fraud against directors of a company (*Nicholson v. Jackson*, W. N. 1876, p. 38); against a plaintiff both as an executor and in his own right (*Macdonald v. Carington*, L. Rep. 4 C. P. Div. 28; 39 L. T. Rep. N. S. 426; 48 L. J. 179, C. P.; 27 W. R. 153); in an action for dissolution of a partnership, for work done by defendant as a traveller (*Naylor v. Farrer*, 26 W. R. 809; W. N. 1878, p. 187); by a local board in respect of breaches of their bye-laws and the Public Health Act: (*Masters v. Pontypool Local Board*, 47 L. J. 797, Ch.)

18. STRIKING OUT.

[See II., 12, (a); V., 20.]

As it is part of the statement of defence, the same rule as to striking out for embarrassment applies as applies to such part of the pleading.

A counter-claim may also be ordered to be struck out on the ground that the defendant has not complied with an order to give security for costs: (*The Julia Fisher*, L. Rep. 2 P. Div. 115.)

See also *Macdonald v. Carington*, *sup.*

19. EFFECT OF DISCONTINUANCE.

Where an action is discontinued the counter-claim is not a fresh action, but falls with the original action: (*Vavas seur v. Krupp*, L. Rep. 15 Ch. Div. 474; 28 W. R. 366.)

20. JUDGMENT ON COUNTER-CLAIM.

[See JUDGMENT.]

VIII. NOTICE CLAIMING RELIEF AGAINST CO-DEFENDANT.

The . . . court . . . and every judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief relating to or connected with the original subject of the cause or matter, and [properly claimed by his pleading] against any other person [than the plaintiff or

petitioner] who shall have been duly served with notice in writing of such claim pursuant to any rule of court or any order of the court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim as if he had been duly sued in the ordinary way by such defendant: (J. A. 1873, s. 24, sub-s. 3.)

No rule of court has been made to give effect to this section, so far as concerns relief by a defendant against his co-defendant without an independent action (per Mellish, L.J., *Treleven v. Bray*, 45 L. J. 113, Ch.; *Padwick v. Scott*, L. Rep. 2 Ch. Div. 736). It is the practice, however, to utilise the following rule, in the manner indicated by the cases cited *infra*.

Where a defendant claims to be entitled to contribution or indemnity, or any other remedy or relief over against any other person . . . the court or a judge may . . . make such order as may be proper for having the question so determined: (O. XVI., r. 17.)

A pleading which asks no cross-relief against a plaintiff either alone or with some other person is not a counter-claim: (*Warner v. Twining*, 24 W. R. 536; *Furness v. Booth*, L. Rep. 4 Ch. Div. 586.)

But, by consent of the plaintiff, issues between co-defendants may be ordered to be tried: (*Id.*; *Bright v. Marner*, L. Rep. 11 Ch. Div. 394 n.; *Bagot v. Easton*, L. Rep. 11 Ch. Div. 392; 27 W. R. 404.)

The pleading, whether it contains a defence to the plaintiff's claim, or a counter-claim against him, or both or neither, will be ordered to be delivered to the co-defendant, and to be treated as notice under sect. 24, sub-sect. 3 of the Act, and O. XVI., r. 17.

The delivery to the co-defendant may be without order: (*Furness v. Booth*, *sup.*; *Butler v. Butler*, L. Rep. 14 Ch. Div. 329; 42 L. T. Rep. N. S. 728; 28 W. R. 825.)

In the latter case there was a counter-claim.

Where one defendant by his statement of defence made certain allegations affecting the rights of his co-defendants, and the latter purchased a copy of the defence, which was not delivered to them in any other way; it was held that the purchase did not affect the co-defendants with notice under the rule: (*Steel v. Dixon*, 42 L. T. Rep. N. S. 765; 28 W. R. 822.)

[And see *post*, XVI.]

IX. CONFESSION OF DEFENCE.

Whenever any defendant, in his statement of defence, or in any further statement of defence . . . alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence . . . and he may thereupon sign judgment for his costs up to the time of the pleading of such defence, unless the court or a judge shall, either before or after the delivery of such confession, otherwise order: (O. XX., r. 3.)

[Such confession may be in the following form] with such variations as circumstances may require: (O. XX., r. 3.)

18 . [Here put the letter and number.]

In the High Court,
Queen's Bench Division.

Between A. B.

C. D.

and

Plaintiff.

Defendant.

The plaintiff confesses the defence stated in the paragraph of the defendant's statement of defence [or, of the defendant's further statement of defence].

(App. B. No. 2.)

As to costs where the defendant only set up performance after action, see *Callender v. Hawkins*, L. Rep. 2 C. P. Div. 592; 26 W. R. 212.

X. REPLY OF THE PLAINTIFF.

1. TITLE AND NAME AND ADDRESS OF PLAINTIFF.

[See *sup.*, II., 1.]

Where a counter-claim has been delivered against the plaintiff and the other person or persons, the additional title should be continued in the reply: (see *sup.*, VII., 5 (b).)

2. ALLEGATIONS.

(a) *Conciseness* [see the General Rule, *sup.*, II., 2, (a)].

(b) *Material Facts and Grounds of Reply* [see *sup.*, II., 2 (a)].

If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right, which heretofore could only have been given by a court of equity, the said courts respectively, and every judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose properly instituted before the passing of this Act: (J. A., 1873, s. 24, sub-s. 1.)

The plaintiff may introduce new matter by way of set-off or to controvert the defence: (*Id.*)

A reply must not refer to an independent document, such as plaintiff's answer to interrogatories, as containing the facts relied on, without setting out the document: (*Williamson v. London and North-Western Railway Company*, L. Rep. 12 Ch. Div. 787; 48 L. J. 559, Ch.; 27 W. R. 724.)

And new claims must not be raised: (*Id.*)

Evidence, argument, and conclusions of law must not be pleaded: (*Id.*)

(c) *Consistency with Statement of Claim.*

No [reply] shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same: (O. XIX., r. 19; *Collett v. Dickinson*, 26 W. R. 403; *Earp v. Henderson*, L. Rep. 3 Ch. Div. 254; *London Docks Company v. Metropolitan Railway Company*, W. N. 1876, p. 272; *Hall v. Eve*, *inf.*)

(d) *Facts Presumed.*

(e) *Effect of Documents.*

(f) *Implied Contracts or Relations.*

(g) *Malice and other Conditions of Mind.*

(h) *Notice.*

[See the General Rules, *sup.*, II., 2]

3. DENIALS.

The denials to the counter-claim (if any) must be contained in the reply to the defence.

It shall not be sufficient . . . for a plaintiff in his reply to deny generally the facts alleged in a defence by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth: (O. XIX., r. 20.)

So far as regards a reply by a plaintiff to a counter-claim, the general

rules as to denials [*sup.*, II., 3] apply: (see *Benbow v. Low*; *Green v. Sevin, inf.*)

And the same rules apply to denials in a reply to a defence containing no counter-claim, subject to the following rule as to joining issue.

Subject to the last preceding rule, the plaintiff by his reply may join issue upon the defence Such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted: (O. XIX., r. 21.)

Where a defence and a counter-claim have been delivered, the plaintiff by merely joining issue on the defendant's pleading, admits the allegations in the counter-claim: (*Rolfe v. Maclaren*, L. Rep. 3 Ch. Div. 106.)

So much of a reply as merely joined issue on a counter-claim was struck out: (*Benbow v. Low*, L. Rep. 13 Ch. Div. 553; 42 L. T. Rep. N. S. 14; 49 L. J. 259, Ch.; 28 W. R. 891.)

Where the statement of defence stated certain facts and admissions, and then a counter-claim, which was as follows: "And, by way of counter-claim, this defendant repeats the several matters hereinbefore stated and admitted, and claims as follows," and the plaintiff by his reply admitted some of the statements in the defence, and joined issue "upon the several defences save as aforesaid, and save in so far as the same do not admit the statement of claim," and continued "in reply to the statement alleged by way of counter-claim by the defendant, the plaintiff repeats the several matters stated in the statement of claim, and the admissions hereinbefore made, and says that, save as stated in the statement of claim or hereinbefore admitted, each of such allegations is untrue," it was held that the plaintiff had not specifically denied the facts alleged in the counter-claim, and had therefore admitted them. But leave to amend was given: (*Green v. Sevin*, L. Rep. 13 Ch. Div. 589; 41 L. T. Rep. N. S. 724; 49 L. J. 166, Ch.)

Besides traversing, a plaintiff may reply by traverse or confession and avoidance, or by both combined: (*Hall v. Eve*, L. Rep. 4 Ch. Div. 341; 46 L. J. 145, Ch.)

Pleading Defences to Counter-claim arising Subsequently.

If, after a statement of defence has been delivered, any ground of defence arises to any set-off or counter-claim alleged therein by the defendant, it may be pleaded by the plaintiff in his reply, either alone or together with any other ground of reply: (O. XX., r. 1.)

4. REPLYING AND DEMURRING [see *post*, XVII.]
5. PARAGRAPHS.
6. FIGURES.
7. SIGNATURE OF COUNSEL.
8. PRINTING.
9. MARKING DATE OF DELIVERY.
10. FILING.

[See the General Rules,
sup., II., 5—11.]

11. DELIVERY.

(a) *How made* [see *sup.* II., 10.]

The plaintiff shall [within such time as and in manner prescribed] deliver a statement of his reply (if any) to . . . the defence, set-off, or counter-claim: (O. XIX., r. 2.)

(b) *Within what Time.*

A plaintiff shall deliver his reply, if any, within three weeks after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the court or a judge: (O. XXIV., r. 1.)

If the defence has been amended, the reply is within time if delivered within two days after delivery of the amended defence.

And see *sup.* II., 10.

Where the plaintiff has taken out a summons for particulars of the defence the time for delivering the reply is suspended, between the date of the summons being returnable, and the delivery of the particulars if the order is made. If the time expires during the pending of the summons, and the order is made, the reply must be delivered on the same day as the particulars; but if the summons is dismissed the plaintiff has the rest of the day in which to deliver his reply: (*Chitty's Archb. Pr.*, 11th edit., 242.)

(c) *Default* [see *post*, XIV., 2.]

12. AMENDMENT.

(a) *By Plaintiff.*

(1) *Where Allowed.*

Where any party has amended his [set-off or counter-claim without leave] the other party may apply to the court or a judge for leave to plead or amend his former pleading within such time and upon such terms as may seem just: (*O. XXVII.*, r. 5.)

The court or a judge may at any stage of the proceedings allow [the plaintiff] to alter his . . . reply . . . and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties: (*O. XXVII.*, r. 1.)

(2) Application.

(3) Time.

(4) Not to be made Pending Demurrer.

(5) How Made.

(6) Delivery of Amended Pleading.

(7) Neglect to Amend and Deliver.

[See *sup.*, II., 10.]

(b) *By Defendant* [see *sup.*, II., 12, (a)]

13. ADMISSION OF TRUTH OF.

[See *sup.*, II., 13.]

14. STRIKING OUT.

The court or a judge may, at any stage of the proceedings . . . order to be struck out or amended any matter . . . which may be scandalous, or which may tend to embarrass, or delay the fair trial of the action: (*O. XXVII.*, r. 1.)

And see *sup.*, II., 12, (a); *Williamson v. London and North-Western Railway Company, sup.*; *Nobel's Explosive Company v. Scott*, W. N. 1879, p. 217.

XI. FURTHER REPLY BY PLAINTIFF.

Where any ground of defence to any set-off or counter-claim arises after reply, or after the time limited for delivering a reply has expired, the plaintiff may, within eight days after such ground of defence has arisen, and by leave of the court or a judge, deliver a further defence or further reply, as the case may be, setting forth the same: (*O. XX.*, r. 2.)

XII. REPLY TO COUNTER-CLAIM OF PERSON OTHER THAN PLAINTIFF.

1. TITLE AND NAME AND ADDRESS OF PARTY DELIVERING.

[See *sup.*, II., 1.]

The additional title of the counter-claim [*sup.* VI., 5, (b)] should be continued in the reply.

2. ALLEGATIONS.

[See General Rules, *sup.*, II., 2.]

The party cannot counter-claim against the original defendant: (*Street v. Gover*, L. Rep. 2 Q. B. Div. 498; 36 L. T. Rep. N. S. 766; 46 L. J. 582, Q. B.; 25 W. R. 750.)

3. DENIALS.

[See II., 3.]

4. PARAGRAPHS.

5. FIGURES.

6. SIGNATURE OF COUNSEL.

7. PRINTING.

8. MARKING DATE OF DELIVERY.

[See General Rules, *sup.*, II., 5-9.]

* 9. DELIVERY.

(a) *How made* [see *sup.*, II.]

(b) *When made.*

Any person named in a defence as a party to a counter-claim thereby made may deliver a reply within the time within which he might deliver a defence if it were a statement of claim: (O. XXII., r. 8.)

If already a party it will be within eight days from delivery of the counter-claim: (O. XXII., r. 1.)

If not a party and served with the counter-claim within eight days from the time limited for appearing: (*Id.*)

10. AMENDMENT.

[See *sup.*, II., 12.]

11. STRIKING OUT.

The court or a judge may, at any stage of the proceedings . . . order to be struck out or amended any matter in [the reply] which may be scandalous, or which may tend to prejudice, embarrass, or delay, the fair trial of the action: (O. XXVII., r. 1.)

XIII. PLEADINGS SUBSEQUENT TO REPLY.

1. WHEN ALLOWED.

No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the court or a judge, and then upon such terms as the court or judge shall think fit: (O. XXIV., r. 2.)

2. JOINING ISSUE BY.

Each party in his pleading, if any, subsequent to reply, may join issue upon the previous pleading: (O. XIX., r. 21.)

3. DELIVERY.

(a) *How made* [see *sup.*, II., 10].

(b) *When made.*

Subject to the last preceding rule, every pleading subsequent to reply shall be delivered within four days after the delivery of the previous pleading, unless the time shall be extended by the court or a judge: (O. XXIV., r. 3.)

XIV. CLOSE OF THE PLEADINGS.

1. BY JOINING ISSUE.

As soon as either party has joined issue upon any pleading of the opposite party simply without adding any further or other pleadings

thereto, the pleadings as between such parties shall be deemed to be closed: (O. XXV.)

2. BY NOT PLEADING.

If the plaintiff does not deliver a reply or demurrer, or any party does not deliver any subsequent pleading, or a demurrer, within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and the statements of fact in the pleading last delivered shall be deemed to be admitted: (O. XXIX., r. 12.)

As to whether defendant may move for judgment, see *Litton v. Litton*, L. Rep. 3 Ch. Div. 793; and JUDGMENT.

XV. DIRECTING ISSUES OF FACT.

Where in any action it appears to a judge that the statement of claim or defence or reply does not sufficiently define the issues of fact in dispute between the parties, he may direct the parties to prepare issues, and such issues shall, if the parties differ, be settled by the judge: (O. XXVI.)

XVI. THIRD AND FOURTH PARTY NOTICES.

1. EXPLANATION OF THE PROCEDURE.

The courts respectively, and every judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title, claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner, and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of court or any order of the court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant: (J. A., 1873, s. 24, sub-s. 3.)

The first part of the sub-section as to relief against the plaintiff has been given effect to by the rules as to counter-claims: (see *sup.*, VII.)

The second part of the sub-section, as to relief against any other person who is a party to the action has not been generally provided for by the rules (see *Treleven v. Bray*, *Padwick v. Scott*, *sup.* VIII.), but is carried into effect by a special order made with the plaintiff's consent in each case: (see *sup.*, VIII.)

The part of the sub-section relating to relief against third persons who are not parties to the action is given effect to as follows:

As to claims by the defendant for contribution, indemnity, or other relief, by O. XVI., rr. 17 (part 1), 18, 20, 21;

As to determining questions so as to bind the third party by O. XVI., rr. 17 (part 2), 19.

2. CLAIMS BY DEFENDANT FOR CONTRIBUTION, INDEMNITY, OR RELIEF.

(a) Notice.

(1) Leave of the Court to Serve.

Where a defendant claims to be entitled to contribution, indemnity, or

other remedy or relief over against any person not a party to the action, he may, by leave of the court or a judge, issue a notice to that effect, stamped with the seal with which writs of summons are sealed: (O. XVI., r. 18; *Swansea Shipping Company v. Duncan*, L. Rep. 1 Q. B. Div. 644.)

Notice of the application for leave should be given to the plaintiff: (*Wye Valley Railway Company v. Hawes*, W. N. 1880, p. 185.)

The court has power to order the notice to be served, if there is one question common to all the parties, though the whole question to be tried between the plaintiff and the defendant is not the same as that which would arise between the defendant and the third party. But the power is discretionary, and will not be exercised if the exercise will tend to prejudice or delay the plaintiff: (*Bower v. Hartley*, L. Rep. 1 Q. B. Div. 652; *Associated Home Company v. Whichcord*, L. Rep. 8 Ch. Div. 454; 38 L. T. Rep. N. S. 602; 47 L. J. 652, Ch.; 26 W. R. 774; *Wye Valley Railway Company v. Hawes*, *sup.*)

Notice will not be ordered to be given to a third party for the purpose of ascertaining whether it is the defendant or the third party who is liable to the plaintiff in damages in an action of tort: (*Horwell v. London General Omnibus Company*, L. Rep. 2 Ex. Div. 365; *Lereculey v. Harrison*, W. N., 1876, p. 39.)

See also *Benecke v. Frost*, L. Rep. 1 Q. B. Div. 419; *The Sarpedon*, L. Rep. 3 P. Div. 28; *Norris v. Beazley*, 46 L. J. 515, C. P.; *Darves v. Thornton*, W. N., 1876, p. 74; *Attenborough v. St. Katherine's Dock Company*, L. Rep. 3 C. P. Div. 456; *Central African Trading Company, v. Grove*, 40 L. T. Rep. N. S. 540; 48 L. J. 510, Ex.; 27 W. R. 933.)

(2) Filing Copy.

A copy of such notice shall be filed with the proper officer: (O. XVI., r. 18.)

(3) Form.

The notice shall state the nature and grounds of the claim. Such notice may be in the form or to the effect of the form No. 1 in App. B. [to the rules of 1875] with such variations as circumstances may require: (*Id.*)

(4) Service.

A copy of [the notice] shall . . . be served on [the third party according to the rules relating to the service of writs of summons: (*Id.*; see WRIT OF SUMMONS.)

Therewith shall be served a copy of the statement of claim, or if there be no statement of claim, then a copy of the writ of summons in the action: (O. XVI., r. 18.)

[Service must be effected] unless otherwise ordered by the court or a judge . . . within the time limited for delivering [the] statement of defence: (*Id.*)

Service in Scotland may be ordered: (*Swansea Shipping Company v. Duncan*, *sup.*)

(b) Appearance.

If a person not a party to the action, who is served as mentioned [above] desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, he must enter an appearance in the action within eight days from the service of the notice. In default of his so doing, he shall be deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise. Provided always, that a person so served and failing to appear within the said period of eight days may

apply to the court or a judge for leave to appear, and such leave may be given upon such terms, if any, as the court or a judge shall think fit : (O. XVI., r. 20.)

(c) *Directions for Determining Question.*

If a person not a party to the action served under these rules appears pursuant to the notice, the party giving the notice may apply to the court or a judge for directions as to the mode of having the question in the action determined; and the court or judge, upon the hearing of such application, may, if it shall appear desirable to do so, give the person so served liberty to defend the action upon such terms as shall seem just, and may direct such pleadings to be delivered, or such amendments in any pleadings to be made, and generally may direct such proceedings to be taken, and give such directions as to the court or a judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the person so served shall be bound or made liable by the decision of the question : (O. XVI., r. 21.)

Where a defendant is or claims to be entitled to contribution or indemnity, or any other remedy or relief over against any other person . . . the court or a judge may, on notice being given to such last-mentioned person, make such order as may be proper for having the question so determined : (O. XVI., r. 17.)

In an action for the price of ironwork for a warehouse being built by S., who agreed to pay the defendants a percentage on it, the defendants having given notice to S. the order made was that S. should not, if liable, dispute the amount due from the defendants to the plaintiff : (*Measures v. Thomas* (Chamb.) W. N. 1875, p. 203 ; see also *Tebb v. Lewis*, W. N. 1875, 204, 260 ; *Pearson v. Lane*, *Id.*, 248.)

A trustee in bankruptcy may be brought in as a third party : (*Ex parte Smith*, L. Rep. 2 Ch. Div. 51.)

Questions between co-defendants may be raised by a statement of defence which contains a counter-claim as against a co-defendant, and delivery of such pleading to a co-defendant is sufficient notice under rule 17. Questions of this kind may be raised after judgment upon further consideration, or at any stage of the proceedings : (*Butler v. Butler*, L. Rep. 14 Ch. Div. 329 ; 42 L. T. Rep. N. S. 728.)

Where a defendant by his separate statement of defence raised certain questions affecting the rights of his co-defendants, but did not make any counter-claim against them, and did not deliver his defence to them, and the co-defendants moved to strike out the paragraphs containing these allegations as embarrassing, the court being of opinion that the questions raised by the defence were material questions to be determined at the trial, and the defendant being unwilling to raise them against his co-defendants, leave was given to the latter to serve a notice on the other defendant under rule 17, for the purpose of raising the questions as between him and them : (*Steel v. Dixon*, 42 L. T. Rep. N. S. 765 ; 28 W. R. 822.)

When in a cause the defendant claims indemnity from a third party, and such third party appears and defends, the court may find the original defendant solely to blame, notwithstanding he does not plead or appear at the trial, but unless issues are directed between the defendant and the third party the court cannot make a decree deciding questions of liability between them. It is competent to the court to order such issues between the defendant and a third party to be tried either at the same time as those between plaintiff and defendant, or after they have been decided : (*The Carlsburn*, L. Rep. 5 P. Div. 590 ; 41 L. T. Rep. N. S. 710 ; 49 L. J. 14, P. D. and A. ; 28 W. R. 378.)

According to Hall, V.C. a defendant proceeding under this rule cannot so proceed as to get present relief, but can only bind the third party by the judgment (*Padwick v. Scott*, L. Rep. 2 Ch. Div. 744.) But in *The Cartisburn, sup.*, James, L.J. says, "It is very desirable that in these cases . . . the order of the court as to the mode of the trial should be so framed as to put the matter in a proper train for deciding the questions between the defendant and the third party," and Baggallay, L.J. said it was perfectly competent for the court to decide the question.

In a former case (*Benecke v. Frost, sup.*), the court directed that the third party should be at liberty to appear and defend the action on one question, and should be bound by the finding of the jury thereon. In another case the third party was ordered to pay the plaintiff his claim, and was substituted as plaintiff against the defendant: (*National Provincial Bank of England v. Bradley Bridge Company*, W. N. 1876, p. 63.)

In another case liberty was given to a third party to put in a defence to the statement of claim limited to such points as were not raised by the defendant's defence: (*Witham v. Vane*, 41 L. T. Rep. N. S. 729; 49 L. J. 242, Ch.; 28 W. R. 276.)

The question of costs ought to be reserved for the decision of a judge after the trial and subject to appeal: (*Benecke v. Frost, sup.*)

A third party who had obtained leave to appear at the trial, and then succeeded in his object of reducing the amount of damages to a sum already paid into court by the defendant, was held not to be entitled to costs as against the plaintiff: (*Williams v. The South-Eastern Railway Company*, 26 W. R. 352.)

The Queen's Bench Division have held that there is no jurisdiction to impose any terms with regard to the payment of the costs of a party brought in by notice under rule 18, upon even the party bringing in: (*Yorkshire Waggon Company v. The Newport and Abercarne Coal Company*, 42 L. T. Rep. N. S. 367; L. Rep. 5 Q. B. Div. 268.)

Where the action was brought to recover damages for breach of covenant, and the defendants denied their liability, but, claiming to be indemnified, if declared liable, by some third parties, by leave under Order XVI., r. 18, served the third parties with notice of the action, and these third parties claimed, in case they should be held liable, to be indemnified by other parties, and obtained leave under the same rule to serve notice of the action on them, Fry, J. at the trial decided substantially in favour of the defendants, and ordered the plaintiffs to pay the costs of the third and fourth parties: (*Witham v. Vane*, 42 L. T. Rep. N. S. 686; 28 W. R. 812.)

The court cannot annul a direction given in a judgment previously delivered, that a third party shall pay the costs of the interlocutory proceedings taken to bring him before the court, though by the judgment in the action it is ordered that he be dismissed from the action with costs to be paid by the defendants: (*Beynon v. Godden*, L. Rep. 4 Ex. Div. 246.)

3. DETERMINING QUESTION SO AS TO BIND THIRD PARTY.

(a) Notice.

When under rule 17 of this order [see *post*] it is made to appear to the court or a judge at any time before or at the trial that a question in the action should be determined, not only as between the plaintiff and defendant, but as between the plaintiff and the defendant and any other person, or between any or either of them, the court or a judge, before or at the time of making the order for having such question determined, shall direct such notice to be given by the plaintiff at such time and to

such person and in such manner as may be thought proper, and if made at the trial the judge may postpone such trial as he may think fit: (O. XVI., r. 19.)

In an action for specific performance where the conveyance could not be completed through the refusal of the trustee to execute he was ordered to be served: (*Treleven v. Bray*, 45 L. J. 112, Ch.; and see *Harry v. Davey*, L. Rep. 2 Ch. Div. 721.)

(b) *Directions for Determining Question.*

When from any . . . cause it appears to the court or a judge that a question in the action should be determined not only as between the plaintiff and defendant, but as between the plaintiff, defendant, and any other person, or between any or either of them, the court or a judge may on notice being given to such last-mentioned person, make such order as may be proper for having the question so determined: (O. XVI., r. 17.)

4. FOURTH AND OTHER PARTY NOTICES.

A third party brought in by notice [*sup.*, 2, 3] may by leave serve a similar notice on a fourth party against whom he claims relief over (*Fowler v. Knoop*, W. N. 1877, p. 68; 36 L. T. Rep. N. S. 219; *Witham v. Vane*, 41 L. T. Rep. N. S. 729; 28 W. R. 276), who may by leave serve a fifth party with a like notice: (*Yorkshire Railway Waggon Company v. Newport Coal Company*, L. Rep. 5 Q. B. Div. 268; 42 L. T. Rep. N. S. 367; 28 W. R. 505.)

XVII. DEMURRER.

1. WHERE ALLOWED.

Any party may demur to any pleading of the opposite party, or to any part of a pleading setting up a distinct cause of action, ground of defence, set-off, counter-claim, reply, or as the case may be, on the ground that the facts alleged therein do not show any cause of action, or ground of defence to a claim or any part thereof, or set-off, or counter-claim, or reply, or as the case may be, to which effect can be given by the court as against the party demurring: (O. XXVIII., r. 1.)

Where a writ is specially indorsed, and notice in lieu of statement of claim is delivered (see *sup.* III., 2), the defendant may demur to such notice and indorsement: (*Robertson v. Howard*, L. Rep. 3 C. P. Div. 280; 38 L. T. Rep. N. S. 715; 47 L. J. 480, C. P.; 26 W. R. 683.)

A plaintiff cannot demur to a single paragraph, if, when taken with the contents of the pleading, it affords a good ground of claim or defence: (*Nathan v. Batchelor*, W. N. 1876, p. 172.)

When a defendant delivers an amended statement of claim, after statement of defence delivered, and the defendant then obtains leave to amend his statement of defence, he may demur to the amended claim: (*Powell v. Jewesbury*, L. Rep. 9 Ch. Div. 34; 39 L. T. Rep. N. S. 213; 27 W. R. 142.)

2. COMBINATION OF DEMURRER TO PART AND PLEADING TO OTHER PART.

A defendant desiring to demur to part of a statement of claim, and to put in a defence to the other part, shall combine such demurrer and defence in one pleading. And so in every case where a party entitled to put in a further pleading desires to demur to part of the last pleading of the opposite party he shall combine such demurrer and other pleading: (O. XXVIII., r. 4.)

3. LEAVE TO DEMUR AND PLEAD TO WHOLE OR SAME PART.

If the party demurring desires to be at liberty to plead as well as demur to the matter demurred to, he may, before demurring, apply

to the court or a judge for an order giving him leave to do so; and the court or judge, if satisfied that there is reasonable ground for the demurrer, may make an order accordingly, or may reserve leave to him to plead after the demurrer is overruled, or may make such other order and upon such terms as may be just: (O. XXVIII., r. 5; *Hogg v. Darley*, 38 L. T. Rep. N. S. 312; 47 L. J. 567, Ch.)

4. GROUNDS.

A demurrer shall state specifically whether it is to the whole or to a part, and if so, to what part, of the pleading of the opposite party. It shall state some ground in law for the demurrer, but the party demurring shall not, on the argument of the demurrer, be limited to the ground so stated: (O. XXVIII., r. 2.)

A demurrer to "such part of the . . . as claims damages," is good in form: (*Powell v. Jewesbury*, *sup.*)

The same strictness as to stating the grounds is not necessary in the case of demurrer, as in the case of statements of defence: (*Dawkin v. Lord Penrhyn*, L. Rep. 4 App. Cas. 5; 48 L. J. 304, Ch.; 39 L. T. Rep. N. S. 583; 27 W. R. 173.)

The statutes of limitation may be raised by demurrer: (*Id.*; *Noyes v. Crawley*, L. Rep. 10 Ch. Div. 31; 39 L. T. Rep. N. S. 267; 48 L. J. 112, Ch.; 27 W. R. 109; *Willis v. Earl Howe*, 43 L. T. Rep. N. S. 375.) See *contra*, *Wakelee v. Davis*, 25 W. R. 60.

The Statute of Frauds cannot be so raised: (*Catling v. King*, L. Rep. 5 Ch. Div. 660; 36 L. T. Rep. N. S. 526; 25 W. R. 550.)

A demurrer may amount to an admission of the allegations of the pleading demurred to: (*Metropolitan Railway Company v. Defries*, L. Rep. 2 Q. B. Div. 387; 47 L. J. 768, Q. B.; 26 W. R. 351; but see *Day v. Brownrigg*, L. Rep. 10 Ch. Div. 294; 39 L. T. Rep. N. S. 533; 48 L. J. 173, Ch.; 27 W. R. 217.)

5. FORM.

A demurrer may be in the form 28 in Appendix C. [the Rules of 1875]: (O. XXVIII., r. 2.)

6. DELIVERY.

A demurrer shall be delivered in the same manner and within the same time as any other pleading in the action: (O. XXVIII., r. 3.)

[See *sup.*, II., 10; V., 17; X., 11; XIII., 3.]

When the time for delivering the pleading to be demurred to has been extended, the demurrer may be delivered within such extended time: (*Hodges v. Hodges*, L. Rep. 2 Ch. Div. 112.)

7. SETTING ASIDE.

If there is no ground [of law] or only a frivolous ground of demurrer stated, the court or a judge may set aside such demurrer, with costs: (O. XXVIII., r. 2.)

The application must be made within ten days after delivery of the demurrer: (see O. XXVIII., r. 6.)

The power will not be exercised when the ground stated fairly admits of argument: (*Wilks v. Parker*, W. N., 1876, p. 74.)

8. ENTRY FOR ARGUMENT.

(a) *By Whom made.*

When a demurrer either to the whole or part of a pleading is delivered, either party may enter the demurrer for argument immediately: (O. XXVIII., r. 6.)

(b) *How made.*

A demurrer shall be entered for argument by delivering to the proper

officer a memorandum of entry in the form [following]: (O. XXVIII., r. 13.)

(c) *When made.*

The time is ten days after delivery: (see *post*, 9.)

(d) *Form.*

18 . B. No.

In the High Court of Justice,
Chancery Division.

A. B. v. C. D.

Enter for the argument the demurrer of _____ to
X. Y., solicitor for the plaintiff [or, &c.]
(App. C. 29.)

(e) *Notice of Entry.*

The party so entering such demurrer shall on the same day give notice thereof to the other party: (O. XXVIII., r. 6.)

9. DEFAULT OF ENTRY AND NOTICE.

If the demurrer shall not be entered and notice thereof given within ten days after delivery, and if the party whose pleading is demurred to does not within such time serve an order for leave to amend, the demurrer shall be held sufficient for the same purposes and with the same result as to costs as if it had been allowed on argument: (O. XXVIII., r. 6.)

10. EFFECT ON POWER OF AMENDMENT.

While a demurrer to the whole or any part of a pleading is pending, such pleading shall not be amended, unless by order of the court or a judge; and no such order shall be made except on payment of the costs of the demurrer: (O. XXVIII., r. 7.)

11. HEARING.

When, on the demurrer being called on, one party only appears, judgment will be given for him, without hearing any argument: (*Turner v. Sanson*, W. N., 1876, p. 163.)

When a petition is demurred to, counsel for the petitioner opens the case: (*Re British Alliance Corporation*, L. Rep. 9 Ch. Div. 635.)

12. ALLOWING DEMURRER.

Where a demurrer to the whole or part of any pleading is allowed upon argument, the party whose pleading is demurred to shall, unless the court otherwise order, pay to the demurring party the costs of the demurrer: (O. XXVIII., r. 8.)

If a demurrer to the whole of a statement of claim be allowed, the plaintiff, subject to the power of the court to allow the statement of claim to be amended, shall pay to the demurring defendant the costs of the action, unless the court shall otherwise order: (O. XXVIII., r. 9.)

Where a demurrer to any pleading or part of a pleading is allowed in any case not falling within the last preceding rule, then (subject to the power of the court to allow an amendment) the matter demurred to shall, as between the parties to the demurrer, be deemed to be struck out of the pleadings, and the rights of the parties shall be the same as if it had not been pleaded: (O. XXVIII., r. 10.)

13. OVERRULING DEMURRER.

Where a demurrer is overruled the demurring party shall pay to the opposite party the costs occasioned by the demurrer, unless the court shall otherwise direct: (O. XXVIII., r. 11.)

Where a demurrer is overruled the court may make such order and upon such terms as to the court shall seem right for allowing the demur-

ring party to raise by pleading any case he may be desirous to set up in opposition to the matter demurred to: (O. XXVIII., r. 12.)

Leave ought to be given to put in a statement of defence: (*Bell v. Wilkinson*, W. N. 1878, p. 3; 26 W. R. 275.)

14. APPEAL FROM ORDER MADE.

The order is final with respect to the time for appealing: (*Trowell v. Shenton*, L. Rep. 8 Ch. Div. 318.)

[See APPEAL.]

15. AMENDMENT OF PLEADING.

[See *sup.* 12.]

XVIII. JUDGMENT ON ADMISSION IN PLEADINGS.

[See JUDGMENT.]

POLICIES OF ASSURANCE.

As to procedure in case of conflicting claims to policy moneys, see ASSIGNMENT OF DEBTS; INTERPLEADER; TRUSTEES.

As to joining the personal representative of the claimant to policy moneys, see PARTIES, I., 5. As to winding-up companies, see WINDING-UP.

PORTIONS.

All causes and matters for the raising of portions, or other charges on land [are specially assigned to the Chancery Division]: (J. A. 1873, s. 33.)

The following form of indorsement of writ is given:

The plaintiff's claim is that the sum of l., which by an indenture of settlement dated , was provided for the portions of the younger children of may be raised.

(App. Ap. 2, s. 1, No. 6.)

[See also *Seton*, 1250—4.]

POSSESSION.

WRIT OF [see EXECUTION XXII.]—PLEADING POSSESSION [see RECOVERY OF LAND.]

PRESERVATION OF PROPERTY.

[See PROPERTY.]

PRINTING.

I. WHAT TO BE PRINTED.

1. PLEADINGS.
2. ANSWERS TO INTERROGATORIES.
3. EVIDENCE.
4. JUDGMENTS AND ORDERS [see JUDGMENT, XV.; PAYMENT INTO AND OUT OF COURT.]

II. HOW PRINTED.

III. COSTS.

I. WHAT TO BE PRINTED.

1. PLEADINGS.

Every pleading which shall contain less than ten folios of seventy-two words each (every figure being counted as one word) may be either printed or written, or partly printed and partly written, and every other pleading, not being a petition or summons, shall be printed: (O. XIX., r. 5, as amended by rule 5a, June, 1876.)

A pleading may be amended by written alterations in the pleading which has been delivered, and by additions on paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than 144 words in any one place, or are so numerous or of such a nature that the making them in writing would render the pleading difficult or inconvenient to read, in either of which cases the amendment must be made by delivering a print of the pleading as amended: (O. XXVII., r. 8.)

2. ANSWERS TO INTERROGATORIES.

An affidavit in answer to interrogatories shall, unless otherwise ordered by a judge, if exceeding ten folios, be printed: (O. XXXI., r. 7; as amended by rule 7a, June, 1876.)

3. EVIDENCE.

Where any written deposition of a witness has been filed for use on a trial, such deposition shall be printed, unless otherwise ordered: (Add. R. Aug. 1875, O. I.)

Any affidavit may be sworn to either in print or in manuscript, or partly in print and partly in manuscript: (O. LVI., r. 3.)

When the evidence in any action is under [O. XXXVIII.] taken by affidavit, such evidence shall be printed: (O. XXXVIII., r. 6.)

The rules of court as to printing depositions and affidavits to be used on a trial shall not apply to depositions and affidavits which have previously been used upon any proceeding without having been printed: (Add. R. Aug. 1875, O. II.)

Other affidavits than those required to be printed by Order XXXVIII., rule 6, in the schedule to the Supreme Court of Judicature Act, 1875, may be printed if all the parties interested consent thereto, or the court or judge so order: (Add. R. Aug. 1875, O. III.)

Where evidence has not been printed in the court below, the court below or a judge thereof, or the Court of Appeal or a judge thereof, may order the whole or any part thereof to be printed for the purpose of the appeal. Any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof, unless the Court of Appeal or a judge thereof shall otherwise order: (O. LVIII., r. 12.)

4. JUDGMENTS AND ORDERS.

[See JUDGMENT, XV.; PAYMENT INTO AND OUT OF COURT.]

II. HOW PRINTED.

Where, pursuant to rules of court, any pleading, special case, petition

of right, deposition, or affidavit is to be printed . . . the following regulations shall be observed :

1. The party on whose behalf the deposition or affidavit is taken and filed is to print the same in the manner provided by Rule 2 of Order LVI. in the first schedule to the Supreme Court of Judicature Act, 1875. [Proceedings required to be printed shall be printed on cream wove machine drawing foolscap folio paper, 19lb. per mill ream, or thereabouts, in pica type leaded, with an inner margin about three-quarters of an inch wide, and an outer margin about two inches and a half wide : (O. LVI., r. 2.)]
2. To enable the party printing to print any deposition, the officer with whom it is filed shall on demand deliver to such party a copy written on draft paper on one side only.
11. It shall be stated in a note at the foot of every affidavit filed on whose behalf it is so filed, and such note shall be printed on every printed copy of an affidavit or set of affidavits, and copied on every office copy and copy furnished to a party.
12. The name and address of the party or solicitor by whom any copy is furnished is to be endorsed thereon in like manner as upon proceedings in court, and such party or solicitor is to be answerable for the same being a true copy of the original, or of an office copy of the original, of which it purports to be a copy, as the case may be.
13. The folios of all printed and written office copies, and copies delivered or furnished to a party, shall be numbered consecutively in the margin thereof, and such written copies shall be written in a neat and legible manner on the same paper as in the case of printed copies : (Add. R., Aug. 1875, O. V.)

III. COSTS.

Where, by any order of the court (whether of appeal or otherwise) or a judge, any pleading, evidence, or other document is ordered to be printed, the court or judge may order the expense of printing to be borne and allowed, and printed copies to be furnished by and to such parties and upon such terms as shall be thought fit : (Ad. R., Aug. 1875, O. V.)

[And see Costs.]

PRIVATE HEARING.

Except where it is expressly provided by statute, the court cannot hear cases in private, even by consent, except cases affecting lunatics, or wards of court, or where a public trial would defeat the ends of justice, or in certain cases where the practice of the old ecclesiastical courts prevails : (*Nagle-Gilman v. Christopher*, L. Rep. 4 Ch. Div. 173.)

PROCEEDS OF CHARGED PROPERTY.

All causes and matters for . . . the sale and distribution of the proceeds of property subject to any lien or charge [are expressly assigned to the Chancery Division] : (J. A. 1873, s. 34.)

PRODUCTION.

Of CESTUI QUE VIE [see CESTUI QUE VIE].
Of DOCUMENTS [see DISCOVERY, EVIDENCE].

PROHIBITION.

- I. JURISDICTION.
- II. APPLICATION.
 1. WHEN MADE.
 2. WHERE AND HOW MADE.
 3. BY WHOM MADE.
- III. PRÆCIPE.
- IV. WRIT.
 1. FORM.
 2. SERVICE.
 3. LODGING (IN COUNTY COURT CASES.)
 4. EFFECT.
- V. SETTING ASIDE.

I. JURISDICTION.

All judges of the High Court have equal jurisdiction, and can therefore both grant injunctions and issue writs of prohibition; but where the rights of parties can be determined by either injunction or prohibition, preference will be given to the cheaper and more effectual remedy: (*Hedley v. Bates*, L. Rep. 13 Ch. Div. 498; 42 L. T. Rep. N. S. 41; 49 L. J. 170, Ch.; 28 W. R. 365.)

Injunctions are generally granted instead of prohibitions: (*Id.*)

The jurisdiction extends to the prohibiting justices of the peace acting in a civil proceeding: (*Id.*)

As to restraining an inferior court from dealing with a counterclaim as to matters arising out of the local jurisdiction, see *Davis v. Flagstaff Company of Utah*, L. Rep. 3 C. P. Div. 228.

II. APPLICATION.

1. WHEN MADE.

Where an inferior court proceeds in a cause properly within its jurisdiction, no prohibition can be awarded till the pleadings raise some issue which the court is incompetent to try: (*Mayor of London v. Cox*, L. Rep. 2 E. & I. App. 239.)

Where the foundation for the jurisdiction is itself defective, a prohibition may be applied for at once: (*Id.*)

A prohibition will be granted after judgment, or after execution and levy made, but before sale: (*Kimpton v. Willey*, 19 L. J. 269, C. P.; *Jones v. Owen*, 18 L. J. 8, Q. B.)

2. WHERE AND HOW MADE.

The application may be made either by motion in court supported by affidavits (*Mayor of London v. Cox*, *sup.*), or on mere production at the Petty Bag Office, of an affidavit showing want of jurisdiction in the inferior court: (see *Chambers v. Green*, L. Rep. 20 Eq. 552.)

In County Court cases the writ may be obtained on summons at chambers: (13 & 14 Vict. c. 61, s. 22.)

In Mayor's Court cases, summons may be issued and an order made during sittings and vacation: (see 15 & 16 Vict. c. lxxvii., s. 32.)

Where application is made to the court, an order *nisi* is generally granted. The summons or order *nisi* must in County Court cases be served on the opposite party and the registrar of the County Court two clear days before hearing below, and, if so directed, stays proceedings: (see 19 & 20 Vict. c. 40.)

The applicant should move that the plaintiff's solicitor be ordered to pay the costs personally, if such an order is required: (*Rogers v. London, Chatham and Dover Railway Company*, 26 W. R. 192.)

3. BY WHOM MADE.

Application may be made either by a party to the action, or the Crown, or any subject of the Crown, although not a party: (*Mayor of London v. Cox, sup.*; *Cook v. Gill*, L. Rep. 8 C. P. 107; *Jacobs v. Brett*, L. Rep. 20 Eq. 1.)

III. PRÆCIPE.

The following is the form of præcipe:—

In the High Court of Justice

Division.

18 .

No.

In the matter of a certain
Between

now depending in the court.

Plaintiff,

and

Defendant.

Seal a writ of prohibition directed to the judge of the above-named court and to the above-named plaintiff to prohibit them from further proceeding in the said 18

Dated the day of 18 .

(Signed)
(Address)

Solicitor for the

(Sched. E. 13, to Rules of April, 1880.)

IV. WRIT.

1. FORM.

The following is the form of writ:

In the High Court of Justice.

Division.

18

No.

Between

Plaintiff,

and

Defendant.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the [judge of the County Court holden at] and to [name of plaintiff] of greeting:

Whereas we have been given to understand that you the said have [entered a plaint against] C.D. in the said court, and that the said court has no jurisdiction in the said [cause] or to hear and determine the said [plaint] by reason that [state facts showing want of jurisdiction].

We therefore hereby prohibit you from further proceeding in the said [action] in the said court.

Witness, HUGH MACCALMONT, EARL CAIRNS, Lord High Chancellor of Great Britain, the day of in the year of Our Lord One thousand eight hundred and

This writ was issued by

of

agent for

of

solicitor for the

who reside at

(Sched. G. 10 to Rules of April, 1880.)

The writ must be engrossed on parchment.

2. SERVICE.

The writ must be served on the judge of the inferior court, and the parties to the proceedings there: (Dan. Forms, 3rd edit. 1009.)

3. LODGING IN COUNTY COURT CASES.

Where a writ of . . . prohibition, addressed to a judge of a County Court, shall have been granted by a Superior Court or a judge thereof, on an *ex parte* application, and the party who obtained it shall not lodge it with the registrar [of the County Court] and give notice to the opposite party that it has issued two clear days before the day fixed for hearing the cause to which it shall relate, the judge of the County Court may in his discretion order the party who obtained the writ to pay all the costs of the day, or so much thereof as he shall think fit, unless the Superior Court, or a judge thereof, shall have made some order respecting such costs: (19 & 20 Vict. c. 108, s. 41.)

4. EFFECT.

The judge below or any party proceeding after the prohibition has been granted is guilty of contempt of the Superior Court: (Dan. Form, 1009.)

V. SETTING ASIDE.

The writ, when issued at the instance of a stranger, cannot be sustained unless he can show that the court has exceeded its jurisdiction both with reference to facts and law, and then it is a matter of discretion with the Superior Court whether or not to set it aside: (*Chambers v. Green*, L. Rep. 20 Eq. 552; *Ellis v. Fleming*, L. Rep. 1 C. P. Div. 237; *Taylor v. Nicholls*, *id.* 242.)

The application is by summons, or motion on notice, supported by affidavits: (*Chambers v. Green*, *sup.*)

If the writ issued out of the Petty Bag Office, the application may be made to any judge of any division of the High Court of Justice: (Per Jessel, M.R., *Lyon v. —*, unreported.)

As to County Court cases, see 13 & 14 Vict. c. 61, s. 22.

As to Mayor's Court cases, see 15 & 16 Vict. c. lxxvii., s. 32.

PROPERTY.

[THE SUBJECT OF ACTION.]

I. PRESERVATION.

1. ON PLAINTIFF'S APPLICATION, ON PRIMÂ FACIE LIABILITY BY CONTRACT.

2. ON ANY PARTY'S APPLICATION.

II. ALLOWANCE OF PART OR INCOME.

III. MANAGEMENT.

1. EFFECT OF PROCEEDINGS ON PARTIES' POWERS.

2. APPLICATION FOR SANCTION.

IV. RAISING MONEY.

1. CARRYING ORDER INTO CHAMBERS.

2. PROCEDURE IN CASE OF SALE [see *post*, VIII.]

3. PROCEDURE IN CASE OF MORTGAGE.

V. INVESTMENT OF MONEY.

1. CONDITIONAL CONTRACT.

2. APPLICATION.

3. EVIDENCE.

4. ORDER.

5. EXAMINATION OF ABSTRACT.
 6. AFFIDAVIT AS TO ABSTRACT.
 7. CARRYING INTO CHAMBERS.
 8. MEMORANDA OF CHIEF CLERK AND REGISTRAR.
 9. REQUISITIONS.
 10. SETTLING DRAFT.
 11. AFFIDAVIT OF ENGROSSMENT.
 12. ALLOWING ENGROSSMENT.
 13. CERTIFICATE OF TITLE.
 14. CERTIFICATE OF EXECUTION.
 15. CERTIFICATE AS TO PAYMENT.
- VI. DELIVERY OF PROPERTY SUBJECT TO A LIEN.
- VII. SALE OF GOODS.
- VIII. SALE OF LAND OR INTEREST THEREIN.
1. JURISDICTION.
 - (a) Generally.
 - (b) *In Foreclosure Action* [see FORECLOSURE].
 - (c) *In Partition Action* [see PARTITION].
 - (d) *Under Settled Estates Act* [see SETTLED ESTATES ACT].
 - (e) *Under Judgment* [see EXECUTION, XIII., 14].
 - (f) *For Payment of Debts.*
 - (g) *For Payment of Rentcharge.*
 - (h) *For Payment of Legacies.*
 - (i) *Wherever Necessary in a Suit.*
 - (k) *Where Estate Incumbered.*
 2. MODES OF SALE.
 - (a) *Public Auction.*
 - (b) *Public Tender.*
 - (c) *Private Contract.*
 3. SALE TO BE WITH JUDGE'S APPROBATION.
 4. CONDUCT OF SALE.
 5. PLACE OF SALE AND AUCTIONEER.
 6. ADVERTISEMENTS.
 7. DEEDS.
 8. APPROVAL OF TITLE.
 9. CONDITIONS OF SALE.
 - (a) *Form and Settling by Counsel.*
 - (b) *Settling by Chief Clerk.*
 10. APPOINTING AUCTIONEER, FIXING TIMES, &c.
 11. PRINTS OF PARTICULARS AND CONDITIONS.
 12. RESERVED BIDDINGS.
 13. LEAVE TO BID.
 14. DIRECTIONS TO AUCTIONEER.
 15. THE SALE.
 16. AFFIDAVIT OF RESULT OF SALE.
 17. CERTIFICATE OF SALE.
 18. DELIVERY OF ABSTRACT.
 19. EXAMINING TITLE.
 20. JUDGE'S CERTIFICATE AS TO TITLE.
 21. PAYMENT OF PURCHASE MONEY INTO COURT.
 22. INTEREST.
 23. DEALING WITH PURCHASE MONEY
 24. COMPENSATION.
 25. PAYMENT OF INCUMBRANCES.
 26. POSSESSION.
 27. CONVEYANCE.
 28. REFUSAL TO EXECUTE.
 29. DELIVERY OF TITLE DEEDS.
 30. RESCINDING CONTRACT.

31. RESALE ON PURCHASER'S DEFAULT.
32. SUBSTITUTING PERSON AS PURCHASER.
33. DISCHARGING PURCHASER FROM HIS BIDDING.
34. OPENING BIDDINGS.
35. SALE OF UNSOLD LOTS.
36. PAYING IN DEPOSIT.
37. VACATING AUCTIONEER'S RECOGNISANCE.

I. PRESERVATION.

1. ON PLAINTIFF'S APPLICATION ON PRIMÂ FACIE LIABILITY BY CONTRACT.

When by any contract a *primâ facie* case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the court or a judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into court or otherwise secured: (O. LII., r. 1.)

Pending appeal, the Court of Appeal appointed the plaintiff receiver of a farm in the possession of a defendant who had got judgment below in an action against him for specific performance of an agreement to take a lease of the farm: (*Hyde v. Warden*, L. Rep. 1 Ex. Div. 309.)

The Master of the Rolls refused the application of the holder of a promissory note made by a married woman that she might be restrained from dealing with her separate estate: (*National Provincial Bank v. Thomas*, cited Morg. and Chute, 593.)

Lush, J. refused to order payment of money in the hands of the defendants, and claimed by the plaintiff, into court: (*Luscher v. Comptoir D'Escompte de Paris*, W. N. 1875, p. 200.)

An application for an order under rule 1 may be made by the plaintiff at any time after his right thereto appears from the pleadings; or, if there be no pleadings, is made to appear by affidavit or otherwise to the satisfaction of the court or a judge: (O. LII., r. 5.)

2. ON ANY PARTY'S APPLICATION.

It shall be lawful for the court or a judge, upon the application of any party to an action, and upon such terms as may seem just, to make any order for the detention, preservation, or inspection of any property, being the subject of such action, and for all or any of the purposes aforesaid to authorise any person or persons to enter upon or into any land or building in the possession of any party to such action, and for all or any of the purposes aforesaid to authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence: (O. LII., r. 3.)

The principle underlying all orders for the preservation of property pending litigation is that the successful party ought to reap the fruits of litigation, and not to have a merely barren victory: (*Polini v. Gray*, L. Rep. 13 Ch. Div. 411; 41 L. T. Rep. N. S. 173; 49 L. J. 41, Ch.; *Gibbs v. David*, 44 L. J. 770, Ch.)

The order is frequently either for a receiver or an injunction: (*Gibbs v. David*, *sup.*; *Strelley v. Pearson*, cited *inf.*)

The order is granted almost as a matter of course: (*Cooper v. Ince Hall Colliery Company*, W. N. 1876, p. 24.)

An order was made for delivery up of jewellery to an officer of the court to abide the event of the action, the plaintiff alleging that the property belonged to him, and had been left with the defendants by a

third party, for a debt of whom the defendants claimed a right to hold : (*Velati v. Braham*, 46 L. J. 415, C. P.)

Where a lessee, who had been for some time in possession of a colliery, and had worked it under an agreement to take a lease, threatened to cease pumping, and the lessor commenced an action for specific performance, and moved for an injunction to restrain the lessee from ceasing to pump, an order was made : (*Streley v. Pearson*, L. Rep. 15 Ch. Div. 113; 43 L. T. Rep. N. S. 155; 49 L. J. 406, Ch.; 28 W. R. 752.)

As to restraining dealings with shares in ships, see *Nicholas v. Dracachis*, L. Rep. 1 P. Div. 72; *The Horlock*, L. Rep. 2 P. Div. 250.

As to staying proceedings and granting injunctions to prevent an appeal being fruitless, see *Polini v. Gray*, *sup*; *Wilson v. Church*, L. Rep. 11 Ch. Div. 576; 27 W. R. 843; and see L. Rep. 12 Ch. Div. 454.

The application may be made to the court or a judge by any party. If the application be by the plaintiff . . . it may be made after notice to the defendant at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application : (O. LII., r. 4.)

The application of a defendant will not generally be entertained before he has delivered his defence : (W. N. 1876, p. 53.)

An order for inspection will not be made on an *ex parte* application, except in cases of great emergency : (*Hennessey v. Bohman*, W. N. 1877, p. 14; *Meluish v. Milton*, 24 W. R. 679.)

The order may be made on summons : (*Cooper v. Ince Hall Colliery Company*, *sup*.)

II. ALLOWANCE OF PART OR INCOME.

Where any real or personal property [forms] the subject of . . . proceedings . . . the court, if satisfied that the same will be more than sufficient to answer all the claims thereon which ought to be provided for in [the action] . . . [may] at any time after the commencement of . . . proceedings . . . allow to the parties interested therein, or to any one or more of them, the whole or part of the annual income of such real property, or a part of such personal property, or a part or a whole of the income thereof, up to such time as the . . . court shall direct, and for that purpose . . . make such orders as may appear . . . necessary or expedient : (15 & 16 Vict. c. 86, s. 57.)

No order will be made unless assets are admitted or all debts are shown to have been paid : (Seton, 873.)

The application is by summons : (Morg. & Ch. 201.)

III. MANAGEMENT.

1. EFFECT OF PROCEEDINGS ON PARTIES' POWERS.

As to the effect of proceedings on the powers of legal personal representatives, see ADMINISTRATION ACTION.

After the institution of a suit against trustees, though the exercise of their discretion as to the maintenance of the estate is not precluded, they are required to act under the control of the court : (Dan. 1140.)

As to the subjects of sanction, see Seton, 483; Dan. 1141.

2. APPLICATION FOR SANCTION.

Applications for the sanction of the court as to management of the property are generally by summons, supported by affidavit or other evidence as to the facts : (Dan. 1141.)

Where letting on lease is to be sanctioned, a conditional contract is entered into and produced, with an affidavit of a land agent, as to grounds

on which the agreement should be adopted, and with evidence of the power to demise on the terms of the agreement: (Dan. 1141-2.)

The order directs the agreement to be carried into effect, and that the lease be settled by the judge absolutely, or in case the parties differ: (Dan. 1142.)

When the judge settles the deed, the order is brought into chambers: (see CHAMBERS);

A summons is taken out to settle the draft;

The draft is brought in and settled;

Conveyancing counsel's assistance is procured (if required): (see CONVEYANCING COUNSEL.)

Engrossment takes place;

An affidavit of engrossment is brought in;

Allowance of the engrossment is made by the chief clerk's memorandum and initials;

The certificate of the chief clerk is made: (see CHAMBERS; Dan. 1142.)

Where the draft lease is settled at chambers before the order approving the contract is drawn up, the order includes the approval of the engrossments: (Dan. 1142.)

IV. RAISING MONEY.

1. CARRYING ORDER INTO CHAMBERS.

Where an order directs money to be raised by sale or mortgage, it is carried into chambers, and a summons to proceed is issued: (see CHAMBERS.)

On the return of the summons, or at an adjournment thereof, the approximate sum required is ascertained: (Dan. 1142-3.)

2. PROCEDURE IN CASE OF SALE.

[See *post*, VIII.]

3. PROCEDURE IN CASE OF MORTGAGE.

The amount to be raised having been ascertained, the costs being taxed by anticipation:

The draft is settled in chambers;

The engrossment is signed by the chief clerk;

The certificate of the chief clerk as to the amount to be paid in, and the mortgagee's name is made;

Payment into court is made by the mortgagee;

Execution of the deed takes place;

The money is applied or distributed: (Seton, 844.)

Sometimes the mortgagee pays the money into court under a second order obtained at chambers instead of under a certificate: (*Id.*)

V. INVESTMENT OF MONEY.

1. CONDITIONAL CONTRACT.

A conditional contract for the purchase and loan is entered into: (Dan. 1117.)

2. APPLICATION.

An application for approval of the contract by the court is made by petition or summons, generally by summons: (Seton, 1245.)

3. EVIDENCE.

Besides producing the conditional contract, evidence of fitness of the purchase or security must be produced: (Dan. 1117.)

If the order is wanted without inquiry, there must be an affidavit of one

or more surveyors, stating the value, rental, and outgoings, and proving the circumstances which render the purchase desirable: (Seton, 1245.)

4. ORDER.

The order is either made without inquiry, or for an inquiry whether a good title can be made; and, if so, for settling the conveyance, and for payment, &c.: (Seton, 1242, 1245.)

The inquiry is general, and not "according to the conditions," though leave may be given to apply in chambers for leave to dispense with any particular requisition: (*Id.*)

5. EXAMINATION OF ABSTRACT.

The abstract is examined by the solicitor having the carriage of the proceeding or his qualified *employé*: (Dan. 1118.)

6. AFFIDAVIT AS TO ABSTRACT.

An affidavit of the examination, and that the abstract is true and correct is made by the solicitor, or if the examination was not by him, by the person making it, and if he is not a solicitor, the solicitor must join, and state that he was competent: (*Id.*)

A form of affidavit is given in the Chancery Regulations of August, 1857.

7. CARRYING INTO CHAMBERS.

The abstract and affidavit are carried into chambers: (Dan. 1118.)

8. MEMORANDA OF CHIEF CLERK AND REGISTRAR.

The chief clerk signs a minute that the opinion of the conveyancing council in rotation, or the particular counsel named, has been directed by the judge, and directing such counsel to settle the draft conveyance or mortgage, if a good title is shown: (*Id.*)

If the reference is to counsel in rotation, the registrar names him in the memorandum: [see CONVEYANCING COUNSEL.]

9. REQUISITIONS.

The requisitions, if any, of counsel are dealt with as on an ordinary sale, any difficulty being brought before the chief clerk or judge on appointment: [see CHAMBERS.]

10. SETTLING DRAFT.

After the title is approved and the draft settled, such draft or a fair copy is left at chambers, in the latter case accompanied by a certificate of the solicitor of its truth (Dan. 1119); and an appointment obtained (see CHAMBERS), at which, if the final opinion of counsel is satisfactory, the draft will be settled and marked for engrossment: (Dan. 1119.)

11. AFFIDAVIT OF ENGROSSMENT.

An affidavit as to the engrossment must be made in the form given in the Chancery Regulations of August, 1857.

12. ALLOWING ENGROSSMENT.

On production of an office copy affidavit, with the engrossment and draft, the chief clerk signs a memorandum of allowance on and initials the engrossment: (Dan. 1119.)

13. CERTIFICATE OF TITLE.

An appointment must be obtained to settle the chief clerk's certificate of title and of the conveyance being settled, on which appointment an affidavit as to searches for incumbrances must be produced, which must have been sworn the same day: (Dan. 1120.)

As to completing the certificate, see CHAMBERS.

14. CERTIFICATE OF EXECUTION.

After execution, if directed by the order, the chief clerk, on an office

copy affidavit of execution being produced to him with the deed and the certificate approving the title, will give a certificate of execution: (Dan. 1120.)

15. CERTIFICATE AS TO PAYMENT.

The chief clerk certifies the person to whom payment of the purchase or mortgage money is to be made: [see PAYMENT INTO AND OUT OF COURT.]

VI. DELIVERY OF PROPERTY SUBJECT TO A LIEN.

Where an action is brought to recover, or a defendant in his statement of defence seeks by way of counter-claim to recover specific property other than land, and the party from whom such recovery is sought does not dispute the title of the party seeking to recover the same, but claims to retain the property by virtue of a lien or otherwise as security for any sum of money, the court or a judge may, at any time after such last-mentioned claim appears from the pleadings, or, if there be no pleadings, by affidavit or otherwise to the satisfaction of such court or judge, order that the party claiming to recover the property be at liberty to pay into court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs as such court or judge may direct, and that upon such payment into court being made, the property claimed be given up to the party claiming it: (O. LII., r. 6.)

The Master of the Rolls refused on motion by the plaintiff to order delivery of a vessel, built under contract for the plaintiff and lying in the Thames, on which a lien was claimed by a bank as assignees for value from the builder of the final instalment of the purchase-money, which under the contract was payable on delivery of the vessel abroad, on the ground that the order would be equivalent to final judgment in an action of detainee: (*Sultan of Turkey v. Union Bank of London*, W. N. 1877, p. 79.)

VII. SALE OF GOODS.

It shall be lawful for the court or a judge, on the application of any party to any action, to make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as to the court or judge may seem desirable, of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once: (O. LII., r. 2.)

An order has been made for the sale of foreign bonds (*Coddington v. Jacksonville Railway Company*, 39 L. T. Rep. N. S. 12; W. N. 1878, p. 78); for the sale of a horse (*Bartholomew v. Freeman*, L. Rep. 3 C. P. Div. 316; 38 L. T. Rep. N. S. 814; 26 W. R. 743).

An application . . . may be made to the court or a judge by any party. If the application be by the plaintiff . . . it may be made after notice to the defendant at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application: (O. LII., r. 4.)

VIII. SALE OF LAND OR INTEREST THEREIN.

1. JURISDICTION.

(a) Generally.

All causes and matters for . . . the sale and distribution of the proceeds of property subject to any lien or charge; [or] the sale of real estates [are assigned to the Chancery Division]: (J. A., 1873, s. 34.)

The court cannot, except in cases of partition, under the Settled

Estates Act, or where some person has a right to require a sale for the satisfaction of a claim or debt, sell an infant's estate merely because it is beneficial to the infant: (Dan. 152; and see *post*.)

(b) *In Foreclosure Action* [see FORECLOSURE].

(c) *In Partition Action* [see PARTITION].

(d) *Under Settled Estates Act* [see SETTLED ESTATES ACT].

(e) *Under Judgment* [see EXECUTION XIII., 14].

(f) *For Payment of Debts*.

The court may order a sale of a testator's real estate for payment of his debts under 3 & 4 Will. 4, c. 104, whether the action has been commenced by a creditor, a trustee, or persons otherwise interested: (*Dinning v. Henderson*, 2 Col. 330; *Price v. Price*, 15 Sim. 484; *Rodney v. Rodney*, 16 Sim. 307.)

Where any suit [is] instituted . . . for the payment of any debts of any person or persons deceased to which their heir or heirs, devisee or devisees, may be subject or liable, and such [court orders] the estates liable to such debts, or any of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy of any such heir or heirs, devisee or devisees, an immediate conveyance thereof cannot be compelled [the] court shall direct, and, if necessary, compel such infant or infants to convey such estates to be sold (by all proper assurances in the law) to the purchaser or purchasers thereof, and in such manner as the said court [thinks proper and directs], and every such infant [is to] make such conveyance accordingly; and every such conveyance is as valid and effectual to all intents and purposes as if such person or persons, being an infant or infants, was or were at the time of executing the same of the full age of twenty-one years: (11 Geo. 4 & 1 Will. 4, c. 47, s. 11.)

[The above section has been] extended to authorise [the court] to direct mortgage . . . to be made of the estates of . . . heirs or devisees: (2 & 3 Vict. c. 60, s. 1.)

The application is by petition: (Shelford R. P. 472.)

Where any tenements or hereditaments . . . devised in settlement by any person or persons whose estate by law, or by his or their will or wills, [is] liable to the payment of any of his or their debts, and by such devise vested in any person or persons for life or other limited interest, with any remainder, limitation, or gift over, which may not be vested, or may be vested, in some person or persons from whom a conveyance or other assurance of the same cannot be obtained, or by way of executory devise [are ordered to be sold] for the payment of such debts or any of them, the court may direct any such tenant for life or other person having a limited interest, or the first executory devisee thereof, to convey, release, assign, surrender, or otherwise assure the fee simple, or other the whole interest or interests so to be sold to the purchaser or purchasers, or in such manner as the court [thinks] proper, and every such conveyance, release, surrender, assignment, or other assurance, [is] as effectual as if the person who makes and executes the same were seised or possessed of the fee simple or other whole estate so to be sold: (11 Geo. 4 & 1 Will. 4, c. 47, s. 12.)

[The above provision has been] extended to authorise [the court] to direct mortgages . . . to be made: (2 & 3 Vict. c. 60, s. 1.)

[The 11 Geo. 4 & 1 Will. 4, c. 47, s. 12, is extended] in cases in other respects falling within the Act to any case in which any lands, tenements, or hereditaments of any deceased person [are] by descent or otherwise than by devise vested in the heir or co-heirs of such person, subject to an executory devise over in favour of a person or persons not existing or

not ascertained; and in any such case the court may direct such heir or co-heirs, notwithstanding such heir or such co-heirs, or any of them, may be an infant or infants, to convey, release, assign, surrender, or otherwise assure the fee simple or other the whole interest or interests so to be sold to the purchaser or purchasers, or in such manner as the court [thinks] proper; and every such conveyance, release, surrender, assignment, or other assurance is as effectual as if the heir or co-heirs [making and executing] the same was or were seised or possessed of the fee simple or other whole estate so to be sold, and, if an infant or infants, was or were of full age; (11 & 12 Vict. c. 87.)

Where any [such] sale or mortgage [is] made, the surplus [if any] of the money raised . . . which remains after answering the purposes for which the same has been raised, and defraying all reasonable costs and expenses, [is] considered in all respects of the same nature, and descends or devolves in the same manner as the estate . . . sold or mortgaged, and belongs to the same person and is subject to the same limitation and provisions, and applicable to the same purposes as such estate or such lands, tenements, or hereditaments would have belonged and been subject and applicable to in case no such sale or mortgage had been made: (2 & 3 Vict. c. 60, s. 2.)

The court now generally declares the infant or other person a trustee, and makes a vesting order: (Dan. 1144; see TRUSTEES.)

(g) *For Payment of Rent Charge.*

The court may order a sale of land for payment of arrears of a rent charge where there is nothing to distrain on: (*White v. James*, 26 Beav. 191.)

(h) *For Payment of Legacies.*

As to ordering sale of lands for payment of the testator's debts, see *Rowley v. Adams*, 7 Beav. 548.

(i) *Wherever Necessary in a Suit.*

If after a suit [has] been instituted in relation to any real estate, it [appears] to the court that it will be necessary or expedient that the said real estate, or any part thereof, should be sold for the purposes of such suit the . . . court [may] direct the same to be sold at any time after the institution thereof, and such sale shall be as valid to all intents and purposes as if directed to be made by [judgment or order] on the hearing . . . : (15 & 16 Vict. c. 86, s. 55.)

The court is only able to direct a sale before the hearing where previously it could have given such direction at the hearing: (Ayck. 516.)

A sale will be ordered where it is for the protection or benefit of the estate: (*Tulloch v. Tulloch*, L. Rep. 3 Eq. 574.)

A sale cannot be ordered in the absence of proper parties: (*Pigott v. Pigott*, 8 L. T. Rep. N. S. 269.)

The order may be obtained on petition: (*Bell v. Turner*, L. Rep. 2 Ch. Div. 409.)

(k) *Where Estate Incumbered.*

An estate cannot be sold free from its incumbrances unless the incumbrancer is bound by the judgment, or consents to the sale: (Dan. 1149.)

Unless it is known that there are no incumbrances, or the sale is under 15 & 16 Vict. c. 86, s. 48, the judgment or order for sale generally directs a preliminary inquiry as to incumbrances, and directs the sale to be free from the incumbrances of consenting incumbrancers and subject to others, and directs accounts, &c.: (Dan. 1149; Seton, 802, 1396.)

An incumbrancer consenting may be ordered to produce and leave his title deeds: (Seton, 1396.)

The consents of incumbrancers are given in chambers in writing: (Dan. 1150.)

2. MODES OF SALE.

(a) *Public Auction.*

Where an estate or other property is directed to be sold to the best bidder, it must be sold by public auction unless the court specially directs otherwise: (Ayck. 516.)

(b) *Public Tender.*

On a sale by public tender, printed particulars and conditions, and advertisements invite tenders for purchase, to be sent under a sealed cover to the person appointed, by a certain day and in a certain form, and name a time and place for opening the tenders. The highest tender is usually accepted, and the result declared and certified: (Dan. 1163.)

(c) *Private Contract.*

If it is for the interest of the parties the judge may, either before or after the property has been offered for sale by auction, receive proposals for sale by private contract: (Ayck. 528.)

The proposal should be made to the vendor or a party; a conditional contract (subject to the judge's approbation) is prepared, signed by the parties, and supported by an affidavit of a surveyor or other competent person that it is fair and for the benefit of the estate, is carried into chambers; and if approved the judge orders the contract to be carried into effect; the title is investigated; an order obtained for completing the purchase; and the conveyance settled and executed: (*Id.*; Dan. 1185.)

3. SALE TO BE WITH JUDGE'S APPROBATION.

Where a [judgment] or order is made, whether in court or in chambers, directing any property to be sold, unless otherwise ordered, the same shall be sold with the approbation of the judge to whose court the cause or matter is attached, to the best purchaser that can be got for the same, to be allowed by the judge: (C. O. 35, r. 13.)

All proper parties shall join in the sale . . . as the court shall direct: (*Id.*)

As to when the sale is allowed to proceed in a district registry, see DISTRICT REGISTRIES, IV.

4. CONDUCT OF SALE.

The conduct of sale is given on the return of the summons to proceed [see CHAMBERS], and generally to the solicitor for the plaintiff, and the solicitor having the conduct of sale is, in all questions arising between vendor and purchaser, considered the agent of all parties to the action: (Ayck. 516.)

The plaintiff's right is not affected by the extent of interest of, or possession of title deeds by other parties: (*Id.*)

Whenever the trusts of any will or settlement are being administered, and a sale is ordered of any property vested in the trustees of such will or settlement upon trust for sale, or with power of sale by such trustees, the conduct of such sale shall be given to such trustees unless the judge . . . otherwise direct: (O. LII., r. 6a, March, 1879.)

When a sale has been directed by the court, and the conduct of it given to one party, no other party has a right to interfere in any way in the sale without the leave of the court. Where the court directed a sale and gave the conduct of it to an independent solicitor, both plaintiff and defendant having liberty to bid, the plaintiff was restrained by injunction from issuing and circulating advertisements that the sale was about to take place: (*Dean v. Wilson*, L. Rep. 10 Ch. Div. 136.)

5. PLACE OF SALE.

The place of sale is appointed by the judge in chambers : (Ayck. 517.)

6. ADVERTISEMENTS.

The judge's clerk directs the preparation and publication of the necessary advertisements. The advertisement is prepared by the solicitor : (*Id.*)

7. DEEDS.

Every person having the title deeds is bound to facilitate the sale, and when necessary they will be ordered to be delivered by the parties, or by the masters of the Supreme Court (if deposited in court) to the solicitor for the purposes of the sale : (Dan. 1154.)

8. APPROVAL OF TITLE.

Before any estate or interest [is] put up for sale under a [judgment] or order of the court, an abstract of the title thereto [is] with the approbation of the court, laid before some conveyancing counsel to be approved by the court for the opinion of such counsel thereon, to the intent that the said court may be the better enabled to give such directions as may be necessary respecting the conditions of sale of such estate or interest, and other matters connected with the sale thereof : (15 & 16 Vict. c. 86, s. 56.)

The court has dispensed with the rule as to counsel where the sale was by private contract : (*Gibson v. Woolard*, 5 De G. M. & G. 835.)

Where the title is referred to the conveyancing counsel of the court, the judge's clerk delivers to the solicitor a memorandum or note which is taken to the registrar's clerk who refers the matter to counsel : (see CONVEYANCING COUNSEL.)

9. CONDITIONS OF SALE.

(a) *Form and Settling by Counsel.*

The abstract is usually accompanied by a copy on draft paper of the ordinary condition of sale in the form in schedule 7 to the Chancery Regulations of August, 1857 (Dan. 1155). These are the formal conditions approved of by the court, and are generally employed with slight modifications in ordinary cases, but in cases of larger sales or complicated titles, they are often considerably modified : (1 Dav. Conv., 651.)

A time must be specified, in the conditions, for the delivery of the abstract : (15 & 16 Vict. c. 86, s. 56.)

The conveyancing counsel of the court is bound to see that the conditions of sale are proper, in the interest of the persons entitled to the property which is to be sold under the direction of the court; but as between the vendor and the purchaser, any error by him must be treated as the error of the vendor : (*Re Banister*, L. Rep. 12 Ch. Div. 131; 40 L. T. Rep. N. S. 828.)

(b) *Settling by Chief Clerk* [see post, 10].

10. APPOINTING AUCTIONEER, FIXING TIMES, &c.

After the conditions are settled, the draft, or a certified fair copy, is carried into chambers, and the chief clerk marks his approval thereon (Ayck. 518). An appointment must be served for this, at which the opinion of counsel on the title is produced, and the following matters are determined : place of sale, times for certifying result of sale, for delivery of abstract and objections, and requisitions, for payment in of purchase money, for delivery of possession or receipt of rents; appointment and remuneration of auctioneer, appointment of person to receive deposit, signature of and directions as to advertisements, survey and valuation (if any) : (Dan. 1157.)

An affidavit of the proposed auctioneer is required when he is unknown at judges' chambers: (Dan. 1157.)

The terms of his remuneration should be fixed by the chief clerk before his appointment: (*Id.*)

The auctioneer is generally appointed to receive the deposits. He must give security, if required by the judge, either by a recognisance with one or more sureties, or by payment into court of a sum of money: (Dan. 1158.)

[At the Rolls] when the deposits to be paid to the auctioneer are estimated not to exceed 200*l.*, his undertaking in writing to pay the deposits into court will be accepted instead of security: (Notice, July, 1880, 70 L. T. 34.)

In case of recognisance, the solicitor prepares a draft; the draft is approved in chambers, and engrossed; the recognisance is acknowledged; the sureties make an affidavit of means; the office copy affidavit is produced at chambers with the recognisance; the chief clerk allows the recognisance; the recognisance is enrolled at the Central Office: (Dan. 1159.)

For form of recognisance, see 1 Dav. Conv. 724.

11. PRINTS OF PARTICULARS AND CONDITIONS.

As soon as particulars and conditions of sale settled at chambers have been printed, two prints thereof, certified by the solicitor to be correct prints of the particulars and conditions settled at the judges' chambers, are to be left at chambers: (Ch. Reg., Aug. 1857, r. 14.)

12. RESERVED BIDDINGS.

Affidavits for the purpose of enabling the judge to fix reserved bids are to state the value of the property, by reference to an exhibit containing such value, so that the value may not be disclosed by the affidavit when filed: (Ch. Reg. Aug. 1857, r. 13.)

A valuation must be made by a surveyor of the whole estate, and each lot separately, and stated in his affidavit. An office copy being procured, the judge's clerk is attended and fixes the reserved biddings, which he commits to writing, and incloses under a sealed cover, and delivers to the person appointed to sell: (Ayck. 519.)

The reserved biddings must not be opened till the time of the sale, and must be kept secret: (Ayck. 519.)

13. LEAVE TO BID.

A party to the action desirous of bidding, must, unless the judgment contains such a direction, obtain an order: (Ayck. 519.)

A person obtaining leave to bid will not be allowed to conduct the sale: (*Id.*)

The application may be made by summons, and will not be given to a testator's executor, a receiver, or a trustee of the property: (*Id.*)

As to when a solicitor may bid, see *Guest v. Smythe*, L. Rep. 5 Ch. App. 551.

14. DIRECTIONS TO AUCTIONEER.

When the auctioneer is appointed, a copy of the particulars and conditions signed by the chief clerk, a bidding paper, a form of affidavit as to the result, and printed directions are obtained from judges' chambers, and with the reserved biddings, if any (under a sealed cover), are forwarded to the auctioneer: (Ayck. 520.)

For form of bidding paper, see 1 Dav. Conv. 727.

15. THE SALE.

The auctioneer inserts the highest bidding for each lot in the bidding

paper, whether the lot is sold or not. If there is no bidding the words "no bidding" must be inserted.

If there is no bidding equal to reserved bidding, the auctioneer states that the property has been bought in on account of the person interested in or entitled, and enters "not sold" in the bidding paper. Each purchaser signs the bidding paper, and his address and quality must be entered. If the purchaser is an agent, it must be so expressed: (Dan. 1161.)

But a person buying in his own name, though really agent for another, may take any objections which a purchaser for himself might take: (*Re Arnold*, L. Rep. 14 Ch. Div. 270; 42 L. T. Rep. N. S. 705; 28 W. R. 635.)

16. AFFIDAVIT OF RESULT OF SALE.

A form of affidavit of the result of sale is given in Schedule 8 to the Chancery Regulations of August, 1857.

The bidding paper, and the printed particulars and conditions must be made exhibits: (Dan. 1161.)

An office copy of the affidavit of the person appointed to sell, of the result of the sale, with the bidding paper and particulars therein referred to, are to be left at chambers at least one clear day before the day appointed for settling the certificate of the result of the sale: (Ch. Reg. Aug. 1857, r. 15.)

17. CERTIFICATE OF SALE.

The office copy affidavit, and the bidding papers and particulars are carried into judges' chambers, and the chief clerk makes his certificate of the sale: (Ayck. 520; and see CHAMBERS.)

The purchasers, if they wish to show cause why the purchase should not be completed, should do so at the appointment to settle the certificate: (Dan. 1162.)

18. DELIVERY OF ABSTRACT.

A time for the delivery of the abstract to the purchaser or his solicitor must be specified in the conditions of sale: (see *sup.*)

In case of neglect, an order for such delivery may be obtained on summons: (*Id.*)

19. EXAMINING TITLE.

After eight days have expired since the filing of the certificate of the result of the sale, the title is investigated: (Ayck. 522.)

Objections which cannot be disposed of out of court must be carried in before the chief clerk in chambers, on an appointment, or on summons to pay in purchase money, or (by purchaser) for inquiry as to title: (Dan. 1165.)

In such case the vendor must either remove the objections or argue them in open court: (Ayck. 522.)

A reference may be directed to conveyancing counsel: (see CONVEYANCING COUNSEL.)

20. JUDGE'S CERTIFICATE AS TO TITLE.

After the title has been investigated the judge grants a certificate approving or disapproving thereof: (Ayck. 522.)

21. PAYMENT OF PURCHASE MONEY INTO COURT.

If the purchaser is satisfied with the title, or the judge certifies that a good title can be shown, the purchaser must, within the time limited by the conditions of sale, obtain an order for liberty to pay his purchase money into court: (Ayck. 522.)

The application is by summons. As a rule several persons may join in one application: (*Id.*)

Where several persons purchase one lot the money must be paid in altogether: (*Id.*)

Payment before investigation of title amounts to waiver of objections, unless the application is made without prejudice: (Ayck. 522.)

A purchaser may pay in without accepting the title, where there are special circumstances, as to prevent interest accruing: (Ayck. 522.)

22. INTEREST.

If interest is payable the summons must extend to its payment from the time when liability commenced till the day of payment: (Ayck. 523.)

23. DEALING WITH PURCHASE MONEY.

Where the order entitles the purchaser to notice and has been lodged at the Chancery Pay Office for the express purpose of entry as a stop order, the court will not deal with the purchase money paid in; and even if the order has not been entered, the court will not deal with the money without proof by affidavit, that the purchaser has had his conveyance, and consents to the distribution: (Dan. 1177; Seton, 1406.)

The vendor's solicitor should obtain a written acknowledgement of receipt of the conveyance and an authority to concur in the purchaser's name in any distribution: (Seton, 1406.)

A purchaser who has not had his conveyance is generally entitled to his costs of appearing on the application, if only to consent: (Dan. 1177.)

24. COMPENSATION.

When the compensation is claimed by either party, the application is made by summons for allowance, and deduction or payment thereof: (Dan. 1170.)

25. PAYMENT OF INCUMBRANCES.

Where the sale is free from incumbrances, and the priorities are undisputed, the purchaser may (1) apply by summons for leave to pay incumbrances out of purchase money, and on their executing, to pay the residue into court; (2) or apply by summons for judge's sanction to an arrangement previously made with the incumbrancers that their charges shall be kept on foot as against the estate and the purchaser only: (Dan. 1178.)

Where the money is in court, the party conducting the sale may apply, by petition or summons, that on execution by the incumbrancers their amounts may be paid out of purchase money: (*Id.*)

26. POSSESSION.

[Where property is sold in a suit (see *sup.*, 1 (i))] any party to the suit in possession of such estate, or in receipt of the rents and profits thereof, shall be compelled to deliver up such possession or receipt to the purchaser, or such other person as the court shall direct: (15 & 16 Vict. c. 86, s. 55.)

Upon payment of purchase money into court, the purchaser is entitled to possession, and to rents and profits from the day mentioned in the conditions: (Ayck. 524.)

Possession will not be allowed to be taken without prejudice to objections to the title even on payment of purchase money into court: (*Id.*)

Possession may be enforced by obtaining an order on summons and serving it on the person in possession, after which a writ of assistance (C. O. 29, r. 5); or more usually, a writ of possession may be obtained: (see EXECUTION.)

27. CONVEYANCE.

The draft is prepared by the solicitor, and at the expense of the purchaser, and a copy sent to the vendor's solicitor for approval: (Ayck. 525.)

All proper parties shall join in the . . . conveyance as the judge shall direct: (C. O. 35, r. 13.)

If objections are taken which cannot be agreed upon by the solicitors, a summons to settle is taken out, which may be adjourned into court: (*Id.*)

The draft may be referred to conveyancing counsel: (See CONVEYANCING COUNSEL and DEEDS.)

In case of delay by the purchaser, the draft may be ordered, on summons, to be delivered at chambers to be settled; if the vendor delays the draft may, on summons, be ordered to be returned to the purchaser: (Dan. 1173.)

28. REFUSAL TO EXECUTE.

If a party refuse to execute, an order to execute may be obtained on summons, which order is enforceable by attachment: (Ayck. 525.)

When any [judgment] or order [has] been made by any court of equity directing the sale of any lands for any purpose whatever, every person seised or possessed of such land, or entitled to a contingent right therein, being a party to the suit or proceeding in which such [judgment] or order [has] been made, and bound thereby, or being otherwise bound by such [judgment] or order [is] deemed to be so seised or possessed or entitled (as the case may be) upon a trust within the meaning of the Trustee Act, 1850; and in every such case . . . the court . . . if [it] think it expedient for the purpose of carrying such sale into effect, [may] make an order vesting such lands or any part thereof, for such estate as the court shall think fit, either in any purchaser or in such other person as the court shall direct; and every such order [has] the same effect as if such person so seised or possessed or entitled had been free from all disability, and had duly executed all proper conveyances and assignments of such lands for such estate: (Tr. Ext. A. 1852, s. 1.)

The application is by summons: (C. O. 35, r. 1.)

The registrars must not pass an order unless stamped as if it had been by deed: (*Id.*, s. 13.)

[And see DEEDS; TRUSTEES.]

29. DELIVERY OF TITLE DEEDS.

If the order for payment of purchase money contains no direction for delivery of title deeds, such an order may be had on summons: (Ayck. 526.)

If the deeds have been deposited in court the solicitor conducting the sale should obtain an order on summons, or by consent, or on petition of course, for delivery to the purchaser: (Dan. 1176.)

30. RESCINDING CONTRACT.

If the judge certify against the title, or the purchaser is otherwise entitled to have the contract rescinded, he may obtain an order on summons to rescind the contract, to be discharged from his purchase, and for payment of his costs, charges, and expenses of investigating the title and consequent thereon (Ayck. 526); unless precluded by conditions: (Dan. 1166.)

If there is a fund in court standing to the credit of the cause, the purchaser's costs, charges, and expenses will be ordered to be paid out of it. If not, by the plaintiff without prejudice to the question how they shall ultimately be borne: (Dan. 1167.)

The purchaser is entitled to a return of his deposit with interest at 4l. per cent : (Seton, 1412.)

31. RESALE ON PURCHASER'S DEFAULT.

If the order for payment in (obtained by the vendor) is confined to obtaining a compulsory order, and default is made, an order for sale may be subsequently obtained on summons : (Dan. 1179.)

But the order may further direct, that in default of payment by a limited time, a resale may take place, and the purchaser pay the deficiency and costs : (*Id.*)

When a resale is ordered, a summons to proceed is again taken out and served on all parties and the purchaser : (Dan. 1181.)

32. SUBSTITUTING PERSON AS PURCHASER.

A purchaser desirous of being discharged from his contract, and of substituting another person in his stead, may obtain an order for the purpose on summons (Ayck. 527), which must be served on the solicitor having conduct of the proceedings, and on the substitute, and be supported by an affidavit of the original or substitute that there has been no collusion or under-bargain between them before the certificate of sale was binding, or disclosing such under-bargain : (Dan. 1182.)

The order is on condition that the purchase-money is first paid in : (*Id.*)

33. DISCHARGING PURCHASER FROM HIS BIDDING.

If the purchaser is not a responsible person, and unable to perform the contract, the vendor may, on summons, supported by affidavit of the facts, and on notice to the purchaser and the parties to the action, obtain an order for the discharge of the purchaser, forfeiture of deposit, and payment by the purchaser of the costs : (Ayck. 527 ; Dan. 1181.)

The purchaser should appear and consent.

34. OPENING BIDDINGS.

In case of fraud or improper conduct in the management of a sale, or misconduct bordering on fraud, the court may either open the biddings, holding the highest bidder bound by his bidding, or discharge him from being the purchaser, and order the land to be resold upon such terms as to costs or otherwise as the court or judge thinks fit : (30 & 31 Viet. c. 48, s. 7.)

The biddings will be opened if a vendor's solicitor has become the purchaser : (*Guest v. Smythe*, L. Rep. 5 Ch. App. 551, 556.)

The biddings may be opened after the sale is confirmed : (*Id.*)

Mere mistake of the vendor is not a sufficient ground : (*Griffiths v. Jones*, L. Rep. 15 Eq. 279). There must be either fraud or misconduct, bordering on fraud : (*Delves v. Delves*, L. Rep. 20 Eq. 77.)

The application must be made before the chief clerk's certificate of the result of the sale has become binding, and should be by summons served on the purchaser and the other parties to the action, or by motion on notice : (30 & 31 Viet. c. 48, s. 7 ; Ayck. 528 ; Dan. 1184.)

35. SALE OF UNSOLD LOTS.

A sale of the lots unsold may be ordered on summons : (Dan. 1163.)

36. PAYING IN DEPOSIT.

If the deposit is paid in by the day mentioned in the certificate, no order is necessary. If not, an order is obtained on summons. By consent a direction may be inserted in the order for payment in of purchase money : (Dan. 1162.)

37. VACATING AUCTIONEER'S RECOGNISANCES.

A recognisance is vacated, or a fund returned, in pursuance of an order

on summons, supported by production of office copies of the certificate of the chief clerk, the recognisance, and the Paymaster-General's certificate of payment in: (Dan. 1163.)

The order is generally engrafted on some other order: (*Id.*)

PROPERTY LAW AMENDMENT ACT.

[See INFANTS; LUNATICS; MARRIED WOMEN.]

PROSECUTION OF DIRECTORS.

[See WINDING-UP.]

PROTECTOR OF SETTLEMENT.

I. JURISDICTION.

1. IN CASE OF LUNACY.

If any person, protector of a settlement, is lunatic, idiot, or of unsound mind, whether so found by inquisition or not, the Lord Chancellor, or the person entrusted with the care of lunatics, is protector of such settlement in his place: (3 & 4 Will. 4, c. 74, s. 33.)

Where the property is situate in England or Wales, and the lunatic is resident in Ireland, the Lord Chancellor of Great Britain is protector: (*Re Graydon*, 1 Mac. & G. 655.)

Where a tenant in tail in possession is a lunatic there is jurisdiction to consent: (*Re Blewitt*, 6 D. M. & G. 187.)

An order was made when the lunatic was tenant for life, and the petitioner, his eldest son, was *quasi* tenant in tail in remainder: (*Grant v. Yea*, 3 M. & K. 245.)

Consent has been given so as to enlarge a base fee: (*Re Graydon*, *sup.*)

When protector of a settlement in the place of a lunatic, the only duty of the court is to see what with reference to the interests of the family it would be proper for the tenant for life to do, and the object must be rather to protect the objects of the settlement than to give any benefit to one member of the family to the exclusion of the others. Consent will be given where the intention is to provide for the immediate family of the lunatic: (*Re Newman*, 2 M. & C. 112; *Grant v. Yea*, *sup.*; see also *Re Tharp*, L. Rep. 3 Ch. Div. 59; *Re Pares*, L. Rep. 2 Ch. Div. 61; 12 Ch. Div. 333.)

2. IN CASE OF FELONY, INFANCY, &c.

If any person, protector of a settlement, shall be convicted of treason or felony, or if any person not being the owner of a prior estate under a settlement shall be protector and shall be an infant, or if it shall be uncertain whether such last-mentioned person be living or dead, then [the Chancery Division] shall be the protector of such settlement in lieu of the person who shall be an infant, or whose existence cannot be ascertained as aforesaid: (3 & 4 Will. 4, c. 74, s. 33.)

Where the husband of a married woman, who is tenant for life under the settlement, is convicted of felony, the Chancery Division becomes protector: (*Re Wainwright*, 1 Phil. C. C. 258.)

If any settlor entailing lands shall, in the settlement by which the lands shall be entailed, declare that the person, who as owner of a prior estate under such settlement would be entitled to be protector of the settlement, shall not be such protector, and shall not appoint any person to be protector in his stead, then the [Chancery Division] shall, as to the lands in which such prior estate shall be subsisting, be the protector of the settlement during the continuance of such estate : (3 & 4 Will. 4, c. 74, s. 33.)

If in any other case where there shall be subsisting under a settlement an estate prior to an estate tail under the same settlement, and such prior estate shall be sufficient to qualify the owner thereof to be protector of the settlement, and there shall happen at any time to be no protector of the settlement as to the lands in which the prior estate shall be subsisting, the said court . . . shall, while there shall be no such protector and the prior estate shall be subsisting, be the protector of the settlement as to such lands : (*Id.*)

II. APPLICATION FOR CONSENT.

In every case in which the Lord Chancellor [&c., or the Chancery Division] shall be the protector of a settlement such Lord Chancellor [&c. or Chancery Division] (as the case may be) while protector of such settlement, shall, on the motion or petition in a summary way by a tenant in tail under such settlement, have full power to consent to a disposition under [the] Act by such tenant in tail, and the disposition to be made by such tenant in tail upon such motion or petition as aforesaid shall be such as shall be approved of [by the court, which may] make such order in the matter as shall be thought necessary : (3 & 4 Will. 4, c. 74, s. 48.)

For form of petition and evidence, see *Re Gravenor*, 1 De G. & S. 700; for forms of orders, see Seton, 1280 *et seq.*)

[If the court as above mentioned] shall, in lieu of any such person as aforesaid, be the protector of a settlement, and there shall be any other person protector of the same settlement jointly with such persons as aforesaid, then and in every such case the disposition by the tenant in tail, though approved of as aforesaid, shall not be valid, unless such other person, being protector as aforesaid, shall consent thereto in the manner in which the consent of the protector is by [the] Act required to be given : (3 & 4 Will. 4, c. 74, s. 48.)

QUESTIONS.

OF FACT.

[See TRIAL; REFEREES.]

OF LAW.

[See INTERPLEADER; SPECIAL CASE; TRIAL.]

RAILWAY COMPANIES.

[See COMPANIES; LANDS CLAUSES ACT; WINDING-UP.]

REAL ESTATES.

All causes and matters for . . . the sale and distribution of the proceeds of property subject to any lien or charge; the specific performance

of contracts between vendors and purchasers of real estates, including contracts for leases; the partition or sale of real estates; . . . the care of infants' estates; are assigned to the Chancery Division: (J. A. 1873, s. 34.)
 [See also FORECLOSURE; SPECIFIC PERFORMANCE; PARTITION; PROPERTY; INFANTS.]

RECEIVER.

- I. JURISDICTION.
- II. WRIT.
- III. APPLICATION.
 1. WHERE MADE.
 2. BY WHOM MADE.
 3. HOW MADE.
 - (a) Motion.
 - (b) Petition.
 - (c) Summons.
 4. WHEN MADE.
- IV. RECEIVER.
- V. ORDER FOR RECEIVER GENERALLY.
- VI. REFERENCE TO CHAMBERS.
- VII. WHAT PERSONS APPOINTED
- VIII. SECURITY.
 1. WHAT REQUIRED.
 2. HOW GIVEN.
 3. FRESH SECURITY.
- IX. ORDER OF APPOINTMENT.
- X. SALARY.
- XI. WHEN APPOINTMENT COMPLETE.
- XII. EFFECT OF APPOINTMENT.
- XIII. ACCOUNTS AND BALANCES.
 1. LEAVING ACCOUNT AT CHAMBERS.
 2. PROCEEDING ON AND PASSING ACCOUNTS.
 3. PAYMENT OF BALANCES.
 4. DEFAULT.
- XIV. DISCHARGE AND COMPLETION OF RECEIVERSHIP.

I. JURISDICTION.

Even before the Judicature Acts, the granting of a receiver was a matter of discretion, to be governed by a view of the whole circumstances of the case: (*Owen v. Homan*, 3 Mac. & G. 378, cited Morg. & Ch. 595.)

See Kerr on Receivers; Seton, 410, 454; Daniel's Chancery Practice, 1563-1618.

A receiver [may be] appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made: (J. A. 1873, s. 25, sub-s. 8.)

A fortiori, a receiver may be appointed at the hearing wherever it is just or convenient: (see *Beddow v. Beddow*, L. Rep. 9 Ch. Div. 89; 47 L. J. 588, Ch.; 26 W. R. 570.)

It has been held "just and convenient" to appoint a receiver—

Of the whole property of which the plaintiff was mortgagee, though of some part he was legal, and of other part equitable mortgagee (*Pease v. Fletcher*, L. Rep. 1 Ch. Div. 273; 45 L. J. 265, Ch.);

In an action for specific performance of a parol contract to execute a bill of sale, where there is immediate danger of the goods being

disposed of (*Taylor v. Eckersley*, L. Rep. 2 Ch. Div. 302; 45 L. J. 527, Ch.);

On the application of a co-owner of property (*The Amptill*, L. Rep. 5 P. Div. 224);

In an action for partition where one of the owners was in occupation though not in exclusive occupation of the property (*Porter v. Lopes*, L. Rep. 7 Ch. Div. 358);

In cross actions for redemption and recovery of land, the property being wasting, and an insufficient security (*Real and Personal Advance Company v. M'Carthy*, 40 L. T. Rep. N. S. 878);

In an administration action, where the estate was in extreme danger of being improperly disposed of, although the executor, the sole defendant, was dead, and no order to continue had been obtained (*Re Parker, Cash v. Parker*, L. Rep. 12 Ch. Div. 293; 40 L. T. Rep. N. S. 878);

In a creditor's administration action, to prevent the administrator or executor paying creditors in full, immediately after writ issued (*Re Radcliffe*, L. Rep. 7 Ch. Div. 733);

Where a creditor under an *elegit* wishes to have equitable execution of property which cannot be taken under the writ (see EXECUTION, XVI.)

See also, as to the meaning of the words "just or convenient," INJUNCTION, II.

A receiver may be appointed, though the person applying has other remedies: (*Bryant v. Bull*, L. Rep. 10 Ch. Div. 153; 39 L. T. Rep. N. S. 470.)

As to appointing a receiver of a railway company, see Railway Companies Act 1867, s. 4.

The section takes away from the judgment creditor of a railway company the right of taking in execution the rolling stock and plant of that company, but gives him new rights, which are independent of the fact whether such company has or has not rolling stock or plant to be taken in execution: (*Re Manchester and Milford Railway Company; Ex parte Cambrian Railway Company*, L. Rep. 14 Ch. Div. 645; 42 L. T. Rep. N. S. 714; 49 L. J. Ch., 454.)

Wherever the judgment creditor of a railway company is unpaid, the appointment of a receiver, or manager, is a matter of right: (*Id.*)

Where the debtor company is carrying on its business in the ordinary way, conducting its own traffic arrangements, the appointment of a manager is "necessary" within the meaning of the section: (*Id.*)

Where the unpaid vendor of land taken by a railway company has commenced an action against a company to enforce his lien, a receiver will not be granted before judgment, though the company admit their liability: (*Latimer v. Aylesbury Railway Company*, L. Rep. 9 Ch. Div. 385.)

A receiver will not be appointed pending a reference to arbitration, unless a special case is made out: (*Law v. Garrett*, L. Rep. 8 Ch. Div. 26.)

II. WRIT.

Where the receiver is a substantial object of the action, the writ should be indorsed with a claim for a receiver: (*Colebourne v. Colebourne*, L. Rep. 1 Ch. Div. 690.)

But a receiver may be appointed though not so claimed: (*Norton v. Gover*, W. N. 1877, p. 206; *Salt v. Cooper*, W. N. 1880, p. 183.)

III. APPLICATION.

1. WHERE MADE.

The application must, subject to the power of transfer, be made in the

division of the court to which the action is attached (J. A. 1875, s. 11, sub-s. 1; see ACTION) and to the judge to whose court the action is attached.

But pending an appeal, the Court of Appeal may appoint a receiver, though no application has been made below (*Hyde v. Warden*, L. Rep. 1 Ex. Div. 309), and the same power exists pending an appeal to the House of Lords, if otherwise successful appellants would be deprived of the fruits of their litigation: (*Polini v. Gray*, L. Rep. 12 Ch. Div. 439.)

2. BY WHOM MADE.

An application . . . may be made to the court or a judge by any party: (O. LII., r. 4.)

(a) Motion.

If the application be by the plaintiff for an order under the said sub-section 8 it may be made either *ex parte* or with notice, . . . and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application: (O. LII., r. 4.)

An application *ex parte* will only be entertained in cases of emergency (*Re H.'s Estate*, L. Rep. 1 Ch. Div. 276; 45 L. J. 749, Ch.; *Taylor v. Eckersley*, L. Rep. 2 Ch. Div. 302.)

(b) Petition.

An order was made on petition when an infant was interested: (Morg. and Chute, 595.)

A petition is the proper application under the County Debentures Act (36 & 37 Vict. c. 35, s. 17), the Mortgage Debenture Act (28 & 29 Vict. c. 78, s. 44), the Railway Companies Act, 1867: (Wms. Pet. 304-5.)

(c) Summons.

A receiver may be appointed on summons:

In a summons suit;

To supply the place of a receiver already appointed, whose office has become vacant;

By consent: (Ayck. 645.)

Under the Mortgage Debenture Acts: (See MORTGAGE DEBENTURE ACTS.)

4. WHEN MADE.

As to defendant's application, see *sup.* (d.). He may obtain the order before judgment (*Sargant v. Read*, L. Rep. 1 Ch. Div. 602; 45 L. J. 206, Ch.)

A receiver till the hearing was appointed before appearance in *Taylor v. Eckersley*, L. Rep. 2 Ch. Div. 302.

And where bankruptcy and consequent loss were expected, a receiver was appointed before the writ was issued: (*Re H.'s Estates*, L. Rep. 1 Ch. Div. 276; 45 L. J. 749, Ch.)

A receiver may be appointed after final judgment without a new action, although the writ does not claim a receiver: (*Salt v. Cooper*, W. N. 1880, p. 183.)

IV. EVIDENCE.

An affidavit or other evidence must be produced verifying such facts and circumstances as constitute the necessity for a receiver: (Ayck. 645.)

When it is intended that a certain person shall by consent be appointed at once, the usual affidavits of fitness must also be produced.

In applications under the 4th section of the Railway Companies Act, 1867, the only evidence required by a judgment creditor for the appointment of a manager is an affidavit that he is such a creditor and that his judgment debt is unsatisfied, and that the company is a going

concern, carrying on its own business and conducting its own traffic in the ordinary way: (*Re Manchester and Milford Railway Company*, cited *sup.* I.)

V. ORDER FOR RECEIVER GENERALLY.

Any such order may be made either unconditionally or upon such terms and conditions as the court shall think just: (J. A. 1873, s. 25, sub-s. 8.)

The fact that in the first of two cross actions a receiver has been appointed does not preclude another party from obtaining a receiver: (*Norton v. Gover*, W. N. 1877, p. 206.)

Where both plaintiff and defendant have applied, one order will be made, the conduct of the action being generally given to the plaintiff: (*Sargant v. Read*, *sup.*)

A receiver may be appointed though the person applying for his appointment has other remedies: (*Bryant v. Bull*, L. Rep. 10 Ch. Div. 153; 39 L. T. Rep. N. S. 470.)

[And see *post.*]

The order usually made in court is that "a proper person be appointed" with any directions necessary: (Seton, 4th edit., 410.)

By arrangement between the parties, when they can agree upon a person named, a receiver is frequently appointed in the first instance in open court. In *Blackborough v. Ravenhill* (16 Jur. 1085) the court, on a motion for a reference to appoint a receiver, said it would make the order appointing the person proposed by consent without a reference on the production of the usual affidavits of fitness: (Jarm. 78.)

VI. REFERENCE TO CHAMBERS.

Upon the order being made, if the receiver is not named, it is carried into chambers, and a summons is taken out to appoint the receiver: (Ayck. 645; Dan. 1586.)

The summons must be supported by affidavits showing the nature and value or annual value of the property to be controlled, and that the receiver is a fit and proper person: (Ayck. 645; Dan. 1587.)

The willingness of the person proposed should also be shown: (Jarm. 377.)

If the appointment of a receiver is ordered by an order of the court directing any accounts or inquiries, a summons need not be taken out for the express purpose of appointing a receiver, as that proceeding may be taken on an adjournment day fixed for that and other purposes, all which may be arranged on the return of the first summons under the order, when the general directions as to its prosecution are given: (Jarm. 377.)

[See CHAMBERS.]

VII. WHAT PERSONS APPOINTED.

Generally the person to be appointed should not be interested in the property: (Dan. 1580.)

A party to the action must obtain the leave of the court before proposing himself as receiver. Except by consent, a solicitor in the cause is not generally considered eligible to the office of receiver, although a practising barrister is: (*Garland v. Garland*, 2 Ves. jun. 137; Seton, 424.)

Where in an action in the Chancery Division, a claim was made for the appointment of a receiver of the testator's real and personal estate *pendente lite*, the person appointed was the plaintiff in the action, and the firm of which he was a member acted as the solicitors in the action both for the plaintiff and the defendant, who had subsequently changed her solicitors, such appointment was held to be an improper one, and the

solicitor was made to pay all the costs in the court below and on appeal: (*Re Lloyd*, L. Rep. 12 Ch. Div. 477; 41 L. T. Rep. N. S. 71.)

As a general rule, it is contrary to the practice of the court to appoint one of the parties to the action receiver, and it will be done only in very special circumstances: (*Re Lloyd*, *sup.*) But where the plaintiff is the person beyond doubt chiefly interested in the property this rule is sometimes relaxed. Therefore, where the plaintiff was formerly in partnership with the defendant, had advanced all his capital, and was liable to the partnership debts, he, offering to act without salary, was appointed receiver of the partnership assets: (*Jarm.* 78; *Ayck.* 644; *Taylor v. Eckersley*, *sup.*).

On applications for appointment of a manager under sect. 4 of the Railway Companies Act, 1867, as a general rule, the directors, or secretary, or some of them, will be appointed by the court managers where they are acting fairly, and the order for appointment of a manager will be made without prejudice to any application on the part of the directors to propose themselves, or some of their number, to act as managers: (*Re Manchester and Milford Railway Company*, cited *sup.* I.)

The court will not sanction the appointment, as receiver, of a person whose duty it is to check and control the individual appointed, as the next friend of an infant: (*Dan.* 1581.)

A peer or a trustee will not generally be appointed: (*Morg. & Ch.* 595.)

The fittest person will be appointed without regard to which party proposed him; but generally the person having the carriage of the order has the right of nominating, and effect will be given to his nomination unless good cause to the contrary is shown by the other side: (*Seton*, 424.)

VII. SECURITY.

1. WHAT REQUIRED.

Where an order is made directing a receiver to be appointed, unless otherwise ordered, the person to be appointed shall first give security to be allowed by the judge to whose court the cause is attached, and taken before a person authorised to administer oaths in Chancery, duly to account for what he shall receive on account of the rents and profits for the receipt of which he is to be appointed, at such periods as such judge shall appoint, and to account for and pay the same as the court shall direct, or, as the case may be, to be answerable for what he shall receive in respect of the personal estate for the getting in and collection of which he is to be appointed, and to account for and pay the same as the court shall direct: (*C. O.* 24, r. 1.)

The word "receiver," includes consignee and manager: (*Pr. C. O.* 10.)

Security may be dispensed with (*Ayck.* 646), but not unless all persons are competent to consent: (*Id.*; *Morg. & Ch.* 169.)

The security required to be given is generally double the amount of the annual income: (*Dan.* 1585.)

2. HOW GIVEN.

The security is a recognisance, sometimes of the receiver alone, but generally of the receiver and two sureties: (*Seton*, 426.)

The sureties must be persons residing within the jurisdiction: (*Seton*, 426.)

Recognisances which were formerly given to the Master of the Rolls and the Senior Master in Ordinary, shall be given to the Master of the Rolls and the senior Vice-Chancellor for the time being: (*C. O.* 42, r. 13.)

The names and descriptions of the sureties should be given to the plaintiff's solicitor, to enable him to test their sufficiency by means of private

inquiries. Generally the chief clerk will fix a time for this to be done, and a further time, if necessary, for objections to be made: (Jarm. 381.)

The draft recognisance is settled in chambers, and then engrossed on parchment, stamped, and allowed by the chief clerk: (Ayck. 646.)

It is acknowledged before a commissioner or officer of the court, and with an office copy affidavit as to the sufficiency of the sureties is left with the judge's clerk: (*Id.*)

The judge's clerk transmits the recognisance to the Central Office for enrolment: (Ayck. 646.)

No recognisance acknowledged in this court, of what nature or kind soever, shall be enrolled therein after six months from the acknowledgment thereof, except under special circumstances, and by an order made by the court upon motion for the enrolment thereof after that time: (C. O. 42, r. 12.)

3. FRESH SECURITY.

Where the property has increased in value since the appointment, additional security may be required: (Dan. 1585.)

Upon any event, such as death or bankruptcy, happening which prevents the recognisances being effectually put in force against the parties, an order may be made on summons for the receiver to give new security: (Seton, 427.)

IX. ORDER OF APPOINTMENT.

The judge shall fix the days upon which receivers shall (annually, or at longer or shorter periods, at his discretion) leave and pass their accounts, and also the days upon which such receivers shall pay the balances appearing due on the accounts so left, or such part thereof as the chief clerk shall certify as proper to be paid by them: (C. O. 24, r. 2.)

Upon the adjourned summons, the order approving the appointment is left with the registrar, who draws the order appointing the receiver, and naming the time within which accounts are to be passed and balances paid: (Ayck. 646.)

If the receiver is named in the order of the court, leaving him to give the necessary security, when such security is completed the chief clerk certifies that the security has been given, and when the passing of accounts and bringing in of balances is to take place: (Jarm. 382.)

On an application at chambers to appoint a receiver, the expense of a certificate, in addition to an order, may be saved by the recognisance being completed and enrolled before an order is drawn up. The recognisance must recite that the judge has approved the proposed receiver subject to his giving security, instead of reciting the order directing a receiver to be appointed; and the order should, after reciting that the recognisance has been enrolled, appoint the receiver, and fix the days for him to bring in his accounts and pay balances: (Dan. 1589.)

X. SALARY.

The person . . . appointed should be allowed a proper salary for his care and pains in receiving [the] rents and profits, or, as the case may be, shall have an allowance made to him in respect of his collecting such personal estate: (C. O. 24, r. 1.)

The allowance depends on the degree of difficulty or facility with which the rents are collected, the maximum being usually 5*l.* per cent.: (Morg. & Chute. 169.)

For extraordinary trouble and expenses an additional allowance may be made by express order: (*Id.*)

A party proposing himself is generally required to act without salary, unless by consent : (Seton, 426.)

As to payment of a commission for collecting rents, see *Union Bank of London v. Ingram*, W. N. 1880, p. 163.

XI. WHEN APPOINTMENT COMPLETE.

The receiver is not in possession until his recognisance (if any) is completed (Morg. & Ch. 596), whether the appointment is by the court of a named person "upon his giving security" or generally of a receiver : (*Edwards v. Edwards*, L. Rep. 2 Ch. Div. 291.)

But the last case only related to chattels. If a receiver is appointed of the rents of lands at the instance of a judgment creditor, though the appointment is conditional upon the receiver's giving security, it operates as an immediate delivery of the land in execution : (*Ex parte Evans, Re Watkins*, L. Rep. 13 Ch. Div. 252; 41 L. T. Rep. N. S. 565; 48 L. J. 97, Bank.)

XII. EFFECT OF APPOINTMENT.

A receiver is appointed for the benefit of all parties, and all parties are bound by his possession. His possession cannot be disturbed without leave of the court : (Morg. & Ch. 596.)

If, when a receiver is appointed a person is in possession of or exercising rights over the subject matter, the appointment leaves him in possession, and does not interfere with the exercise of his rights : (*Johnes v. Cloughton*, Jac. 573; *Evelyn v. Lewis*, 3 Ha. 475.)

Upon application, the court will always take care to give to any party, who has a right paramount to that of the receiver or the party obtaining the receiver, the means of obtaining justice, and will assist him in asserting and having the benefit of his right : (Per Kindersley, V.C., *Hawkins v. Gathercole*, 1 Drew. 18.)

A landlord should obtain the authority of the court before distraining : (Seton, 428.)

A mortgagee whose rights are interfered with may apply by summons or motion for leave to bring an action for recovery of the land, or to be examined *pro interesse suo* ; but, to obtain the latter order, he must not have been guilty of delay : (Fisher, 418-9.)

When a receiver is appointed of real or leasehold property, the order generally directs the parties to deliver possession, and directs the tenants to attorn and pay rents : (Dan. 1590.)

The receiver should report a refusal to deliver possession or attorn after application, to the solicitor of the party who applied for the receiver that he may get enforced the order of the court : (*Id.*)

Giving up possession by parties may be enforced by writ of assistance or writ of delivery : (see EXECUTION.)

Payment of rent may be ordered, though there has been no attornment, on motion with notice, or summons : (Dan. 1596.)

After attornment the receiver may distrain, without order, for rent accrued during the tenancy within the year, but if the rent is in arrear more than a year, an order must be obtained on summons, the chief clerk's minute being sufficient : (Dan. 1596-7.)

A receiver may, without order, let for a year certain or less or any term not exceeding three years ; may determine such tenancies by notice : (Dan. 1597.)

A receiver ought not without leave
To raise rents on slight grounds ;
To evict a tenant ;

To lay out more than a small sum : (Dan. 1597.)

If any loss arises from the receiver's default, he must bear it : (*Hutchinson v. Massarene*, 2 Ball & B. 55, cited Morg. & Ch. 596.)

As to when he is liable for a banker's default, see cases cited Morg. & Ch. 170.

Applications for the direction of the court should be by summons, by the party conducting the proceedings, or, in case of his refusal, by the receiver : (Dan. 1600.)

XIII. ACCOUNTS AND BALANCES.

1. LEAVING ACCOUNT AT CHAMBERS.

Receivers' accounts are to be delivered at chambers on or before the day appointed for that purpose, and, in default, the receiver will be liable to the consequences imposed by G. C. O. 24, r. 2 : (Ch. Reg. Aug. 1857, r. 16 ; see *post*, 4.)

The form of account to be used is that in No. 14 in the schedule to the Chancery Regulations of August, 1857.

In the first account passed, the receiver should state, in the columns for observation, how each tenant holds ; and every alteration should be noticed in the subsequent accounts. In this column should also be entered remarks as to arrears of rent, repairs, &c. : (Dan. 1600.)

If the account is drawn up irregularly, the receiver may be ordered to draw it up in proper form, and to pay the costs of irregularity : (*Id.*)

2. PROCEEDING ON AND PASSING ACCOUNT.

Upon a receiver's account being left in the judge's chambers to be passed, a summons to proceed thereon shall be taken out : (C. O. 24, r. 3.)

If the receiver neglects to take out the summons, any party may do so : (Dan. 1600.)

The receiver is usually directed to hand copies of the account to parties entitled to attend the passing, and to charge for the same in his costs : (Dan. 1601.)

Upon the return of the summons the account is substantiated : (Dan. 1601.)

The costs of the receiver's appointment, if it be his first account, and of passing the account, and the costs of all parties entitled to attend upon it, are to be produced and taxed at the time of passing the account, and are included therein : (Jarm. 385.)

The account, when passed, shall be entered by the receiver in books : (C. O. 24, r. 3.)

The books are in duplicate : (Dan. 1601.)

The affidavit verifying the account so passed shall refer to it as an exhibit, and not be annexed to it : (C. O. 24, r. 3.)

A form of affidavit is given in the schedule to the Chancery Regulations of August, 1857.

The books and office copy affidavit are left at chambers, and a memorandum of allowance of the account is signed at the foot by the chief clerk : (Dan. 1601.)

One book is retained at chambers ; the other is delivered to the receiver from time to time : (*Id.*)

A certificate of the allowance of the account is afterwards made and filed : (*Id.*)

3. PAYMENT OF BALANCES.

A receiver may at any time apply by summons for an order to pay in money : (Dan. 1602.)

Where, in an action brought against the E. Railway Company, by debenture holders of the company, an order was made appointing a receiver of the tolls, &c., who was to pay all the expenses proper and necessary for maintenance, management, and working of the company, and reserving liberty to "any party to apply as to any payments to be made by the receiver, and generally as he might be advised;" and the G. railway company having recovered judgment in an action against the E. company for certain sums (alleged to be due as for expenses proper and necessary for maintenance, management, and working of the E. company), took out a summons in the debenture holder's action, asking that the receiver might be directed, out of the money in his hands, to pay the sums for which judgment had been recovered, it was held that, assuming the sums were proper and necessary, as aforesaid, the G. company, not being parties to the action, had no *locus standi* to make the application: (*Brocklebank v. The East London Railway Company*, L. Rep. 12 Ch. Div. 839; 41 L. T. Rep. N. S. 205; 48 L. J. 729, Ch.)

4. DEFAULT.

If the receiver does not leave his account, or pay balances into court, or to parties entitled, any party interested may obtain an order on summons against him, with costs: (Dan. 1602-3.)

And, with respect to such receivers as shall neglect to leave and pass their accounts and pay the balances thereof at the times so to be fixed for that purpose as aforesaid, the judge before whom such receivers are to account shall from time to time, when their subsequent accounts are produced to be examined and passed, not only disallow the salaries therein claimed by such receivers, but also charge them with interest after the rate of *5l. per cent. per annum* upon the balances so neglected to be paid by them during the time the same shall appear to have remained in the hands of such receiver: (C. O. 24, r. 2.)

The receiver is charged with interest by making yearly, or half-yearly rests in the account, whether he has been discharged or is still in office: (Dan. 1603-4.)

The receiver may be charged with interest on money improperly kept in his hands, although he has passed his account, and all parties have expressed themselves satisfied: and for this purpose an inquiry what money he has received from time to time, and how long he has kept it, may be directed: (Dan. 1604.)

In case of default by any receiver appointed by the court in leaving or passing any account, or in making any payment, the parties, or any of them may be required to attend at chambers at a time to be appointed for that purpose, to show cause why such account has not been left or passed, [or] payment made: (C. O. 35, r. 23.)

Thereupon such directions may be given at chambers, or by adjournment in open court as shall be proper . . . for the discharge of any receiver, and appointment of another, and for payment of the costs incurred by any neglect or default; or a certificate by the chief clerk of such neglect or default as aforesaid, according to the facts, may be made and filed, without any fee being payable thereon: (*Id.*)

After such certificate shall have been so made, unless the same shall be discharged, none of the parties shall be at liberty to further prosecute the proceeding at chambers, unless and until the court or judge shall upon application make an order directing the same to be prosecuted: (*Id.*)

Upon such certificate becoming binding, any party may apply to the court, and the court may make such order relative to costs, and to relieve any party from the effect of any decree or order before made or proceed-

ing taken which shall not have been duly prosecuted, or otherwise, as may be thought proper: (*Id.*)

For the purposes aforesaid, any party, or the solicitor [to the Chancery Division] may be directed to summon the persons whose attendance is required, and to conduct any proceedings, and carry out any directions which may be given: (*Id.*)

The costs of [such] solicitor shall be paid by such parties, or out of such funds as the court or judge may direct; and if any costs of [such] solicitor . . . be not otherwise paid, the same shall be paid out of the suitors' fund: (*Id.*)

XIV. DISCHARGE AND COMPLETION OF RECEIVERSHIP.

After giving security, a receiver cannot be discharged on his own application without showing reasonable cause: (Dan. 1613.)

A receiver appointed for the benefit of all parties will not be discharged on the *ex parte* application of the party at whose instance he was appointed: (*Id.*)

A receiver will be discharged—

Where he becomes unnecessary;

To make room for another at a low salary;

In case of bankruptcy: (Dan. 1613-4.)

The application is by petition, motion, or summons: (Dan. 1614.)

Upon a petition for this purpose, the receiver should not appear, nor will he be allowed his costs of appearance, although served with the petition: (Jarm. 389.)

If the receiver has not passed his final account, the order directs him so to do: (Dan. 1614.)

The order also directs his discharge, and his recognisances to be vacated subject to the payment of any balance remaining in his hands: (Jarm. 389.)

To vacate the recognisance, the order, with an office copy of the chief clerk's certificate, and the Paymaster-General's certificate of payment in, or an affidavit of payment to a person entitled, must be taken to the Secretary of the Rolls, who initials the order. The order is then taken to the clerk of enrolments, who strikes out the enrolment, and obtains the signature of the Master of the Rolls to the roll, after which the clerk of enrolments signs a memorandum on the order that the recognisance is vacated: (Dan. 1614.)

When a receivership has been completed, the book containing the accounts shall be deposited in the [Central Office]: (C. O. 24, r. 4.)

RECOVERY OF LAND.

- I. WHAT IS AN ACTION FOR.
- II. LEAVE TO JOIN CLAIM WITH OTHER CLAIMS.
- III. WRIT OF SUMMONS.
- IV. APPEARANCE AND LIMITING DEFENCE.
[See APPEARANCE, IX.]
- V. PLEADINGS.
- VI. DISCOVERY.
- VII. WITHDRAWING DEFENCE.
- VIII. JUDGMENT.

1. BY DEFAULT OF APPEARANCE OR PLEADING.

2. ON WITHDRAWAL OF DEFENCE [see *sup.* VII.]

3. IN OTHER CASES [see JUDGMENT].

IX. EXECUTION.

X. COSTS.

I. WHAT IS AN ACTION FOR.

An action for the recovery of land is an action claiming possession of the land itself: (*Gledhill v. Hunter*, L. Rep. 14 Ch. Div. 492; 42 L. T. Rep. N. S. 392; 49 L. J. 333, Ch.; 28 W. R. 530.)

Hall, V.C., held that an action to establish title to certain land was an action for recovery of land: (*Whetstone v. Dewis*, L. Rep. 1 Ch. Div. 99; 33 L. T. Rep. N. S. 501; 45 L. J. 504, Ch.; 24 W. R. 93.)

But the matter only came before him on an application for leave to join another claim, and three weeks only after the rules came into operation; and Jessel, M.R., has since held that such an action is not an action for recovery of land: (*Gledhill v. Hunter*, *sup.*)

An action to recover rents is not for the recovery of land: (*Id.*)

A foreclosure action is not an action for the recovery of land: (*Tawell v. Slate Company*, L. Rep. 3 Ch. Div. 629.)

II. LEAVE TO JOIN CLAIM WITH OTHER CLAIMS.

No cause of action shall, unless by leave of the court or a judge, be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held: (O. XVII., r. 2.)

The necessary leave to join a cause of action with an action for the recovery of land must be obtained before the writ is served: (*Re Pilcher*; *Pilcher v. Hinds*, L. Rep. 11 Ch. Div. 905; 40 L. T. Rep. N. S. 422, 832; 48 L. J. 512, 587, Ch.)

The practice is to obtain leave before the writ is issued: (*Id.*)

If the writ has been served, the court cannot order the action to be continued: (*Id.*)

Leave will be given to join with the claim for land, claims for

Recovery of a deed relating to the land (*Cook v. Enchmarch*, L. Rep. 2 Ch. Div. 111);

Execution of a conveyance of the land to new trustees (*Manisty v. Kenealey*, 24 W. R. 918);

Recovery of personal property comprised in the same instrument (*Cook v. Enchmarch*, *sup.*);

Administration of personal estate of the person from whose administrator the land is claimed (*Kitching v. Kitching*, W. N. 1876, p. 255: and see *Whetstone v. Dewis*, *sup.*);

A receiver: (*Allen v. Kennet*, 24 W. R. 845.)

III. WRIT OF SUMMONS.

As to joining claims with other claims, see *sup.*, II.

The following forms of indorsement are given:

The plaintiff's claim is to recover possession of a house, No. in street, or of a farm called Blackacre, situate in the parish of in the county of

The plaintiff's claim is to establish his title to [here describe property], and to recover the rents thereof.

[The two previous Forms may be combined.]

(App. A. p. 2, s. 4, Rules of 1875.)

Where mesne profits are claimed, add "And for mesne profits:" (*Id.*)

Service of a writ of summons in an action to recover land may, in case of vacant possession, when it cannot otherwise be effected, be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property: (O. IX., r. 8.)

IV. APPEARANCE AND LIMITING DEFENCE.

[See APPEARANCE, IX.]

V. PLEADINGS.

[Where a landlord, not originally a party, has appeared, he] shall in all subsequent proceedings be named as a party defendant to the action: (O. XII., r. 20.)

In an action by an heir-at-law, it is not sufficient to say that the plaintiff is heir-at-law; his pedigree should be shown: (*Phillips v. Phillips*, L. Rep. 4 Q. B. Div. 27; 39 L. T. Rep. N. S. 556; 48 L. J. 125, Q. B.; 27 W. R. 436.)

Where the statement of claim, after alleging facts which would show a title in Frances Evelyn, contained a statement that "the said Frances Evelyn died intestate as to real estate and leaving Sir Hugh Evelyn heir-at-law," and then stated facts which showed a title in the plaintiff to Sir Hugh Evelyn's estate, it was held, on a summons to strike out the paragraph above stated, that it was not embarrassing, and was a sufficient statement of the facts on which the plaintiff relied: (*Evelyn v. Evelyn*, L. Rep. 13 Ch. Div. 138; 42 L. T. Rep. N. S. 248; 49 L. J. 18, Ch.; 28 W. R. 531.)

There shall be no local venue for the trial of any action, but when the plaintiff proposes to have the action tried elsewhere than in Middlesex, he shall in his statement of claim name the county or place in which he proposes that the action shall be tried, and the action shall, unless a judge otherwise orders, be tried in the county or place so named. Where no place of trial is named in the statement of claim, the place of trial shall, unless a judge otherwise orders, be the county of Middlesex: (O. XXXVI., r. 1.)

This applies to the Chancery Division: (*Redmayne v. Vaughan*, 24 W. R. 983.)

No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession. And he may nevertheless rely upon any ground of defence which he can prove, except as hereinbefore mentioned: (O. XIX., r. 15.)

The defendant, if he relies upon an equitable title, must in his statement of defence allege the nature of the deeds and documents upon which he relies, and it is not sufficient to allege that "by virtue of divers mesne acts and mesne assurances in the law all the estate and interest of the plaintiff's predecessor in title is now vested in the defendant": (*Sutcliffe v. James*, 40 L. T. Rep. N. S. 875; 27 W. R. 750.)

Forms of pleadings are given in Appendix C., numbers 24, 25, to the rules of 1875.

[And see PLEADING.]

VI. DISCOVERY.

Where the plaintiff sued for recovery of land on breach of a lessee's covenant in a lease, and the defendant alleged verbal consent to the breach, the plaintiff was allowed to interrogate the defendant as to when the

consent was given, and the conversation which took place, but not as to the persons in whose presence the consent was given: (*Eade v. Jacobs*, L. Rep. 3 Ex. Div. 335; 37 L. T. Rep. N. S. 621; 47 L. J. 74, Ex.; 26 W. R. 159.)

A defendant in a land action, although denying the plaintiff's title, must make an affidavit of documents and specify in detail all the documents in his possession relating to the subject-matter, although he states that they relate exclusively to his own title, and do not aid the plaintiff's case, and although the defendant may not be compellable to produce them at the hearing: (*Fortescue v. Fortescue*, 34 L. T. Rep. N. S. 847; 24 W. R. 945; *Magdalen Hospital v. Knotts*, 21 S. J. 610; *New British Mutual Investment Company v. Peed*, L. Rep. 3 C. P. Div. 196; 26 W. R. 354); but the court must be satisfied, upon the pleadings or upon affidavit, that the plaintiff has some tangible ground of action: (*Phillips v. Phillips*, L. Rep. 4 Q. B. Div. 127; 40 L. T. Rep. N. S. 815; 48 L. J. 135, Q. B.)

A defendant in an action for recovery of land may object to allow his title deeds or court rolls to be inspected: (*New British Mutual Insurance Company v. Peed*, *sup.*; *Owen v. Wynn*, L. Rep. 9 Ch. Div. 29; 38 L. T. Rep. N. S. 623; 26 W. R. 644.)

A party who is covenantee to a covenant for production of deeds cannot be ordered to obtain production if the covenantor is not a party: (*Bethell v. Casson*, 1 H. & M. 806.)

When an ejectment action has been transferred from a County Court into the High Court, the proceedings must thenceforth be regulated by the practice of the High Court, and discovery cannot be obtained before the delivery of a statement of claim: (*Davies v. Williams*, L. Rep. 13 Ch. Div. 550; 42 L. T. Rep. N. S. 469.)

VII. WITHDRAWING DEFENCE.

The court or a judge may, before, or at, or after the hearing or trial upon such terms as to costs, and as to any other action, and otherwise, as may seem fit, order the action to be discontinued. . . . The court or a judge may in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged ground of defence . . . to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave: (O. XXIII.)

[At common law, where a sole defendant in ejectment confessed the action, the claimant was] entitled to and [might] forthwith sign judgment and issue execution for the recovery of possession and costs: (C. L. P. A. 1852, s. 203.)

In case one of several defendants in ejectment, who [defended] separately for a portion of the property for which the other defendant or defendants [did] not defend [was] desirous of confessing the claimant's title to such portion, he [might] give a like notice to the claimant; and thereupon the claimant was entitled to and [might] forthwith sign judgment and issue execution for the recovery of possession of such portion of the property, and for the costs occasioned by the defence relating to the same, and the action [might] proceed as to the residue: (*Id.*, s. 204.)

In case one of several defendants in ejectment, who [defended] separately in respect of property for which other defendants also [defended, was] desirous of confessing the claimant's title, he [might] give a like notice thereof; and thereupon the claimant [was] entitled to and [might] sign judgment against such defendant for the costs occasioned by his defence, and . . . proceed in the action against the other defendants to judgment and execution: (*Id.*, s. 205.)

It has been argued that when one of several defendants has actively defended, and before the action is heard, serves a summons for leave to withdraw, the terms ought to be that he should pay all the costs of the action, as each defendant in ejectment was liable to all the plaintiff's costs (see *post*), but where the plaintiff company were mortgagees of the premises, the subject of the action, in the possession of M'Carthy and his tenant Smith, the latter holding only part of the premises, and Smith, on being joined as a defendant in the action, took an active part in the defence, but before the hearing, gave up possession of the portion of the premises occupied by him, served on the plaintiff company a summons for leave to withdraw his defence on such terms as to the court should seem fit, on the ground that he had so given up possession, and the terms offered as terms before the chief clerk were, that the defendant Smith should pay the amount owing by him in respect of an occupation rent which had been fixed in chambers pursuant to a previous order of the court, the costs occasioned by Smith's defence, and the costs of the application, Fry, J., acceded to the application, and ordered the plaintiff to pay the costs of adjourning the summons into court: (*Real and Personal Advance Company Limited v. M'Carthy and Smith*, 42 L. T. Rep. N. S. 48; L. Rep. 14 Ch. Div. 188; 47 L. J. 615, Ch.; 28 W. R. 418.)

VIII. JUDGMENT.

1. BY DEFAULT OF APPEARANCE OR PLEADING.

[See JUDGMENT, I. 1 (e) and 2 (b) (4).]

Where a defendant has failed on account of his pleading being defective, and leave to defend has been refused, judgment may be given "without prejudice to the rights, if any, of the defendant". (*Sutcliffe v. James*, 40 L. T. Rep. N. S. 875.)

2. ON WITHDRAWAL OF DEFENCE.

[See *sup.*, VII.]

3. IN OTHER CASES.

[See JUDGMENT.]

IX. EXECUTION.

A judgment for the recovery or for the delivery of the possession land may be enforced by writ of possession: (O. XLII., r. 3.)

A judgment that a party do recover possession of any land may be enforced by writ of possession in manner heretofore used in actions of ejectment in the Superior Courts of Common Law: (O. XLVIII., r. 1.)

Where by any judgment any person therein named is directed to deliver up possession of any lands to some other person, the person prosecuting such judgment shall, without any order for that purpose, be entitled to sue out a writ of possession on filing an affidavit showing due service of such judgment and that the same has not been obeyed: (O. XLVIII., r. 3.)

The sheriff under this writ, must put the person, in whose behalf the writ is issued, into possession, and in order to do so he may, if necessary, break open doors, and, if he fears violence, take the *posse comitatus* with him: (See Chitty's Archb. Pract. p. 1034, 11th edit.)

X. COSTS.

At common law each defendant in an action of ejectment when there were several defendants, although defending only for part of the premises, was liable for the whole of the plaintiff's costs: (*Johnson v. Mills*, 17 L. T. Rep. N. S. 215; L. Rep. 3 C. P. 22.)

RECTIFICATION OF INSTRUMENTS.

[See CANCELLATION, &C., OF INSTRUMENTS.]

REDEMPTION.

I. JURISDICTION.

II. PARTIES.

1. GENERAL RULES.

2. PERSONS INTERESTED IN EQUITY OF REDEMPTION.

- (a) *Mortgagor.*
- (b) *Assignees.*
- (c) *Bankruptcy Trustees.*
- (d) *Devisees.*
- (e) *Executors and Administrators.*
- (f) *Heir.*
- (g) *Legatees.*
- (h) *Incumbrancers, Execution Creditors, &c.*
- (i) *Trustees.*

3. MORTGAGEES AND THOSE CLAIMING UNDER THEM.

- (a) *Mortgagees.*
- (b) *Assignees.*
- (c) *Cestuis que trustent.*
- (d) *Devisees.*
- (e) *Executors and Administrators.*
- (f) *Heir.*
- (g) *Tenant in Tail, &c.*
- (h) *Trustees.*
- (i) *Wrongful Possessors.*

III. INDORSEMENT OF WRIT.

IV. ORDER FOR ACCOUNT WHEN CLAIMED [see ACCOUNT].

V. PROCEEDINGS GENERALLY SUBSEQUENT TO WRIT.

VI. PLEADINGS.

VII. DISCOVERY.

VIII. JUDGMENT.

IX. TAKING ACCOUNTS.

X. CHIEF CLERK'S CERTIFICATE.

XI. PAYMENT.

XII. FINAL ORDER DISMISSING ACTION.

XIII. SUCCESSIVE REDEMPTIONS.

XIV. COSTS.

I. JURISDICTION.

All causes and matters for . . . the redemption of mortgages [are assigned to the Chancery Division]: (J. A. 1873, s. 34.)

II. PARTIES.

1. GENERAL RULES.

All the parties interested in the several estates or mortgages must be made parties to the action (Dan. 190); though the result may be the trial of a legal right between parties thus brought before the court for different purposes: (Fisher, 883.)

2. PERSONS INTERESTED IN EQUITY OF REDEMPTION.

(a) *Mortgagor.*

A mortgagor cannot redeem without making all those who have an equal right to redeem with himself parties to the action: (Dan. 189.)

Before the question of redemption can be agitated between two mortgagees, the mortgagor shall be a party; and even where he is out of the jurisdiction, he must be joined in a redemption suit by a second mortgagee, for, if the action be dismissed for nonpayment, the judgment operates as a foreclosure, and the mortgagor cannot be foreclosed without being a party: (*Palk v. Clinton*, 12 Ves. 48, 58, 61; *Fell v. Brown*, 2 Bro. C. C. 276; *Farmer v. Curtis*, 2 Sim. 466.)

An action for redemption cannot be sustained by a party having a partial interest in the equity of redemption in the absence of the other parties interested in it: (Dan. 242.)

A joint tenant or tenant in common may redeem, but must redeem the whole: (Seton, 1052.)

A tenant in tail, who has joined with tenant for life in mortgaging, redeem: (*Playford v. Playford*, 4 Ha. 546, cited Seton, 1052.)

If the estate of a married woman be mortgaged, and the right of redemption be reserved to her and her husband, or either of them, she must be made a party: (Fisher, 885.)

But if a woman married before the Dower Act joins with her husband in mortgaging freeholds, her dower is extinguished, and she cannot redeem: (*Dawson v. Bank of Whitehaven*, L. Rep. 6 Ch. Div. 218.)

If a tenant for life of a mortgaged estate mortgage his life interest for a term, if he shall so long live, with a power of sale, he is a necessary party to an action for redemption of the original mortgage brought by a purchaser under the power of sale: (*Id.*)

If the mortgagor become bankrupt, he is not a necessary party if the trustee disclaims either fee simple or leasehold mortgaged property: (see Fisher, 886; Bankruptcy Act 1869, s. 23; *Re Mercer and Moore*, L. Rep. 14 Ch. Div. 287; 42 L. T. Rep. N. S. 311; 49 L. J. 201, Ch.)

If the trustee refuses to proceed, and the creditors commence an action, the bankrupt should be made a party: (Fisher, 887, citing *Franklyn v. Fern*, Barn. 30.)

After full satisfaction of all his creditors, the bankrupt may sue: (Seton, 1052-3.)

(b) *Assignees.*

When two estates are mortgaged to the same person to secure the same sum, and afterwards the equity of redemption of one estate becomes vested in a different person from the other, the owner of one cannot redeem his part separately: (Dan. 189; Fisher, 884.)

The rule is the same where the mortgagee holds securities upon distinct estates, and even for distinct debts of the mortgagor, whether the securities be by the same or different instruments, and whether redemption be sought by an incumbrancer, or by the owner of the equity of redemption, or of part of the mortgaged estate, or one of the estates separately mortgaged: (Fisher, 885.)

Consolidation only applies where default has been made on all the securities in respect of which it is claimed, and there can be no consolidation between a mortgage by A. for his own debt, and a mortgage by A. and B. of other property for their partnership debt: (*Cummins v. Fletcher*, L. Rep. 14 Ch. Div. 699; 42 L. T. Rep. N. S. 859; 49 L. J. 563, Ch.; 28 W. R. 772.)

The rule as to consolidation does not apply where one of the mortgages

was created subsequently to the assignment of the equity of redemption to the party seeking to redeem: (*Mills v. Jennings*, L. Rep. 13 Ch. Div. 639; 42 L. T. Rep. N. S. 169; 28 W. R. 549.)

Where consolidation has taken place and then assignments have been made to different purchasers, the first assignee in point of time, though of the estate secondly mortgaged, is first entitled to redeem both properties: (*Id.*)

A tenant for life, when the property has been settled, is entitled to redeem in preference to those entitled in remainder, but he cannot compel those in remainder to redeem him. The redeeming tenant for life must hold the equity of redemption subject to the trusts of the settlement: (*Seton*, 1052.)

If, pending a suit for redemption, the equity of redemption be assigned, the assignee is bound: (*Fisher*, 915-6.)

And the death of the assignor is immaterial: (*Fisher*, 916.)

(c) *Bankruptcy Trustees.*

The trustee is a proper party to a redemption action commenced by creditors of the bankrupt in consequence of the trustee himself refusing to sue, when the creditors make out a case entitling them to sue: (*Fisher*, 887, citing *Franklyn v. Fern*, *sup.*)

(d) *Devisees.*

The devisee, whether in trust or beneficially, is a necessary party in respect of so much of the equity of redemption as has been devised to him: (*Fisher*, 894.)

And see *post* (f).

(e) *Executors and Administrators.*

The mortgagor's personal representative is not generally a necessary party where the mortgage is in fee; but if it is alleged that the mortgagee has been in possession and is overpaid, the personal representative must be joined: (*Fisher*, 896.)

If the equity of redemption have been dealt with by the mortgagor in his lifetime, so as to be converted into personalty, his personal and not his real representative is the proper plaintiff: (*Fisher*, 898.)

The executor or administrator is the proper person to sue in respect of securities on chattel interests, without the beneficiaries: (*Fisher*, 908.)

(f) *Heir.*

The heir is a necessary party in respect of what he takes by descent; but, if the whole equity be devised, the heir is not a proper party to a suit by the devisee to redeem: (*Fisher*, 894.)

If the title of the devisee be doubtful both should be parties: (*Fisher*, 895.)

But one of them only should be plaintiff: (*Id.*)

(g) *Legatees.*

Legatees whose legacies are charged by the mortgagor's will on the mortgaged estate are necessary parties to a suit in which the right to redeem is questioned: (*Fisher*, 895, citing *Batchelor v. Middleton*, 6 Ha. 78.)

But they cannot sue without their trustee or executor: (*Troughton v. Binks*, 6 Ves. 573.)

(h) *Incumbrancers, Execution Creditors, &c.*

A second incumbrancer may commence an action to redeem the first without making a subsequent incumbrancer a party (*Dan.* 242; *Fisher*, 894; *Shepherd v. Gwinnet*, 3 Sw. 151); but compare the cases as to

joining the mortgagor, cited *sup.* (a), in an action by a subsequent incumbrancer; and see Seton 1085.

A judgment creditor who has issued execution may sue to redeem: (Seton, 1052, 1085.)

Sequestrators may redeem: (*Id.*)

(i) *Trustees.*

The trustees of persons entitled beneficially under a settlement of a lease are not necessary parties, when the settlor, after assignment to the trustees, has renewed in his own name: (Fisher, 890.)

Where persons entitled under a will to a charge sue to redeem, the trustees of the will are necessary parties: (Fisher, 895.)

Bare trustees of the equity of redemption sufficiently represent the trust estate without the presence of the persons beneficially interested: (*Mills v. Jennings*, L. Rep. 13 Ch. Div. 639; 42 L. T. Rep. N. S. 169; 23 W. R. 549.)

The court will not permit the representatives of a deceased trustee of a mortgagor, or even the surviving trustee (when the original number has been much reduced), to redeem without the presence of some of the *cestuis que trustent*; but the mortgagee is safe without the *cestuis que trustent*: (Fisher, 912, citing *Stansfield v. Hobson*, 15 Beav. 189.)

As to trustees for creditors, see Fisher, 913-4.

3. MORTGAGEES AND THOSE CLAIMING UNDER THEM.

(a) *Mortgagees.*

Where the mortgage has been assigned the mortgagee need not be made a party: (Dan. 227.)

But where the mortgagee has been in possession before assignment he may be made a party in respect of the overplus of rents and profits received by himself: (Dan. 227-8.)

Where there are several tenants in common or joint tenants of the mortgage money, all must be parties: (Fisher, 902.)

A second mortgagee suing to redeem a prior incumbrancer must make the prior incumbrancer a party: (Dan. 190.)

And also the mortgagor: (*Id.*; Fisher, 884.)

(b) *Assignees.*

Where a mortgage has been assigned, the assignee, and not the mortgagee, is the necessary party: (Dan. 227; Fisher, 901.)

But where a mortgagee who has a plain redeemable interest makes several conveyances upon trust in order to entangle the affair and render redemption difficult, the mortgagor need not trace all the parties interested, but he must bring the owner of the legal estate before the court: (Dan. 227.)

And where the mortgagee has been in possession, and an account of the overplus received by him is sought, he must be made a party as well as the assignee: (Fisher, 901.)

Where a legal interest passes by an assignment *pendente lite*, the assignee must be added as a party: (Fisher, 917.)

(c) *Cestuis que trustent.*

When the mortgage money is vested in trustees, they represent the *cestuis que trustent* sufficiently to protect the mortgagor, but some of the *cestuis que trustent* ought to be parties to secure the due application of the trust property: (Dan. 226; but see Fisher, 910-911.)

(d) *Devisees.*

The devisee of the legal estate must be made a party, though he is only

a trustee for the persons entitled to the mortgage money (Fisher, 904); and the heir is not a necessary party : (*Id.* 905.)

(e) *Executors and Administrators.*

When a redemption action is brought against the heir of a mortgagee, the personal representative must also be made a party as the person entitled to receive the money : (Dan. 246.)

In the case of a Welsh mortgage of long standing the court excuses the absence of the legal personal representatives : (Fisher, 906.)

The executor or administrator is the proper person to be sued in respect of securities on chattel interests, without the beneficiaries : (Fisher, 908.)

As to the power of executors and administrators of mortgages of freeholds and copyholds to reconvey, see 37 & 38 Vict. c. 78, s. 4.

(f) *Heir.*

If the legal estate descends to the mortgagee's heir, he must be made a party : (Fisher, 905.)

If the legal estate has been devised, the heir is not a necessary party : (*Id.*)

When the heir cannot be found, the Attorney-General must be made a party : (Fisher, 906.)

(g) *Tenant in Tail, &c.*

When a mortgagee in fee has made a conveyance in strict settlement, the first tenant in tail, and all those having intermediate estates, are necessary parties : (Dan. 227 ; Fisher, 904.)

(h) *Trustees.*

Trustees are generally necessary parties : (Fisher, 904, and see *sup.*(d).)

(i) *Wrongful Possessors.*

Persons with whom the mortgagee has dealt wrongfully for the produce of the mortgaged estate are proper parties to a redemption suit, as being in possession of the value of the converted part of the estate, though they no longer hold the property in specie : (Fisher, 905.)

III. INDORSEMENT OF WRIT.

In all cases of ordinary account . . . where the plaintiff, in the first instance, desires to have an account taken, the writ of summons shall be indorsed with a claim that such account be taken : (O. III., r. 8.)

The following form may be used :

The plaintiff's claim is to have an account taken of what, if anything, is due on a mortgage dated . . . and made between [*parties*], and to redeem the property comprised therein.

(Rules 1875, App. A., p. 2, s. 1.)

IV. ORDER FOR ACCOUNT WHEN CLAIMED.

[See ACCOUNT.]

V. PROCEEDINGS GENERALLY SUBSEQUENT TO WRIT.

The proceedings are conducted in the usual way down to the hearing : (Ayck. 267.)

VI. PLEADINGS.

The right to redeem must be clearly shown, and the mortgagor must offer to redeem : (Seton, 1048.)

VII. DISCOVERY.

The mortgagee is not generally bound to produce his deeds until he is redeemed : (Seton, 1058.)

A person claiming under the mortgagor, as a purchaser, devisee, or heir, is not entitled to production without paying off principal, interest, and costs : (*Chichester v. Donegal*, L. Rep. 5 Ch. Ap. 497 ; Seton, 1058.)

But if the defendant does not submit to be redeemed, or denies that he is a mortgagee, he cannot withhold production until payment : (Dan. 1693 ; Seton, 1058.)

Production of the mortgage deed itself will be ordered if the amount due is disputed, or when necessary to establish the right to redeem : (Seton, 1059 ; *Patch v. Ward*, L. Rep. 1 Eq. 436.)

VIII. JUDGMENT.

The ordinary form of judgment directs an account to be taken of principal, interest, and costs to be taxed, that upon payment of the amount certified within six calendar months from the date of the chief clerk's certificate, at the time and place thereby appointed, the defendant shall reconvey, and deliver up all deeds, &c., and that in default of payment the action shall stand dismissed with costs to be taxed. But that if it appears that there is nothing due, the defendant shall within twenty-one days from the certificate convey and pay to the plaintiff the amount, if any, certified : (Seton, 1040.)

An account is sometimes directed of the costs, charges, or expenses incurred : (*Id.*)

As to the right of an owner of a limited interest in the equity of redemption, who has redeemed, to a reconveyance, see *Pearce v. Morris*, L. Rep. 5 Ch. Ap. 227, and cases there cited.

As to "just allowances," see ACCOUNT ; Seton, 1079 *et seq.*

When a mortgagee in possession has in that character received rents and profits in excess of the interest due, the court may direct the account to be taken with annual rests, so that the surplus of profit from time to time received may be applied in reduction of principal : (Seton, 1078 ; Fisher, 957.)

In taking an account against a mortgagee in possession, the mortgagor is not entitled to claim the benefit of a proviso contained in the mortgage deed for reduction of interest on punctual payment : (*Union Bank of London v. Ingram*, W. N. 1880, p. 166 ; 70 L. T. 25.)

A commission paid by a mortgagee in possession to a receiver of rents may be allowed : (*Id.*)

IX. TAKING ACCOUNTS.

On the return of the summons to proceed on the judgment [see ACCOUNT] the mortgagee is directed to bring in evidence of the amounts due to him ; and if he has been in possession, and the judgment so directs, an account of rents, and for expenditure in repairs and lasting improvements : (Dan. 1138-9.)

The inquiries and accounts are prosecuted in chambers in the usual way : (See ACCOUNT, CHAMBERS.)

The mortgagee's costs of suit are usually directed to be included in the account, and are taxed by the taxing master ; and any other costs claimed by him may be sent by the chief clerk to be moderated by the taxing officer : (Dan. 1139.)

X. CHIEF CLERK'S CERTIFICATE.

The chief clerk makes his certificate of the amount due, and thereby appoints a time and place for payment of the amount due to the mortgagee : (Dan. 1139.)

XI. PAYMENT.

Payment is made at the time and place appointed, as in foreclosure actions: (see FORECLOSURE, XIV.)

The court will not enlarge the time for payment in redemption actions: (Ayck. 267; Dan. 861.)

If the money is not paid at time, a final order to dismiss the action is necessary: (Ayck. 267-8; see *post*, XII.)

XII. FINAL ORDER DISMISSING ACTION.

The application for a final order is by motion of course supported by an affidavit of the defendant as to attendance and nonpayment: (Dan. 859.)

The effect of final dismissal of a redemption action is equivalent to a final judgment for foreclosure: (*Id.*; Ayck. 268.)

A dismissal for want of prosecution had the same effect: (Dan. 859.)

XIII. SUCCESSIVE REDEMPTIONS.

If the judgment provides for successive redemptions, on the first redemption a summons to proceed further on the judgment is taken out and served, and an account is taken of what is due to the next person to be redeemed, a certificate made, and a time and place appointed for payment, and so on till all directions in the judgment are exhausted: (Dan. 1139.)

A period of three months each is given to the persons entitled to redeem after the first one, who gets six months: (Seton, 1085.)

XIV. COSTS.

The mortgagee is entitled to the costs of suit, and also to all costs properly incurred by him in reference to the mortgaged property for its protection or preservation, recovery of the mortgage money, or otherwise relating to questions between him and the mortgagor, and to add the amount to the sum due to him on his security for principal and interest: (Seton, 1060; O. L.V., cited COSTS, III.)

The costs of all persons claiming under the mortgagee, and made necessary parties by his act, fall upon the mortgagor: (Seton, 1065.)

The mortgagee's right to the costs of a redemption action can only be lost by positive misconduct, of a vexatious, oppressive, or fraudulent character, or by improper resistance to the mortgagor's redeeming: (Seton, 1060, where the cases are collected.)

REDUCTION OF CAPITAL.

[See COMPANIES, VIII.]

REFEREES.

I. POSITION OF REFEREES.

1. TO BE OFFICERS OF THE COURT.
2. SPECIAL REFEREES.
3. OFFICIAL REFEREES.

II. WHAT MATTERS MAY BE REFERRED.

1. FOR INQUIRY AND REPORT.
2. FOR TRIAL.

- III. ORDER OF REFERENCE.
- IV. DISTRIBUTION OF BUSINESS AMONG OFFICIAL REFEREES.
 - 1. GENERAL REFERENCE.
 - 2. PARTICULAR REFERENCE.
- V. HEARING AND TRIAL.
- VI. POWERS.
- VII. SUBMITTING QUESTION FOR COURT'S OPINION, OR STATING FACTS SPECIALLY.
- VIII. REPORT.
 - 1. ON REFERENCE FOR INQUIRY AND REPORT ONLY.
 - 2. ON REFERENCE FOR TRIAL.
 - 3. SUBMITTING QUESTION OR STATING FACTS SPECIALLY.
- IX. POWERS OF COURT AFTER REPORT OR FINDING.
- X. JUDGMENT ON REFERENCE.
- XI. FEES AND REMUNERATION.

I. POSITION OF REFEREES.

1. TO BE OFFICERS OF THE COURT.

In all cases of any reference to or trial by referees under this Act the referees shall be deemed to be officers of the court: (J. A. 1873, s. 58.)

2. SPECIAL REFEREES.

Special referees are appointed—

(a) By the court, in cases of reference for inquiry or report: (J. A. 1873, s. 56);

(b) By agreement between the parties, in cases of reference for trial: (J. A. 1873, s. 57.)

By consent ordinary accounts under a decree may be ordered to be taken before a special referee: (per Fry, J., *Fearnehouse v. Fernell*, 21 S. J. 609, who doubted whether it could be so ordered without consent.)

3. OFFICIAL REFEREES.

There shall be attached to the Supreme Court permanent officers to be called official referees, for the trial of such questions as shall under the provisions of this Act be directed to be tried by such referees: (J. A. 1873, s. 83.)

The present official referees are Mr. James Anderson, Q.C., Mr. G. M. Dowdeswell, Q.C., Mr. C. M. Roupell, Mr. H. W. Verey.

II. WHAT MATTERS MAY BE REFERRED.

1. FOR INQUIRY AND REPORT.

Subject to any rules of court and to such right as may now exist to have particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice or before the Court of Appeal, may be referred by the court or by any divisional court or judge before whom such cause or matter may be pending, for inquiry and report to any official or special referee: (J. A. 1873, s. 56.)

Where a cause has been transferred from one judge of the Chancery Division to another, for the purpose only of trial or hearing, the latter may direct that further proceedings, before or after the hearing or trial, shall be taken and prosecuted before any official or special referee: (O. L.I., r. 1a, June, 1877.)

A question in a cause only can be referred; the whole action cannot be referred to an official or special referee as such, even by consent: (*Long-*

man v. East, Pontifex v. Severn, Mellin v. Monico, L. Rep. 3 C. P. Div. 142; 38 L. T. Rep. N. S. 826; 26 W. R. 183.)

2. FOR TRIAL.

In any cause or matter (other than a criminal proceeding by the Crown) before the said High Court in which all parties interested who are under no disability consent thereto and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the court or a judge, conveniently be made before a jury, or conducted by the court through its ordinary officers, the court or a judge may at any time, on such terms as may be thought proper, order any question or issue of fact or any question of account arising therein to be tried either before an official referee . . . or before a special referee to be agreed on between the parties: (*J. A. 1873, s. 57.*)

As to reference by a judge of the Chancery Division, to whom an action has been transferred for hearing only, see O. LI., r. 1a, June, 1877, *sup.* 1.

A judge sitting at Nisi Prius has power to order a reference compulsorily under s. 57: (*Hoch v. Boor*, W. N. 1880, 93; 43 L. T. Rep. N. S. 425; 49 L. J. 665, Q. B.)

The whole action cannot be referred to a referee, as such, without consent (*Longman v. East, &c., sup.*); or even by consent where any question of law is involved (per Brett, L.J. in *Longman v. East, sup.*, and in *Ward v. Pilley*, L. Rep. 5 Q. B. Div. 427; 43 L. T. Rep. N. S. 301; 28 W. R. 937.)

But if the case is once brought within the 57th section, by reason of a prolonged examination of documents or accounts, or any scientific or local investigation not fit for an officer of the court or a jury, being required, the court has a discretion to order, not only the matter of account, but all the issues in the action, to be referred to an official referee: (*Ward v. Pilley, sup.*; *Goodwin v. Budden*, 42 L. T. Rep. N. S. 536; *Ward v. Hall*, W. N. 1880, p. 69.)

Questions of fraud seriously affecting a party's character and fortune will not, against his will, be ordered to be tried otherwise than in open court (*Leigh v. Brooks*, L. Rep. 5 Ch. Div. 592; 46 L. J. 344, Ch.); but, although there are charges of fraud, if the issues involve a prolonged examination of documents, they may be compulsorily referred: (*Hoch v. Boor*, W. N. 1880, p. 93; 43 L. T. Rep. N. S. 425.)

The expression "question of account" will receive a large construction: (*Re Leigh*, L. Rep. 3 Ch. Div. 292.)

Any question of account which may be referred compulsorily to a master under sect. 3 of the Common Law Procedure Act, 1854 [see ARBITRATION], may be referred compulsorily: (*Ward v. Pilley, sup.*)

A claim in an administration action against the estate for a large sum alleged to be owing for pictures and articles of *vertù*, comprised in an account of twenty-four items, has been referred to an official referee: (*Re Leigh, sup.*)

A question of damages, consisting of various items, in an action for injuries caused to a vessel by the defendant's negligence, should be referred to an official referee: (*Liverpool, &c. Company v. London Navigation Company*, W. N. 1875, p. 203.)

Reading a lot of letters is not a prolonged examination of documents: (*Green's Trustees v. Barrett*, W. N. 1875, p. 204.)

Where to an action for money had and received the defendant pleaded amongst other matters that "the plaintiff and defendant still are

partners or co-adventurers in holding certain horse races and race meetings, which said partnership still subsists, and the alleged causes of action arose out of such partnership and not otherwise," an order made by a judge at chambers referring all the issues in the action to an official referee was held right: (*Goodwin v. Budden*, 42 L. T. Rep. N. S. 536.)

Where the action was on a builder's bill containing many items, which required to be examined, all the issues in the action were compulsorily referred: (*Ward v. Pilley, sup.*)

Where there was a counter-claim involving evidence as to many purchases and sales of goods in business, the issues were compulsorily referred: (*Hoch v. Boor, sup.*)

Issues of fact in a patent case require "scientific investigation". (*Saxby v. Gloucester Waggon Company*, W. N. 1880, p. 28.)

III. ORDER OF REFERENCE.

In any case within the 57th section of the Act, if the plaintiff or defendant desires to have the action tried in any other mode than that specified in the notice of trial, he shall apply to the court or a judge for an order to that effect, within four days from the time of the service of the notice of trial, or within such extended time as a court or judge may allow: (O. XXXVI., r. 5.)

It is impossible to reconcile this rule with the decision in *Longman v. East*, that the whole action cannot be referred compulsorily to an official referee.

Per Brett, L.J., the rule does not apply to cases of references under s. 57, and the decision of Bacon, V.C. in *Lascelles v. Butt* (L. Rep. 2 Ch. Div. 588; 35 L. T. Rep. N. S. 122) is now obsolete, but the decision was affirmed in the Court of Appeal, which on the 11th May, 1876, intimated an opinion that an application made after four days after the trial was irregular: (see W. N. 1880, p. 166; 20 S. J. 541.)

A form of order of reference under sect. 56 is given in Sched. H. 31 to the Rules of April 1880.

A form of order of reference under s. 57 is given in Sched. H. 32 to the same rules.

The order of reference should state whether the reference is for inquiry and report or for trial, and in the latter case it should state whether all the issues of fact are to be tried, or only certain issues, and, if only certain issues, the order should state by some sufficient description the issues of fact to be tried: (note to *Longman v. East, &c.*, L. Rep. 3 C. P. Div. 163.)

Where the parties had agreed that certain questions should be referred to a referee, but desired that further consideration should be reserved that the question of costs might come before the judge, Fry, J. ordered that the agreed issues should be referred, and that the trial of the action should stand over until the report should be made, with liberty to apply: (*Re Brook*, W. N. 1880, p. 187.)

The discretion of the court or judge ordering or refusing a reference will not generally be interfered with on appeal: (*Lascelles v. Butt*, W. N. 1876, p. 166; *Saxby v. Gloucester Waggon Company, sup.*; *Hoch v. Boor, sup.*; *Ward v. Pilley, sup.*)

From an order of a judge sitting in the Chancery Division or sitting at Nisi Prius, an appeal lies to the Court of Appeal: (*Hoch v. Boor, sup.*)

IV. DISTRIBUTION OF BUSINESS AMONG OFFICIAL REFEREES.

1. GENERAL REFERENCE.

The business to be referred to the official referees appointed under the

Supreme Court of Judicature Act, 1873, shall be distributed among such official referees in rotation by the clerks to the registrars of the Supreme Court, Chancery Division, in like manner in all respects as the business referred to conveyancing counsel appointed under the Act of the 15 & 16 Vict. c. 80, s. 41, is directed to be distributed by the 2nd of the Consolidated General Orders of the Court of Chancery : (O. XXXVI., r. 29a, June 1876.)

When an order shall have been made referring any business to the official referee in rotation, such order, or a duplicate of it, shall be produced to the registrar's clerk, whose duty it is to make such distribution as aforesaid; and such clerk shall (except in the case provided for by rule 29c of this order) indorse thereon a note specifying the name of the official referee in rotation to whom such business is to be referred; and the order so indorsed shall be a sufficient authority for the official referee to proceed with the business so referred : (O. XXXVI., r. 29b, June, 1876.)

The clerk making such distribution shall be responsible for the business being distributed according to regular and just rotation, and in such manner as to keep secret from all persons the rota or succession of [referees] to whom such business may be referred; and it shall be his duty to keep a record of such references, with proper indexes, and to enter therein all such references, with the dates when the same are made : (C. O. 2, r. 2.)

In case the [referee] shall from illness or from any other cause be unable or decline to accept any such reference the same shall be offered to the other [referees] successively, until some one of them shall accept the same : (C. O. 2, r. 4.)

2. PARTICULAR REFERENCE.

The preceding rules of this order are not to interfere with the power of the court, or of the judge at chambers, to direct or transfer a reference to any one in particular of the said official referees, where it appears to the court or the judge to be expedient; but every such reference or transfer shall be recorded in the manner mentioned in rule 2 of the 2nd of the said Consolidated General Orders, and a note to that effect be indorsed on the order of reference or transfer; and in case any such reference or transfer shall have been or shall be made to any one in particular of the said referees, then the clerk in making the distribution of the business according to such rotation as aforesaid shall have regard to any such reference or transfer : (O. XXXVI., r. 29c, June, 1876.)

V. HEARING AND TRIAL.

[Questions in] actions shall be tried and heard either . . . before an official or special referee, with or without assessors : (O. XXXVI., r. 2; *Longman v. East, &c., sup.*)

As to the notice specifying the mode of trial, see TRIAL.

All . . . trials [of matters referred for trial under sect. 57 (see *sup.* II., 2)] shall be conducted in such manner as may be prescribed by rules of court, and subject thereto in such manner as the court or judge ordering the same shall direct : (J. A. 1873, s. 57.)

Such official referees shall perform the duties entrusted to them in such places, whether in London or in the country, as may from time to time be directed or authorised by any order of the . . . High Court, or of the Court of Appeal : (J. A. 1873, s. 83.)

Where the sittings under a reference are to be held elsewhere than in London, a convenient place in which the sittings may be held shall be provided to the satisfaction of the official referee, by and at the expense of the party proceeding with the reference : (O., 24th April, 1877; W. N. 1877, p. 228.)

Any such special referee so agreed on shall . . . proceed in the same manner as an official referee: (J. A. 1873, s. 57.)

Subject to any order to be made by the court or judge ordering the same, evidence shall be taken at any trial before a referee, and the attendance of witnesses may be enforced by subpoena, and every such trial shall be conducted in the same manner, as nearly as circumstances will admit, as trials before a judge of the High Court, but not so as to make the tribunal of the referee a public court of justice: (O. XXXVI., r. 31.)

Where any cause or matter, or any question in any cause or matter, is referred to a referee, he may, subject to the order of the court or a judge, hold the trial at or adjourn it to any place which he may deem most convenient, and have any inspection or view, either by himself or with his assessors (if any), which he may deem expedient for the better disposal of the controversy before him. He shall, unless otherwise directed by the court or a judge, proceed with the trial *de die in diem*, in a similar manner as in actions tried by a jury: (O. XXXVI., r. 30.)

Where an order of reference is made directing it to be subject to the Common Law Procedure Acts and the Judicature Acts, the award will not be set aside because the reference did not proceed *de die in diem*: (*Robinson v. Robinson*, W. N. 1876, p. 154; 34 L. T. Rep. N. S. 337; 24 W. R. 675.)

The official referees shall sit at least from 10 a.m. to 4 p.m. on every day during the Michaelmas, Hilary, Easter, and Trinity Sittings of the High Court of Justice, except on Saturdays, during such sittings, when they shall sit at least from 10 a.m. to 2 p.m.; but nothing in this rule shall prevent their sitting on any other days: (O. LXI., r. 8, Feb. 1876, there called r. 10.)

VI. POWERS.

In all cases of any reference to or trial by referees under this Act the referees shall be deemed to be officers of the court, and shall have such authority for the purpose of such reference or trial as shall be prescribed by rules of court or (subject to such rules) by the court or judge ordering such reference or trial: (J. A. 73, s. 58.)

And any such special referee so agreed on shall have the same powers and duties and proceed in the same manner as an official referee: (J. A. 1873, s. 56.)

Subject to any such order as last aforesaid [by the court or judge ordering the reference] the referee shall have the same authority in the conduct of any reference or trial as a judge of the High Court when presiding at any trial before him: (O. XXXVI., r. 32.)

An application for production of documents should be made to the court or judge ordering the reference: (*Re Leigh*, L. Rep. 4 Ch. Div. 661.)

Nothing in these rules contained shall authorise any referee to commit any person to prison or to enforce any order by attachment or otherwise: (O. XXXVI., r. 33.)

VII. SUBMITTING QUESTION FOR COURT'S OPINION, OR STATING FACTS SPECIALLY.

The referee may, before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the decision of the court, or state any facts specially, with power to the court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the court may direct: (O. XXXVI., r. 34, March, 1879, repealing O. XXXVI., r. 34.)

VIII. REPORT.

1. ON REFERENCE FOR INQUIRY AND REPORT ONLY.

Where any question is referred to a referee for report only, the referee must report to the court: (see J. A. 1873, s. 56; *Cruikshank v. Floating Swimming Baths Company*, L. Rep. 1 C. P. Div. 260.)

The report must state the facts on which it is based, and the principle on which damages have been assessed: (*Mayor of Birmingham v. Allen*, W. N. 1877, p. 190.)

The evidence should not be stated: (*Longman v. East, &c.*, *sup.*)

The referee must by his report find the materials on which the court is to act: (per Bramwell, L.J., *Longman v. East, &c.*, *sup.*)

Subject to any rules of court [where any question is referred] for inquiry and report to any official or special referee . . . the report of any such referee may be adopted wholly or partially by the court, and may (if so adopted) be enforced as a judgment by the court: (J. A. 1873, s. 56.)

2. ON REFERENCE FOR TRIAL.

The report of any referee upon any question of fact on any such trial shall (unless set aside by the court) be equivalent to the verdict of a jury: (J. A. 1873, sect. 58.)

3. SUBMITTING QUESTIONS OR STATING FACTS SPECIALLY.

The referee may . . . by his report under the reference made to him, submit any question arising therein for the decision of the court, or state any facts specially, with power to the court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the court may direct: (O. XXXVI., r. 34, March 1879, repealing O. XXXVI., r. 34.)

IX. POWERS OF COURT AFTER REPORT OR FINDING.

With respect to all such proceedings before referees and their reports, the court or such judge as aforesaid shall have, in addition to any other powers, the same or the like powers as are given to any court whose jurisdiction is hereby transferred to the said High Court with respect to references to arbitration and proceedings before arbitrators and their awards respectively, by the Common Law Procedure Act 1854: (J. A. 1873, s. 59; and see ARBITRATION.)

The court shall have power to require any explanation or reasons from the referee, and to remit the cause or matter, or any part thereof, for re-trial or further consideration to the same or any other referee; or the court may decide the question referred to any referee on the evidence taken before him, either with or without additional evidence as the court may direct: (O. XXXVI., r. 34, March 1879, repealing O. XXXVI., r. 34.)

Explanations or reasons required from a referee are not given on oath: (*Broder v. Saillard*, L. Rep. 2 Ch. Div. 692.)

As to when a report will be remitted, see *Mayor of Birmingham v. Allen*, *sup.*)

Where an official referee has made his report, any application under r. 34 must be made within the time limited for moving against the verdict of a jury: (*Sullivan v. Rivington*, 28 W. R. 372.)

The party affected by the report may move to set it aside on the grounds of rejection of evidence, or on such other grounds as a new trial is ordered: (*Wood v. Barnicot*, W. N. 1878, 25, 36; *Longman v. East, &c. sup.*; see NEW TRIAL.)

The party moving must be prepared with some affidavit or other

evidence of what took place before the referee: (*Stubbs v. Boyle*, L. Rep. 2 Q. B. Div. 124.)

The motion must be on notice: (*Graves v. Taylor*, 27 W. Rep. 412.)

X. JUDGMENT ON REFERENCE.

It has been held that a referee has no power to order judgment to be entered in any case: (*Longman v. East*, L. Rep. 3 C. P. Div. 142; 38 L. T. Rep. N. S. 11; see O. XL., r. 5.)

Where the referee has made a report on a reference for inquiry and report only, the proper course seems to be to take out a summons, or move that the report may be adopted: (*Wood v. Barnicot*, W. N. 1878, pp. 25, 36; *Munro v. Rendall*, *inf.*)

Where the referee has reported on a matter referred for trial, the proper course is to move for judgment, on the result of the trial before the referee, the motion being set down: (*Munro v. Rendall*, W. N. 1878, p. 41.)

XI. FEES AND REMUNERATION.

All proper and reasonable travelling expenses incurred by [official referees] in the discharge of their duties shall be paid by the Treasury out of moneys to be provided by Parliament: (J. A. 1873, s. 83.)

The fee to be taken by an official referee attached to the Supreme Court, in respect of all matters, questions, or issues referred to him by any order, shall be the sum of 5*l.* for the entire reference, irrespective of the time occupied, which sum shall be paid before the reference is proceeded with: (O. 24th April 1877, rescinding O. 1st Feb. 1876.)

Every such fee shall be collected by means of a stamp or stamps to be affixed to the appointment paper or summons issued by the official referee for appointing the time and place for proceeding with the reference: (*Id.*)

Where the sittings under a reference are to be held elsewhere than in London, a convenient place in which the sittings may be held shall be provided to the satisfaction of the official referee, by and at the expense of the party proceeding with the reference; and there shall be paid, in addition to the above fee of 5*l.*, 1*l.* 1*s.* 6*d.* for every night the official referee, and 15*s.* for every night the official referee's clerk, is absent from London on the business of the reference, together with the reasonable expenses of their travelling from London and back: (*Id.*)

A deposit on account of expenses may be required before proceeding with the reference, or at any time during the course thereof; and a memorandum of the amount deposited shall be delivered to the party making the deposit: (*Id.*)

The fees and expenses and deposit (if any) hereby authorised in respect of any reference shall be paid in the first instance by the party proceeding with the reference.

The official referees shall conform to all regulations that may be made from time to time by the Treasury for the accounting for all moneys received by them: (O. 24th April 1877, rescinding O. of 1st Feb. 1876.)

The remuneration (if any) to be paid to special referees or assessors shall be determined by the court: (J. A. 1873, sect. 56.)

In the case of a special referee, Hall, V.C. fixed the remuneration at 5*l.* 5*s.* a sitting: (*Wallis v. Lichfield*, W. N. 1876, p. 30.)

REGISTRIES.

[See DISTRICT REGISTRIES.]

REHEARING.

I. HIGH COURT.

The jurisdiction to rehear, formerly possessed by equity judges, is not possessed by judges of the High Court, at any rate where an order has been drawn up: (*Re St. Nazaire Land Company Limited*, L. Rep. 12 Ch. Div. 88; 41 L. T. Rep. N. S. 110; 27 W. R. 854.)

But the court has a sort of general control over orders made on interlocutory applications: (*Mullins v. Howell*, L. Rep. 11 Ch. Div. 763; 48 L. J. 679, Ch.)

[See also JUDGMENT, XVII.]

II. COURT OF APPEAL.

The Court of Appeal has no jurisdiction to rehear an appeal, even *pro forma*: (*Flower v. Lloyd*, L. Rep. 6 Ch. Div. 297; 37 L. T. Rep. N. S. 419; 46 L. J. 838, Ch.; 25 W. R. 793; *Ex parte Banco de Portugal*, L. Rep. 14 Ch. Div. 1; 42 L. T. Rep. N. S. 210.)

III. HOUSE OF LORDS.

The House of Lords has jurisdiction to rehear an appeal: (*De la Warre v. Sackville*, W. N. 1877, p. 217.)

REMOVAL OF ACTION.

[See CERTIORARI; TRANSFER.]

RENEWAL OF LEASE.

When any person who might, if within the jurisdiction, be compelled to renew any lease, is out of the jurisdiction, the court may, on the petition of any person entitled to such renewal, whether under disability or not, direct such person as the court shall appoint to surrender the subsisting lease and execute a new one: (see 11 Geo. 4 & 1 Will. 4, c. 65, ss. 18, 20; see also INFANTS, VI.; MARRIED WOMEN, IV.)

REPLY.

[See PLEADING, X.—XII.]

RESTRAINING ORDER.

- I. IN ACTION.
- II. ON MOTION OR PETITION.
 1. APPLICATION.
 2. EVIDENCE.
 3. ORDER.
 - (a) *Requisites.*
 - (b) *Service.*
 - (c) *Effect.*
 4. COMMENCING ACTION.
 5. DISCHARGING OR VARYING ORDER.

I. IN ACTION.

The court may order the Bank of England to suffer the transfer of stock or pay dividends, and to grant an injunction restraining such transfer or payment, although the governor and company are not parties to the suit: (39 & 40 Geo. 3, c. 36.)

The injunction could only be granted after a suit was commenced, and then only on notice to the defendant: (Ayck. 296; see also Dan. 134, 1065, 1537.)

II. ON MOTION OR PETITION.

2. APPLICATION.

It shall be lawful for the . . . court . . . upon the application of any party interested, by motion or petition, in a summary way, without [action], to restrain the governor and company of the Bank of England, or any other public company, whether incorporated or not, from permitting the transfer of any stock in the public funds, or any stock or shares in any public company, which may be standing in the name or names of any person or persons, or body politic or corporate, in the books of the governor and company of the Bank of England, or in the books of any such public company, or from paying any dividend or dividends due or to become due thereon: (5 Vict. c. 5, s. 4.)

The application is *ex parte*: (Dan. 1538.)

The petition should be intituled in the matter of the person on whose behalf it is presented, and also of the Act: (Ayck. 297.)

It must state the circumstances on which the petitioner relies: (*Id.*; see also *Re Locke*, 18 W. R. 275; W. N. 1877, p. 38.)

2. EVIDENCE.

The affidavit must show special grounds for the intervention of the court: (Ayck. 297.)

The amount of stock, or the particular shares sought to be affected, and the name of the person in whose name it stands, should also be shown: (Dan. 1539.)

3. ORDER.

(a) *Requisites.*

Every order of the . . . court upon such motion or petition as aforesaid, shall specify the amount of the stock or the particular shares to be affected thereby, and the name or names of the person or persons, body politic or corporate, in which the same shall be standing: (5 Vict. c. 5, s. 4.)

(b) *Service.*

The order must be served on the Chief Accountant at the Bank of

England, or, in case of any other company, on the secretary or other public officer by delivering a copy and showing the original: (Dan. 1539.)

(c) *Effect.*

The order is only intended for interim purposes: (Ayck. 297.)

But it continues in force until discharged, even though an action be commenced for the same purpose: (*Id.*; Dan. 1539.)

4. COMMENCING ACTION.

The party obtaining the order should proceed to issue a writ to sustain it within a reasonable time: (Ayck. 297; Dan. 1539.)

5. DISCHARGING OR VARYING ORDER.

The court shall have full power, upon the application of any party interested, to discharge or vary such order, and to award such costs, upon such application, as to the said court shall seem fit: (5 Vict. c. 5, s. 4.)

The application is by motion, on notice to the party who obtained the order, and supported by affidavit: (Dan. 1539.)

REVIEWING TAXATION.

[See APPEAL, IV.]

SALE.

[See PROPERTY, VII., VIII.]

SAMPLES.

[See DISCOVERY, VI.]

SCANDAL.

[See CHAMBERS, XX.; DISCOVERY, II. 1; EVIDENCE, III. 10
PLEADING.]

SEARCH.

The following is the form of *præcipe* :

SEARCH.

In the High Court of Justice.

Division.

18

No. .

v.

Search for

Dated the

day of

18 .

(Signed)

(Address)

Agent for

Solicitor for

(Sched. E. 32 to Rules of April, 1880.)

[See also JUDGMENT; CENTRAL OFFICE; APPEARANCE.]

SEQUESTRATION.

[See EXECUTION.]

SETTLED ESTATES.

- I. INTERPRETATION.
- II. TO WHAT PROCEEDINGS ACT APPLIES.
- III. WHERE GENERAL PRACTICE APPLIES.
- IV. ORDERS OF COURT AND FORMS.
- V. WHERE EXERCISE OF POWERS FORBIDDEN.
 1. PREVIOUS APPLICATION TO PARLIAMENT.
 2. CONTRARY DECLARATION IN SETTLEMENT.
 3. IN EXTENSION OF SETTLOR'S ESTATE.
- VI. EXERCISING POWERS REPEATEDLY.
- VII. EXERCISE NOTWITHSTANDING EXPRESS POWERS.
- VIII. PRELIMINARY CONTRACTS FOR LEASES.
- IX. LICENCES TO LEASE COPYHOLDS.
- X. LEASES.
 1. SAVING OF POWERS UNDER OTHER ACTS.
 2. PARTICULAR LEASES OR POWER OF LEASING AUTHORISED.
 3. WHOLE OR PART OF PROPERTY LEASED.
 4. SURRENDERED LEASEHOLDS.
 5. CONDITIONS ON AUTHORIZING LEASES.
 - (a) Interest of all Parties regarded.
 - (b) Lease to take effect in Possession.
 - (c) Term.
 - (d) Rent.
 - (e) Protection of Trees.
 - (f) Deed executed.
 - (g) Counterpart executed.
 - (h) Condition for re-entry.
 - (i) Other Stipulations.
 6. HOW LEASE TAKES EFFECT.
 7. GENERAL POWER OF LEASING.

XI. SALES.

1. GENERAL POWER TO AUTHORISE.
2. SURFACE RESERVING MINERALS OR RIGHTS.
3. MINERALS WITHOUT SURFACE.
4. CONSIDERATION BY RENT.
5. DEED EXECUTED.
6. PURCHASE MONEY [see *post*, XVIII.]

XII. SANCTIONING PROCEEDINGS.

XIII. SANCTIONING IMPROVEMENTS.

XIV. PROCEDURE TO OBTAIN COURT'S SANCTION.

1. APPLICANTS.

- (a) *No Obligation to apply.*
- (b) *Interest necessary in Applicant.*
- (c) *Infants.*
 - (1) Represented by Guardians.
 - (2) Next Friends.
 - (3) Tenants in Tail.
- (d) *Lunatics (so found).*
 - (1) Represented by Committees.
 - (2) Tenants in Tail.
- (e) *Lunatics (not so found).*
- (f) *Married Women.*
- (g) *Bankrupts, &c.*

2. PETITION.

- (a) *Assigned to Chancery Division.*
- (b) *Title.*
- (c) *Petitioner's Description.*
- (d) *Description of Property.*

3. APPOINTING DAY FOR HEARING.

4. APPOINTING INFANT'S GUARDIAN.

5. DIRECTION TO GUARDIAN OF INFANT TENANT IN TAIL.

6. DIRECTION TO COMMITTEE OF LUNATIC TENANT IN TAIL.

7. EXAMINATION OF MARRIED WOMAN.

- (a) *When it takes place.*
- (b) *In what Cases necessary.*
- (c) *Before whom taken.*
 - (1) Within Jurisdiction.
 - (2) Out of Jurisdiction.
- (d) *Form of Examination, Certificate, and Affidavit of Verification.*
- (e) *Dispensing with.*

8. NOTICE OF APPLICATION.

9. CONSENTS.

- (a) *No Obligation to Consent.*
- (b) *Where Consents necessary.*
- (c) *How Consents given.*
 - (1) Infants [see *sup.*, 1 (c)].
 - (2) Lunatics (so found) [see *sup.*, 1 (d)].
 - (3) Married Women [see *sup.*, 1 (f)].
 - (4) Bankrupts, &c. [see *sup.*, 1 (g)].
- (d) *Dispensing with Consents.*
- (e) *Saving Rights of Non-Consenting Parties.*

10. NOTICE TO NOTIFY ASSENT, &c.

- (a) *To whom given generally and Form.*
- (b) *Infants* [see *sup.*, 1 (c)].
- (c) *Lunatics (so found)* [see *sup.*, 1 (d)].
- (d) *Lunatics (not so found)* [see *post*, (g)].
- (e) *Bankrupts, &c.* [see *sup.*, 1 (g)].
- (f) *Persons out of Jurisdiction* [see *post*, (g)].

(g) *Where Special Direction necessary.*(h) *Dispensing with.*

11. INSPECTION AND COPY OF PETITION.

12. NOTIFICATION OF ASSENT, &C.

(a) *What given.*(b) *By Infants* [see *sup.* 1 (c) ; 5].(c) *By Lunatics (so found)* [see *sup.*, 1 (d) ; 6].(d) *By Bankrupts, &c.* [see *sup.*, 1 (g)].(e) *Consequence of not giving.*

13. POSTPONING HEARING.

14. EVIDENCE.

(a) *As to Grounds for Application.*(b) *As to no previous Application to Parliament.*(c) *Of Notice to Trustees.*(d) *With regard to Leases.*

15. ORDERING NOTICE BY ADVERTISEMENT, &C.

XV. LEAVE TO OPPOSE PETITION.

XVI. ORDER.

1. *HOW ENTITLED* [see *sup.*, XIV., 2 (b)].2. *TO STATE NAMES OF PETITIONERS, &C.*3. *AS TO STIPULATIONS IN LEASES AND POWERS OF LEASING.*4. *DIRECTION AS TO EXECUTION OF DEED.*5. *CHARGING AND RAISING COSTS, &C.*6. *RECORDING EXERCISE OF POWERS.*

XVII. HOW SALE CONDUCTED.

XVIII. PURCHASE MONEY.

1. *TO WHOM PAID.*2. *INTERIM INVESTMENT.*3. *INCOME OF INVESTMENTS.*4. *BY WHOM MONEY APPLIED.*5. *HOW MONEY APPLIED.*6. *PAID IN RESPECT OF LIMITED INTERESTS.*

XIX. TIME.

XX. COSTS.

XXI. FEES.

XXII. VALIDITY OF LEASE, &c.

XXIII. AMENDING ORDERS AS TO POWERS OF LEASING [see *sup.*, X., 7].

I. INTERPRETATION OF TERMS.

The word "settlement," as used in [the Act, and the rules thereunder], shall signify any Act of Parliament, deed, agreement, copy of court roll, will, or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure or any estates or interests in any such hereditaments stand limited to or in trust for any persons, by way of succession, including any such instruments affecting the estates of any one or more of such persons exclusively: (S. E. A. 1877, s. 2; O. 1.)

An interest which may arise by way of accruer is a limitation by way of succession: (*Re Goodwin*, 3 Giff. 620.)

In the following instances the limitations have been held to constitute a settlement:

Devise of realty upon trust to sell at the trustees' discretion, invest the proceeds, and pay the income to the widow for life, and afterwards to hold the fund and income in trust for the children (*Re Laing's Trusts*, L. Rep. 1 Eq. 416; 14 L. T. Rep. N. S. 57);

Devise of realty and personalty upon trust to sell, and out of the proceeds pay debts and invest the surplus, and out of the income of the property or investments pay an annuity to the widow, and subject thereto to stand possessed of the property for four children in equal shares, to vest on their respectively being of age or married with consent, and, in case of any child's death before such event, his share to be held in trust for the others, and in case they should also die, upon trust for the widow absolutely. After the widow's death these limitations were held to constitute a settlement (*Collett v. Collett*, L. Rep. 2 Eq. 203);

Conveyance of land in fee upon trust during the joint lives of husband and wife for her separate use without power to anticipate, and after her death, if she died in her husband's lifetime, for such persons as she should appoint by will, and in default for the person or persons whom she should leave her heir or co-heirs, and their assigns; but if she survived her husband for such persons as she should appoint, and, in default, upon the trusts declared if she died without appointing in her husband's lifetime (*Beioley v. Carter*, L. Rep. 6 Ch. App. 230; 20 L. T. Rep. N. S. 381);

Conveyance in trust for a married woman's separate use for life without power to anticipate, and after her death in trust for sale (*Re Morgan*, L. Rep. 9 Eq. 587);

Devise upon trust to permit widow to occupy during widowhood, and afterwards to sell (*Carlyon v. Truscott*, L. Rep. 20 Eq. 348);

Devise of real estate, upon trust for A. if she attained twenty-one or married previously, with a gift over upon trust in direct settlement if A. should not live to attain a vested interest: (*Re Horn*, 29 L. T. Rep. N. S. 830).

The limitation of lands in fee upon trust for such children as should attain twenty-one, and if but one such the whole to him, with a gift over, was held not to be by way of succession: (*Re Burdin*, 2 L. T. Rep. N. S. 70; 5 Jur. N. S. 1378.)

The term "settled estates," as used in [the Act and rules], shall signify all hereditaments of any tenure and all estates or interests in any such hereditaments which are the subject of a settlement; and for the purposes of this Act a tenant in tail after possibility of issue extinct shall be deemed to be a tenant for life: (S. E. A. 1877, s. 2; O. 1.)

All estates or interests in remainder or reversion not disposed of by the settlement and reverting to a settlor or descending to the heir of a testator, shall be deemed to be estates coming to such settlor or heir under or by virtue of the settlement: (s. 2.)

In determining what are settled estates within the meaning of [the] Act, the court shall be governed by the state of facts, and by the trusts or limitations of the settlement at the time of the said settlement taking effect: (*Id.*)

When an estate was devised in fee upon trust to let and manage during the widow's life and the children's minority, and to pay a moiety of the net rents to the widow for life, and subject thereto for the children in fee, it was held that the entirety of the estate was a settled estate: (*Re Shephard*, L. Rep. 8 Eq. 571; 21 L. T. Rep. N. S. 525.)

The court ordered a sale of an estate as settled, where parties entitled absolutely to some shares therein joined as petitioners: (*Re Goodwin*, 3 Giff. 620.)

The expression "the court" [in the Act and rules] shall . . . mean the High Court of Justice: (s. 3; O. 1.)

In the orders "the Act" shall mean the Settled Estates Act, 1877;

"The petition" shall mean a petition under the Act; and

"The judge" shall mean the judge of the court with whose name the petition shall be marked, or to whom the petition shall be transferred: (O. 1.)

II. TO WHAT PROCEEDINGS ACT APPLIES.

[The] Act shall, except as hereinafter provided, apply to all matters existing at the time of the passing of [the] Act, whether proceedings are actually pending or not, and any proceedings in any such matter may be continued or taken under [the] Act as if the matter originated under [the] Act, or may be continued or taken under the Acts hereby repealed, or partly under [the] Act and partly under the said repealed Acts as occasion may require: (s. 57.)

III. WHERE GENERAL PRACTICE APPLIES.

In all cases not provided for by the Act, or [the] orders, the existing forms and mode of procedure and general practice of the court on similar proceedings shall apply to proceedings under the Act: (O. 28.)

IV. ORDERS OF COURT AND FORMS.

The judge in person sitting in court or in chambers in the case of any petition may by special order dispense with all or any of the preceding orders so far as they are applicable to such petition in any case in which he shall think fit, and upon such terms and conditions (if any) as he may deem proper: (O. 32.)

[The] orders may be cited as "The Settled Estates Act Orders, 1878:" (O. 34.)

The forms set forth in the appendix [to the orders] shall be adhered to, subject only to such variations as may be necessary to meet the circumstances of the case or direction of the court: (O. 27.)

V. WHERE EXERCISE OF POWERS FORBIDDEN.

1. PREVIOUS APPLICATION TO PARLIAMENT.

The court shall not be at liberty to grant any application under this Act in any case where the applicant, or any party entitled, has previously applied to either house of Parliament for a private Act to effect the same, or a similar object, and such application has been rejected on its merits, or reported against by the judges to whom the bill may have been referred: (s. 32.)

It will be presumed, unless the contrary is proved, that the rejection by Parliament was on the merits: (*Re Wilson*, 1 L. T. Rep. N. S. 25.)

2. CONTRARY DECLARATION IN SETTLEMENT.

No such powers shall be exercised, if an express declaration that they shall not be exercised is contained in the settlement: (s. 38.)

3. IN EXTENSION OF SETTLOR'S ESTATE.

Nothing in [the] Act shall be construed to empower the court to authorise any lease, sale, or other act beyond the extent to which, in the opinion of the court, the same might have been authorised in and by the settlement by the settlor or settlors: (S. E. A. 1877, s. 39.)

VI. EXERCISING POWERS REPEATEDLY.

The court shall be at liberty to exercise any of the powers conferred on it by [the] Act, whether the court shall have already exercised any of the powers conferred by [the] Act in respect of the same property or not: (s. 38.)

VII. EXERCISE, NOTWITHSTANDING EXPRESS POWERS.

The circumstance of the settlement containing powers to effect similar purposes shall not preclude the court from exercising any of the powers conferred by this Act, if it shall think that the powers contained in the settlement ought to be extended: (S. E. A. 1877, s. 38.)

The court may direct a sale, although a power of sale, which is sufficient without any extension, is contained in the settlement: (*Re Thompson*, Johns. 418.)

Lands settled in trust for a married woman for her life, without power to anticipate, and after her death in trust for sale, were ordered to be sold in her lifetime: (*Re Morgan*, L. Rep. 9 Eq. 587.)

Where a testator gave a tenant for life leasing powers, only exercisable with the consent of a person named, the court refused to dispense with the consent, though arbitrarily, but not maliciously, withheld: (*Re Hurle*, 2 H. & M. 196.)

VIII. PRELIMINARY CONTRACTS FOR LEASES.

The power to authorise leases conferred by [the] Act shall extend to authorise preliminary contracts to grant any such leases: and any of the terms of such contracts may be varied in the leases: (S. E. A. 1877, s. 8.)

The court will not sanction the granting of leases pursuant to contracts entered into by a testator in his lifetime, where such contracts are not within the express terms of the Act, but may give leave to the applicant to apply for a private Act of Parliament: (*Cust v. Middleton*, 3 L. T. Rep. N. S. 718: 3 D. F. & J. 33.)

IX. LICENCES TO LEASE COPYHOLDS.

All the powers to authorise and to grant leases contained in [the] Act shall be deemed to include respectively powers to authorise the lords of settled manors . . . to give licences to their copyhold or customary tenants to grant leases of land held by them of such manors, to the same extent, and for the same purposes, as leases may be authorised or granted of freehold hereditaments under [the] Act: (S. E. A. 1877, s. 9.)

Nothing in [the] Act shall authorise the granting of a lease of any copyhold or customary hereditaments not warranted by the custom of the manor without the consent of the lord, nor otherwise prejudice or affect the rights of any lord of a manor: (s. 56.)

X. LEASES.

1. SAVING OF POWERS UNDER OTHER ACTS.

Nothing in this Act shall interfere with the exercise of any powers to authorise or grant leases conferred by any Act of Parliament not expressly repealed by this Act: (s. 59.)

The Acts repealed are the Settled Estates Acts 1853-76.

2. PARTICULAR LEASES OR POWER OF LEASING AUTHORISED.

The power to authorise leases conferred by [the] Act may be exercised by the court, either by approving of particular leases or by ordering that powers of leasing, in conformity with the provisions of [the] Act, shall be vested in trustees: (S. E. A. 1877, s. 10.)

3. WHOLE OR PART OF PROPERTY LEASED.

The power to authorise leases conferred by [the] Act shall extend to authorise leases either of the whole or any parts of the settled estates, and may be exercised from time to time: (S. E. A. 1877, s. 6.)

4. SURRENDERED LEASEHOLDS.

Any leases, whether granted in pursuance of [the] Act or otherwise,

may be surrendered, either for the purpose of obtaining a renewal of the same or not; and the power to authorise leases conferred by this Act shall extend to authorise new leases of the whole or any part of the hereditaments comprised in any surrendered lease: (S. E. A. 1877, s. 7.)

5. CONDITIONS ON AUTHORISING LEASES.

(a) *Interests of all Parties Regarded.*

It shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in [the] Act contained, to authorise leases of any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste or not, provided the following conditions be observed: (s. 4.)

(b) *Lease to take Effect in Possession.*

Every such lease shall be made to take effect in possession at or within one year next after the making thereof: (s. 4.)

A lease takes effect in possession, although it is authorised upon the surrender of an existing lease, and an underlease, granted by the surrendering lessee, is unexpired: (*Re Ford*, L. Rep. 8 Eq. 309.)

(c) *Term.*

Every such lease . . . shall be for a term not exceeding:

For an agricultural or occupation lease, so far as relates to estates in England, twenty-one years;

For a mining lease [including, if thought necessary for effective working, the use of contiguous lands, *Re Reveley*, 8 L. T. Rep. N. S. 450] or a lease of water mills, way leaves, water leaves [either separately or for the purpose of other leases, *Re Wallace*, W. N. 1869, p. 66] or other rights or easements, forty years;

For a repairing lease, sixty years;

For a building lease, ninety-nine years: (s. 4.)

Any such lease (except an agricultural lease) may be for such term of years as the court shall direct, where the court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant such a lease for a longer term than for the term [above] specified in that behalf: (S. E. A. 1877, s. 4.)

Leases have been frequently authorised for the extended term, e.g., in Lancashire, for building, for 600 years (*Re Cross's Charity*, 27 Beav. 592); in Yorkshire, for building, for 999 years (*Re Carr*, 9 Jur. N. S. 1267).

Where it is the custom of the district to grant conveyances at fee farm rents, a sale of the whole estate is directed with the approbation of the judge at chambers, and proposals are then carried in with respect to each particular grant: (*Re Elliott*, W. N. 1879, p. 135.)

The court refused to allow a lease of a mansion-house where the settlement expressly directed that it should not be let: (*Re Duchess of Cleveland*, 22 W. R. 818.)

Nothing in [the] Act shall authorise any sale or lease beyond the term of twenty-one years of any settled estates in respect of which, under the Act of the thirty-fourth and thirty-fifth years of King Henry the Eighth, chapter twenty, "to embar feigned recovery of lands wherein the King's Majesty is in reversion," or under any other Act of Parliament, the tenants in tail are restrained from barring or defeating their estates tail, or where the reversion is vested in the Crown: (s. 55.)

(d) *Rent.*

On every such lease shall be reserved the best rent or reservation in the

nature of rent, either uniform or not, that can be reasonably obtained, to be made payable half-yearly or oftener, without taking any fine or other benefit in the nature of a fine : (s. 4.)

The court must see that, on the whole, the best terms are made for the benefit of persons interested under the settlement, and may, in estimating the "best rent," take into consideration the value of a surrendered lease : (*Re Rawlins*, L. Rep. 1 Eq. 286 ; 13 L. T. Rep. N. S. 626.)

In the case of a mining lease, a repairing lease, or a building lease, a peppercorn rent, or any smaller rent than the rent to be ultimately made payable, may, if the court [directs], be made payable during all or any part of the first five years of the term of the lease : (s. 4.)

Where the lease is of any earth, coal, stone, or mineral, a certain portion of the whole rent or payment reserved shall be from time to time set aside and invested as hereinafter mentioned ; namely, when and so long as the person for the time being entitled to the receipt of such rent is a person who by reason of his estate, or by virtue of any declaration in the settlement, is entitled to work such earth, coal, stone, or mineral for his own benefit, one fourth part of such rent, and otherwise three fourth parts thereof ; and in every such lease sufficient provision shall be made to ensure such application of the aforesaid portion of the rent, by the appointment of trustees or otherwise, as the court shall deem expedient : (s. 4.)

(e) *Protection of Trees.*

No such lease shall authorise the felling of any trees, except so far as shall be necessary for the purpose of clearing the ground for any buildings, excavations, or other works authorised by the lease : (s. 4.)

(f) *Deed Executed.*

Every such lease shall be by deed : (s. 4.)

(g) *Counterpart Executed.*

The lessee shall execute a counterpart : (s. 4.)

The execution of any lease by the lessor or lessors shall be deemed sufficient evidence that a counterpart of such lease has been duly executed by the lessee as required by [the] Act : (s. 48.)

(h) *Condition for Re-entry.*

Every such lease shall contain a condition for re-entry on nonpayment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf : (s. 4.)

(i) *Other Stipulations.*

Subject and in addition to the conditions hereinbefore mentioned, every such lease shall contain such covenants, conditions, and stipulations as the court shall deem expedient with reference to the special circumstances of the demise : (s. 5 ; and see *post*, XVI., 3.)

6. HOW LEASE TAKES EFFECT.

The lease or contract executed by [the person or persons directed by the court to execute] shall take effect in all respects as if he or they was or were at the time of the execution thereof absolutely entitled to the whole estate or interest which is bound by the settlement, and had immediately afterwards settled the same according to the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the court shall direct : (s. 12.)

7. GENERAL POWER OF LEASING.

Where the court shall deem it expedient that any general powers of leasing any settled estates conformably to [the] Act should be vested in trustees, it may by order vest any such power accordingly, either in the existing trustees of the settlement or in any other persons ; and such

powers, when exercised by such trustees, shall take effect in all respects as if the power so vested in them had been originally contained in the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use, or otherwise, as the court shall direct; and in every such case the court, if it shall think fit, may impose any conditions as to consents or otherwise on the exercise of such power, and the court may also authorise the insertion of provisions for the appointment of new trustees from time to time for the purpose of exercising such powers of leasing as aforesaid: (S. E. A. 1877, s. 13.)

Where tenants for life in remainder would not consent, the court refused to authorise a general power of granting mining leases on the application of the tenant for life in possession: (*Re Hutchinson's Trusts*, 14 L. T. Rep. N. S. 129.)

Powers to grant mining, building, repairing, and other leases have been several times vested in trustees: (see *Re Greene*, 10 Jur. N. S. 1098; *Re Northey*, Brickd. 126-7; *Re Jones*, 5 Jur. N. S. 138.)

The court refused to allow two estates held by the same trustees as distinct trusts to be demised under one lease: (*Tolson v. Sheard*, L. Rep. 5 Ch. Div. 19; 37 L. T. Rep. N. S. 756.)

Where a general power had been vested in the first tenant for life, and after her death the next tenant for life applied that the power might be vested in one of the trustees, the court made the order without repeating the advertisement: (*Re Kentish Town Estate*, 1 J. & H. 230.)

In orders under [the] Act for vesting any powers of leasing in any trustees or other persons, no conditions shall be inserted requiring that the leases thereby authorised shall be submitted to or be settled by the court or a judge thereof, or be made conformable with a model lease deposited in the judge's chambers, save only in any case in which the parties applying for the order may desire to have any such condition inserted, or in which it shall appear to the court that there is some special reason rendering the insertion of such a condition necessary or expedient: (S. E. A. 1877, s. 14; and see *Re Dorning*, 14 W. R. 125; *Re Hoyle*, 10 L. T. Rep. N. S. 775.)

In all cases of orders, whether under [the] Act, or under the corresponding enactments of the Acts repealed (19 & 20 Vict. c. 120, s. 10), in which any such condition as last aforesaid shall have been inserted, it shall be lawful for any party interested to apply to the court to alter and amend such order by striking out such condition, and the court shall have full power to alter the same accordingly; and the order so altered shall have the same validity as if it had originally been made in its altered state, but nothing herein contained shall make it obligatory on the court to act under this provision in any case in which, from the evidence which was before it when the order sought to be altered was made, or from any other evidence, it shall appear to the court that there is any special reason why, in the case in question, such a condition is necessary or expedient: (s. 15.)

XI. SALES.

1. GENERAL POWER TO AUTHORISE.

It shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, from time to time to authorise a sale of the whole or any parts of any settled estates, or of any timber (not being ornamental timber) growing on any settled estates: (s. 16.)

A general power of sale to trustees will not generally be authorised (*Re*

Peacock, 15 L. T. Rep. N. S. 206); but the court has authorised such a power: (*Re Andrews*, 28 L. T. Rep. N. S. 877.)

An order for sale to a tenant for life will not be made without inquiry: (*Re Hilton*, 14 L. T. Rep. N. S. 129.)

Where part of the estate is not settled, the order must not provide for its sale: (*Re Thompson*, Johns. 418; *Grey v. Jenkins*, 26 Beav. 356.)

Where parties absolutely entitled to some shares joined as petitioners, the court made an order for sale: (*Re Goodwin*, 3 Giff. 620.)

The purchaser must enter into any covenants, and submit to any restrictions, which the court deems advisable.

The copyhold portion of a settled estate has been ordered to be enfranchised before sale, the whole estate being ordered to be sold as freehold, and the costs of enfranchisement directed to be paid out of the proceeds of sale: (*Re Adair*, L. Rep. 16 Eq. 124.)

2. SURFACE RESERVING MINERALS OR RIGHTS.

On any sale of land, any earth, coal, stone, or mineral may be excepted, and any rights or privileges may be reserved, and the purchaser may be required to enter into any covenants, or submit to any restrictions, which the court may deem advisable: (s. 19.)

3. MINERALS WITHOUT SURFACE.

A sale of minerals apart from the surface may be authorised: (*Re Law*, 7 Jur. N. S. 511; *Re Mallin*, 3 Gif. 126; *Re Milward*, L. Rep. 6 Eq. 248.)

In one case a provision was inserted limiting the time within which the mine was to be worked out: (*Re Mallin*, *sup.*)

In another case rights of using the surface were granted, and an average rent was reserved for occupied and damaged land: (*Re Milward*, *sup.*)

4. CONSIDERATION BY RENT.

When any land is sold for building purposes it shall be lawful for the court, if it shall see fit, to allow the whole or any part of the consideration to be a rent issuing out of such land, which may be secured and settled in such manner as the court shall approve: (s. 18.)

5. DEED EXECUTED.

On every sale or dedication to be effected as hereinbefore mentioned, the court may direct what person or persons shall execute the deed of conveyance; and the deed executed by such person or persons shall take effect as if the settlement had contained a power enabling such person or persons to effect such sale or dedication, and so as to operate (if necessary) by way of revocation and appointment of the use, or otherwise, as the court shall direct: (s. 22.)

The nominees of the court are alone capable of making a good conveyance so as to bind the legal estate, though not in them: (*Eyre v. Saunders*, 5 Jur. N. S. 703.)

In one case, the court held that it could not direct one of several persons holding the legal estate to execute for all: (*Re Holl*, W. N. 1868, p. 70.)

6. PURCHASE MONEY.

[See *post*, XVIII.]

XII. SANCTIONING PROCEEDINGS.

It shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties who are or may hereafter be entitled under the settlement, and subject to the provisions and restrictions in [the] Act contained, to sanction any action, defence,

petition to Parliament, parliamentary opposition, or other proceedings appearing to the court necessary for the protection of any settled estate, and to order that all or any part of the costs and expenses in relation thereto be raised and paid by means of a sale or mortgage of or charge upon all or any part of the settled estate, or be raised and paid out of the rents and profits of the settled estates, or out of any moneys or investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estate, or out of the income of such moneys or investments, or out of any accumulation of rents, profits, or income: (s. 17.)

XIII. SANCTIONING IMPROVEMENTS.

It shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, from time to time to direct that any part of any settled estates be laid out for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, either to be dedicated to the public or not: (s. 20.)

The court may direct that the parts so laid out shall remain vested in the trustees of the settlement, or be conveyed to or vested in any other trustees, upon such trusts for securing the continued appropriation thereof to the purposes aforesaid in all respects, and with such provisions for the appointment of new trustees when required, as by the court shall be deemed advisable: (s. 20.)

Where any part of any settled estates is directed to be laid out for such purposes as aforesaid, the court may direct that any such streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, including all necessary or proper fences, pavings, connections, and other works incidental thereto respectively, be made and executed: (s. 21.)

The court may direct that all or any part of the expenses in relation to such laying out and making and execution be raised and paid (a) by means of a sale or mortgage of or charge upon all or any part of the settled estates; (b) or be raised and paid out of the rents and profits of the settled estates or any part thereof; (c) or out of any moneys or investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estates; (d) or out of the income of such moneys or investments; (e) or out of any accumulations of rents, profits, or income: (s. 21.)

The court may also give such directions as it may deem advisable for any repair or maintenance of any such streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, or other works, out of any such rents, profits, income, or accumulations during such period or periods of time as to the court shall seem advisable: (s. 21.)

XIV. PROCEDURE TO OBTAIN COURT'S SANCTION.

1. APPLICANTS.

(a) *No Obligation to Apply.*

Nothing in [the] Act shall be construed to create any obligation on any person to make any application to the court, or to exercise any power: (S. E. A. 1877, s. 53.)

(b) *Interest Necessary in Applicant.*

Any person entitled to the possession or to the receipt of the rents and profits of any settled estates for a term of years determinable on his death,

or for an estate for life or any greater estate, and also any person entitled to the possession or to the receipt of the rents and profits of any settled estate, or the assignee of any person who, but for such assignment, would be entitled to such estate for a term of years determinable with any life, or for an estate for any life, or any greater estate, may apply to the court . . . to exercise the powers conferred by [the] Act: (s. 23.)

For the purposes of [the] Act, a tenant in tail, after possibility of issue extinct, shall be deemed a tenant for life: (s. 2.)

An order cannot be granted on the petition of any person not mentioned in the section: (*Taylor v. Taylor*, L. Rep. 1 Ch. Div. 426; 3 Ch. Div. 145.)

Where a testator devised his real estates to trustees for a term of 100 years on trust to accumulate the rents for twenty-one years or until the first tenant for life or in tail should attain twenty-five, and subject thereto in strict settlement, the accumulations to be invested in real estate, and the will contained a power for the tenant for life in possession, or for the trustees during the minority of any tenant in life or in tail, to grant building leases, and the trustees had purchased a building estate at a time when the first tenant for life had attained twenty-one, but not twenty-five, on petition presented by the trustees, the first tenant for life, the first tenant in tail in existence, who was an infant, and the owners of the prior life estates, who were also infants, for an order giving the trustees power to grant building leases until there should be a tenant for life in possession, Malins, V.C. held, that he had power to make the order: (*Re Harris*, 42 L. T. Rep. N. S. 583.)

Where the life estate is outstanding in trustees, they, as well as the tenant for life, must petition: (*Ex parte Puxley*, L. Rep. 2 Eq. 237.)

Where property was left to a widow for life and widowhood, she and the remaindermen were held to be the proper persons to petition: (*Williams v. Williams*, 9 W. R. 888.)

Where one of two persons is evidently indefeasibly entitled in fee simple an order may be made on the petition of both: (*Re Williams*, 20 W. R. 967.)

Where the settled estates are devised to trustees, upon trust to receive the rents and income, and, after defraying the ground rents and expenses of management, to pay the net rents and income to a person for life, such person is not a proper person to petition: (*Ex parte Taylor*, L. Rep. 20 Eq. 297.)

It is doubtful whether a tenant for life who is to receive the rents and profits through the hands of a trustee, simply, is a proper person to petition: (*Id.*; *Re Smith*, W. N. 1878, p. 196.)

For the purposes of [the] Act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and profits of estates, although his estate may be charged or incumbered either by himself or by the settlor, or otherwise howsoever, to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and profits as aforesaid, unless they shall concur therein: (S. E. A. 1877, s. 54.)

(c) *Infants.*

(1) Represented by Guardians.

All powers given by [the] Act, and all applications to the court under [the] Act, and consents to and notifications respecting such applications, may be executed, made, or given by, and all notices under [the] Act may be given to guardians on behalf of infants: (s. 49.)

The guardian must be one specially appointed under the Act.

A father, although natural guardian, and a testamentary guardian, are not within the Act: (*Re Caddick*, 7 W. R. 334; *Re James*, L. Rep. 5 Eq. 334.)

(2) Next Friends.

If an infant is a petitioner, the petition may be presented by the infant by his next friend: (O. 5.)

(3) Tenants in Tail.

In the cases of infant . . . tenants in tail no application to the court or consent to or notification respecting any application may be made or given by any guardian . . . without the special direction of the court: (s. 49.)

As to how the direction is obtained, see *post*, 5.

(d) Lunatics (*So Found*).

(1) Represented by Committees.

All applications to the court under [the] Act, and consents to, and notifications respecting such applications, may be . . . made, or given by, and all notices under [the] Act may be given to . . . committees on behalf of lunatics: (s. 49.)

Committees must get the report of the Master in Lunacy, approved by the jurisdiction in lunacy, before petitioning: (*Re Woodcock*, L. Rep. 3 Ch. App. 229; *Re Wade*, 1 H. & T. 202.)

(2) Tenants in Tail.

In the case of . . . lunatic tenants in tail no application to the court, or consent to, or notification respecting any application may be made or given by any . . . committee without the special direction of the court: (s. 49.)

As to how the direction is obtained, see *post*, 6.

(e) Lunatics (*Not so Found*).

The court cannot appoint a guardian for the purposes of the Act, of a person of unsound mind not so found: (*Re Clough*, L. Rep. 15 Eq. 284; 28 L. T. Rep. N. S. 261; but see *Re Venner*, L. Rep. 6 Eq. 249.)

(f) Married Women.

Subject to such examination as [mentioned *post*] married women may make or consent to any applications, whether they be of full age or infants: (S. E. A. 1877, s. 52.)

No clause or provision in any settlement restraining anticipation shall prevent the court from exercising, if it shall think fit, any of the powers given by [the] Act, and no such exercise shall occasion any forfeiture, anything in the settlement contained to the contrary notwithstanding: (s. 50.)

(g) Bankrupts, &c.

All applications to the court under [the] Act, and consents to and notifications respecting such applications, may be executed, made, or given by, and all notices under [the] Act may be given to . . . trustees or assignees of the property of bankrupts, debtors in liquidation, or insolvents: (s. 49.)

2. PETITION.

(a) *To be assigned to Chancery Division.*

[The application is] by petition, in a summary manner (s. 23), subject to the provisions of the Judicature Acts, . . . assigned to the Chancery Division of the High Court of Justice in like manner as if such causes and matters had arisen under an Act of Parliament by which, prior to the passing of the Judicature Acts, exclusive jurisdiction in respect to such

causes and matters had been given to the Court of Chancery, or to any judges or judge thereof respectively: (s. 3.)

A petition is necessary, although an action is pending: (*Harvey v. Clarke*, 25 Beav. 7.)

(b) *Title.*

Every such petition shall be marked with the words "In the High Court of Justice, Chancery Division," and with the title of the judge before whom it is intended to be heard (see form No. 1 in the Appendix) . . . : (O. 2.)

The following form is given in the Appendix :

In the High Court of Justice,
Chancery Division.

The Master of the Rolls
(or the Vice-Chancellor Malins
or other Vice-Chancellor).

In the Matter of Estates settled by A.B. (or A.B. and others) by
will dated (or deed dated) consisting of
certain lands (or messuages or tenements) in in the
parish of in the county of

And in the Matter of the Settled Estates Act 1877.

All petitions, notices, affidavits, and other proceedings under the Act shall be entitled "In the matter of the estates settled" [by the settlor or settlors, naming one of them and referring to the instrument by which the settlement shall have been created, and mentioning the parish or place and county in which the lands, messuages, or tenements proposed to be dealt with are situate] "and in the matter of the Settled Estates Act, 1877": (O. 2.)

(c) *Petitioner's Description.*

Every petition under the Act shall set forth the name, address, and description of the petitioner, and also a place within three miles from the site of Temple Bar, London, where he may be served with any order of the court or of the judge in chambers, or notice relating to the subject of such petition: (O. 31.)

As to substituting guardian's name for that of next friend, see *post*, 4.

(d) *Description of Property.*

Every petition shall, in the body thereof, or in a schedule thereto, or by a plan thereto annexed, contain a detailed description of the property proposed to be dealt with by such petition sufficient to identify the same: (O. 2.)

3. APPOINTING DAY FOR HEARING.

Upon the presentation of the petition, a day shall be appointed for hearing not less (unless the judge gives special leave) than eight clear days after such presentation, and in the computation of such eight clear days, Sundays and other days on which the offices are closed shall not be reckoned: (O. 2.)

4. APPOINTING INFANT'S GUARDIAN.

Where it is desired that any guardian of an infant shall make or consent to any application to the court under the Act, or make any notification respecting any application to the court, or that notice may be given to any such guardian on behalf of an infant, the court may appoint a guardian to such infant for the purposes of the Act, and an application for such appointment may, after the petition is presented, be made at chambers by the petitioner by summons: (O. 5.)

Forms of summons are given in Appendices 5 and 6 to the Orders.

Upon an application to appoint a guardian to an infant for any such purpose as aforesaid, the summons shall be served upon the parent, testamentary guardian, or guardian appointed by the Court of Chancery or the Chancery Division of the High Court of Justice, of the infant, if there be any such parent or guardian, unless the court or judge shall dispense therewith: (O. 8.)

Upon an application to appoint a guardian of an infant the following facts shall be proved:—

1. The age of the infant.
2. Whether he has any parent, testamentary guardian, or guardian appointed by the Court of Chancery or the Chancery Division of the High Court of Justice, and, if so, whether such parent or guardian has any interest in the application, and if he has, the nature of such interest, and whether or not adverse to the interest of the infant.
3. Where and under whose care the infant is residing, and at whose expense he is maintained.
4. In what way the proposed guardian is connected with the infant, and why proposed and how qualified to be appointed.
5. That the proposed guardian has no interest in the application, or if he has, the nature of his interest, and that it is not adverse to the interest of the infant.
6. The consent of the guardian to act: (O. 10.)

If the petition [is] presented by the infant by his next friend after the petition has been presented and answered, and a guardian appointed, the word "guardian" shall be substituted in the petition for the words "next friend," and the name of the guardian (if the next friend and guardian shall not be the same person) for the name of the next friend: (O. 5.)

5. DIRECTION TO GUARDIAN OF INFANT TENANT IN TAIL.

In the case of [an] infant tenant in tail by guardian applying or consenting to an application, or giving a notification respecting an application, an application may be made at chambers by the petitioner after the petition is presented that such guardian may be directed to so apply or consent, or give a notification, and such application may be combined with the application to appoint a guardian: (O. 6.)

In cases where the guardians of infant tenants in tail shall be served with notice of the application in pursuance of the 26th section of the Act, an application may be made at chambers by the petitioner before the expiration of the time specified in such notice that such guardians may notify that they either assent to or dissent from such application, or submit their rights and interests, so far as they may be affected by such application, to be dealt with by the court: (O. 7.)

Forms of summonses are given in appendices 5 and 6 to the Orders.

Upon any application that a guardian of [an] infant tenant in tail may be directed to make or consent to any application on behalf of such infant, or to notify that the infant assents to or dissents from such application, or submits his rights or interests, so far as they are affected by such application, to be dealt with by the court, the summons shall be served on the guardian appointed or proposed to be appointed of such infant, for such purpose: (O. 9.)

Upon an application that a guardian of an infant tenant in tail may be directed to make or consent to any application or to give any notification respecting any application, evidence is to be produced to satisfy the judge

that it is, and the guardian is to make an affidavit that he believes that it is, proper and consistent with a due regard for the interest of such infant that such direction shall be given: (O. 12.)

6. DIRECTION TO COMMITTEE OF LUNATIC TENANT IN TAIL.

In the case of a lunatic tenant in tail by his committee applying or consenting to an application, or giving a notification respecting an application, an application may be made at chambers by the petitioner, after the petition is presented, that such committee may be directed to so apply or consent, or give a notification: (O. 6.)

In cases where the committees or guardians of lunatic or infant tenants in tail shall be served with notice of the application in pursuance of the 26th section of the Act, an application may be made at chambers by the petitioner, before the expiration of the time specified in such notice, that such committees or guardians may notify that they either assent to or dissent from such application, or submit their rights or interests, so far as they may be affected by such application, to be dealt with by the court: (O. 7.)

Upon an application that a committee of a lunatic tenant in tail may be directed to make or consent to any application on behalf of such lunatic or to notify that the lunatic assents to or dissents from such application, or submits his rights or interests, so far as they are affected by such application, to be dealt with by the court, the summons shall be served on the committee of such lunatic: (O. 9.)

Upon an application that a committee of a lunatic tenant in tail may be directed to make or consent to any application, or to give any notification respecting any application, the authority of the judge or judges entrusted with the care and commitment of the custody of the persons and estates of lunatics to such committee to act on behalf of the lunatic shall be produced, and if it shall appear thereby that such judge or judges are of opinion that it is proper and consistent with a due regard for the interest of the lunatic that the committee shall make or consent to the application or give any specific notification respecting the application, such authority shall, unless the court or judge shall for any special reason require further evidence, be sufficient evidence upon which the court or judge may direct the committee to act in conformity with such authority: (O. 11.)

7. EXAMINATION OF MARRIED WOMAN.

(a) *When it takes place.*

The examination of a married woman under sects. 50 and 51 of the Act may be taken at any time after the petition is presented and answered: (O. 13.)

A married woman, who is a petitioner, may be examined by the court any time before the order is made (*Re Packer*, 39 L. J. 220, Ch.; *Re Peeke*, W. N. 1871, p. 171); and her examination has been taken in court when the petition was heard: (*Re Taylor*, L. Rep. 14 Eq. 557.)

A married woman who is a consenting party may be examined at any time up to the petition being heard, or her consent may be taken in court before it is heard (*Re Forster*, 24 Beav. 220); and her examination has been taken after the making, but before the drawing up of the order: (*Re Tarbutt* (8 L. T. Rep. N. S. 657).)

(b) *In what Cases Necessary.*

Where a married woman shall apply to the court, or consent to an application to the court, under this Act, she shall first be examined apart from her husband, touching her knowledge of the nature and effect of the application, and it shall be ascertained that she freely desires to make or consent to such application; and such examination shall be made whether

the hereditaments which are the subject of the application shall be settled in trust for the separate use of such married woman independently of her husband, or not: (S. E. A. 1877, s. 50.)

Where a woman married after presentation of the petition, but before any proceedings were taken under it, she was ordered to be examined: (*Re Marshall*, L. Rep. 15 Eq. 66; 27 L. T. Rep. N. S. 439.)

(c) *Before whom Taken.*

(1) *Within Jurisdiction.*

The examination of such married woman, when residing within the jurisdiction of the court to which such application is made, shall be made either by the court or by some solicitor duly appointed by the court for that purpose, who shall certify, under his hand, that he has examined her apart from her husband, and is satisfied that she is aware of the nature and effect of the intended application, and that she freely desires to make or consent to the same: (S. E. A. 1877, s. 51.)

When it is desired that a married woman resident within the jurisdiction of the court shall be examined otherwise than by the court, a solicitor who is a perpetual commissioner to take acknowledgments of deeds by married women may be appointed for that purpose by the judge at chambers in the Form No. 7 in the Appendix . . . without summons or order, upon the request of the petitioner: (O. 14.)

A certificate of the solicitor for the petitioner in the Form No. 7 in the Appendix . . . that the person to be appointed is not a solicitor for the petitioner, or for any party whose concurrence or consent to the application, is required: (O. 14.)

Where an examination by such solicitor will cause unreasonable expense, delay, or inconvenience, or where the married woman is resident out of the jurisdiction of the court, an application by summons may be made *ex parte* by the petitioner at chambers to appoint a solicitor if such woman is resident within the jurisdiction of the court, and if not so resident a person, whether a solicitor or not, to take such examination: (O. 14.)

A form of summons is given in Appendix 8 to the Orders.

The solicitor must be in actual practice, and not one acting for the husband, or concerned in the proceedings: (*Re Noyes*, 6 W. R. 7; *Re Brealy*, 24 Beav. 220; *Hopkins v. Hopkins*, 10 Hare, App. 2.)

In one case it was stated by the court that no person connected with the husband should be allowed to be present during the application (*Re Bendyshe*, 3 Jur. N. S. 727); but it has been since held that the attestation of the signature of the wife and the commissioner by the husband's solicitor was no objection to the certificate: (*Re Lewis*, 24 W. R. 103.)

(2) *Out of Jurisdiction.*

When the married woman is resident out of the jurisdiction of the court to which such application is made, her examination may be made by any person appointed for that purpose by the court, whether he is or is not a solicitor of the court, and such person shall certify under his hand to the effect hereinbefore provided in respect of the examination of a married woman resident within the jurisdiction, and the appointment of any such person not being a solicitor shall afford conclusive evidence that the married woman was at the time of such examination resident out of the jurisdiction of the court: (S. E. A. 1877, s. 51.)

As to appointing a person not a solicitor, see *sup.* (2).

(d) *Forms of Examination, Certificate, and Affidavit of Verification.*

The forms are given in Appendices 9-11 to the Orders.

(e) *Dispensing with.*

The examination was dispensed with when the order was beneficial,

and delay would have been prejudicial (*Re Halliday*, L. Rep. 12 Eq. 199; *Re Thorne*, 26 L. T. Rep. N. S. 683); where the married woman's interest was remote, and was represented by trustees: (*Re Lord de Tabley*, 11 W. R. 936; *Re Tibbett*, 13 W. R. 394; *Re Earl of Kilmorey*, 26 W. R. 54.)

The court refused to dispense with the examination where the petitioner was abroad: (*Re Johnson*, W. N. 1869, p. 87.)

8. NOTICE OF APPLICATION.

Notice of any application to the court under [the] Act shall be served on all trustees who are seised or possessed of any estate in trust for any person whose consent or concurrence to or in the application is hereby required, and on any other parties who in the opinion of the court ought to be so served, unless the court shall think fit to dispense with such notice: (s. 30.)

The form of notice is given in Appendix 12 to the Rules.

9. CONSENTS.

(a) *No Obligation to Consent.*

Nothing in [the] Act shall be construed to create any obligation on any person to . . . consent to any application to the court: (s. 53.)

(b) *Whose Consents Necessary.*

Subject to the exception [thereinafter] contained, every application to the court must be made with the concurrence or consent of the following parties; namely,

Where there is a tenant in tail under the settlement in existence, and of full age, then the parties to concur or consent shall be such tenant in tail, or if there is more than one such tenant in tail then the first of such tenants in tail, and all persons in existence having any beneficial estate or interest under or by virtue of the settlement prior to the estate of such tenant in tail, and all trustees having any estate or interest on behalf of any unborn child prior to the estate of such tenant in tail;

And in every other case the parties to concur or consent shall be all the persons in existence having any beneficial estate or interest under or by virtue of the settlement, and also all trustees having any estate or interest on behalf of any unborn child: (s. 24.)

Persons interested, down to the first tenant in tail, must consent: (*Re Bolton's Estates*, 24 L. T. Rep. N. S. 86.)

Trustees can only consent for unborn children, unless, perhaps, such trustees have a power of sale: (*Grey v. Jenkins*, 26 Beav. 351.)

Where the property was vested in trustees, who had power to receive and give discharges for the money, it was held unnecessary to have the consent of all the *cestuis que trustent*, and that the trustees' consent was sufficient: (*Eyre v. Saunders*, 4 Jur. N. S. 830.)

Where property was devised upon trust to pay the rents to a person for life, and after his death to sell and stand possessed of the proceeds upon certain trusts, and the trustees were empowered to give receipts, Lord Romilly held the consent of the beneficiaries to be unnecessary (*Re Potts*, L. Rep. 16 Eq. 631, n.); but he afterwards refused to follow it, and Jessel, M.R. and Hall V.C. have required the consent of the beneficiaries, though the trustees had power to sell and give receipts: (*Re Ives*, L. Rep. 3 Ch. Div. 690; *Re Dendy*, L. Rep. 4 Ch. Div. 879.) Malins, V.C. has held that such trustees sufficiently represented the beneficiaries: (*Re Strutt*, L. Rep. 16 Eq. 631, n.; *Stace v. Gage*, L. Rep. 8 Ch. Div. 451.) Hall, V.C. dispensed with service on some of the beneficiaries: (*Re Chamberlain*, 23 W. R. 852.)

Persons beneficially interested in respect of portions, or of a jointure, should consent : (*Re Broughton*, 12 W. R. 34; *Re Tarbutt*, 8 L. T. Rep. N. S. 657.)

Consents which cannot be obtained on account of its being unable to ascertain the persons who ought to give them, as in the case of unascertained contingent remaindermen, are unnecessary : (*Beioley v. Carter*, L. Rep. 4 Ch. App. 230; 19 L. T. Rep. N. S. 472; *Re Strutt*, L. Rep. 16 Eq. 629.)

The estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and profits as aforesaid unless they shall concur therein : (s. 54.)

(c) *How Consent Given.*

(1) Infants [see *sup.*, 1 (c)].

(2) Lunatics (So Found) [see *sup.*, 1 (d)].

(3) Married Women [see *sup.*, 1 (f)].

A married woman entitled to a jointure, charged on the estate, must be examined : (*Re Tarbutt*, 8 L. T. Rep. N. S. 657.)

(4) Bankrupts, &c. [see *sup.*, 1 (g)].

(d) *Dispensing with Consents.*

Where an infant is tenant in tail under the settlement it shall be lawful for the court, if it shall think fit, to dispense with the concurrence or consent of the person, if only one, or all or any of the persons, if more than one, entitled, whether beneficially or otherwise, to any estate or interest subsequent to the estate tail of such infant : (s. 25.)

[After notice to notify has been given, as mentioned *post*, 10], an order may be made upon any application notwithstanding that the concurrence or consent of any such person as aforesaid shall not have been obtained or shall have been refused, but the court in considering the application shall have regard to the number of persons who concur in or consent to the application, and who dissent therefrom or who submit or are to be deemed to submit their rights or interests to be dealt with by the court, and to the estates or interests which such persons respectively have or claim to have in the estate as to which such application is made; and every order of the court made upon such application shall have the same effect as if all such persons had been consenting parties thereto : (s. 28.)

The court can dispense with consent, though notice to notify has not been given : (*Re Hooke*, W. N. 1875, p. 29; *Re Cundee*, W. N. 1877, p. 184.)

The court will not dispense with the consent of persons opposing, if their number and the value of their interests are nearly equal to those of the persons supporting the petition : (*Re Taylor*, L. Rep. 1 Ch. Div. 426; 3 Ch. Div. 146.)

Where in the opinion of the court it would be more advantageous to sell a settled estate together with property of the testator to which he was absolutely entitled as one estate, the interest of a person opposing who was interested only in the event of four children all dying under the age of twenty-one years without having issue living at their death was held to be too remote for consideration : (*Re Spurway's Settled Estates*, L. Rep. 10 Ch. Div. 230; 40 L. T. Rep. N. S. 377; 48 L. J. 213, Ch.)

The court dispensed with the consent of a married daughter, to save expense, when all the other children consented : (*Re Thorp*, W. N. 1876, p. 251.)

It was held that an infant born after presentation of the petition need not be served :—(*Re Lewis*, 24 W. R. 103.)

(e) *Saving Rights of Non-Consenting Parties.*

It shall be lawful for the court, if it shall think fit, to give effect to any petition subject to and so as not to affect the rights, estate, or interest of any person whose concurrence or consent has been refused, or who has not submitted or is not deemed to have submitted his rights or interests to be dealt with by the court, or whose rights, estate, or interest ought in the opinion of the court to be excepted : (s. 29.)

Orders have been made subject to the charges imposed on the estate in favour of a great number of legatees (*Re Legge*, 6 W. R. 20 ; *Re Parry*, 34 Beav. 462), and subject to the right of a person of unsound mind, not so found, to a definite annual sum out of the property : (*Re Tarbutt*, 8 L. T. Rep. N. S. 657 ; *Re Franklin*, 7 W. R. 45.)

10. NOTICE TO NOTIFY ASSENT, &c.

(a) *To Whom Given Generally and Form.*

Where on an application under [the] Act the concurrence or consent of any such person as aforesaid [see *sup.*, 9] shall not have been obtained, notice shall be given to such person in such manner as the court to which the application shall be made shall direct, requiring him to notify within a time to be specified in such notice whether he assents to or dissents from such application, or submits his rights or interests so far as they may be affected by such application to be dealt with by the court : (s. 26.)

Every such notice shall specify to whom and in what manner such notification is to be delivered or left : (*Id.*)

A form of notice is given in Appendix 3 to the Orders.

A copy of the notice, with a form of notification at the foot, must also be sent : (see Form 3.)

The notice required to be given by the 26th section of the Act, if given before the hearing (or if given after the hearing, and the judge shall not otherwise direct), may, without any other direction of the court, be given within the jurisdiction of the court, except in the case of a person of unsound mind not so found by inquisition, by delivering to the person to be served a notice (in the Form No. 3 in the Appendix hereto) with such variations as circumstances require : (O. 4.)

The time to be specified in such notice for the person served to deliver or leave a notification shall—(a) in case the person to be served is a guardian of an infant, be such as shall be directed by the judge in the order appointing the guardian, and in case the person to be served is a married woman, or a committee of a lunatic, not less than twenty-eight clear days after the service; (b) and in other cases not less than fourteen clear days after the service : (O. 4.)

(b) *Infants* [see *sup.*, 1 (c)].

(c) *Lunatics (So Found)* [see *sup.*, 1 (d)].

(d) *Lunatics (Not so Found)* [see *post*, (g)].

(e) *Bankrupts, &c.* [see *sup.*, 1 (g)].

(f) *Persons out of Jurisdiction* [see *post*, (g)].

(g) *Where Special Directions Necessary.*

In case the person to be served is of unsound mind, not so found by inquisition, or out of the jurisdiction of the court, or it is desired to serve such notice on any person within the jurisdiction of the court in any other manner than above provided, an application shall be made at chambers *ex parte* by the petitioner for directions as to the manner in which such notice shall be given, and as to the time to be specified in

such notice within which the notification is to be made by the person served : (O. 4.)

For form of summons see Appendix to Orders, No. 2.

Notice has been directed to be given to a person of unsound mind, not so found (*Re Crabtree*, 32 L. T. Rep. N. S. 349); and the notice should also be served on the persons in whose care he is : (*Id.*)

Where a person was too old to consent in writing, notice was ordered to be given by serving the petition on him : (*Re Slack*, W. N. 1875, p. 224.)

(h) *Dispensing with.*

Provided also, that where, on an application under [the] Act the concurrence or consent of any such person as aforesaid shall not have been obtained, and in case such person cannot be found, or in case it shall be uncertain whether he be living or dead, or in case it shall appear to the court that such notice as aforesaid cannot be given to such person without expense disproportionate to the value of the subject-matter of the application, then and in any such case the court, if it shall think fit, either on the ground of the rights or interests of such person being small or remote, or being similar to the rights or interests of any other person or persons, or on other ground, may by order dispense with notice to such person, and such person shall thereupon be deemed to have submitted his rights and interests to be dealt with by the court : (s. 27.)

11. INSPECTION AND COPY OF PETITION.

Any person served with a notice, pursuant to the 26th section of the Act, requiring him to notify whether he assents to or dissents from the application or submits his rights or interests, so far as they may be affected by such application, to be dealt with by the court, and any trustee or other person served with notice pursuant to the 30th section of the Act, shall be at liberty, upon reasonable notice to the petitioner's solicitor, to inspect and peruse the petition without payment of any fee, and he shall be entitled to be furnished with a copy thereof upon such application, terms, and conditions as are provided by rules 8, 9, 12, and 13 of Order V. of the Additional Rules of Court, under the Supreme Court of Judicature Act, 1875, dated the 12th Aug. 1875 : (O. 22; COPIES; COSTS.)

12. NOTIFICATION OF ASSENT, &C.

(a) *What Given.*

A form of notification, which must be annexed to or preceded by a copy of the notice to notify, is given in Appendix 4 to the Orders, and should be sent by the person sending the notice to notify : (see Forms.)

A request to be heard in opposition may be combined with the notice : (see App. 4.)

(b) *By Infants* [see *sup.*, 1 (c), 5].

(c) *By Lunatics (So Found)* [see *sup.*, 1 (d), 6].

(d) *By Bankrupts, &c.* [see *sup.*, 1 (g)].

(e) *Consequence of not Giving.*

In case no notification shall be delivered or left in accordance with the notice and within the time hereby limited, the person to or for whom such notice shall have been given or left shall be deemed to have submitted his rights and interests to be dealt with by the court : (s. 26.)

13. POSTPONING HEARING.

When a petition has been put into the paper for hearing, and by reason of the parties not being ready, or for any other cause, the judge allows it to stand over generally, it may be put into the paper for a subsequent day, without any application to the court or judge, on the petitioner or his

solicitor applying for that purpose to the secretary of the Lord Chancellor or Master of the Rolls (as the case may be): (O. 3.)

Notice of the appointment of such subsequent day shall be given by the petitioner, or his solicitor, two clear days before the day fixed, to the other parties entitled to appear on such petition: (O. 3.)

14. EVIDENCE.

(a) *As to Grounds for Application.*

Upon every petition the court shall be satisfied by sufficient evidence that it is proper and consistent with a due regard for the interests of all parties entitled under the settlement that the powers should be exercised; and it shall be stated in the affidavit why and upon what ground it is deemed to be so: (O. 15.)

(b) *As to no Previous Application to Parliament.*

Upon every petition evidence shall be produced to satisfy the court that neither the applicant nor any party entitled has previously applied to either House of Parliament for a private Act to effect the same or a similar object, or, if any such application has been made, that the same was not rejected on its merits or reported against by the judges to whom the Bill may have been referred: (O. 17.)

(c) *Of Notice to Trustees.*

Upon every petition where there are any trustees seised or possessed of any estate in trust for any of the persons whose consent or concurrence to or in the application is required, evidence is to be produced that notice of the application has been served on such trustees: (O. 16.)

(d) *With Regard to Leases.*

When application is made to the court, either to approve of a particular lease, or to vest any powers of leasing in trustees, the court shall require the applicant to produce such evidence as it shall deem sufficient to enable it to ascertain the nature, value, and circumstances of the estate, and the terms and conditions on which leases thereof ought to be authorised: (s. 11.)

15. ORDERING NOTICE BY ADVERTISEMENTS, &c.

Notice of any application to the court under this Act shall, if the court shall so direct, but not otherwise, be inserted in such newspapers as the court shall direct: (s. 31.)

The form of notice is given in Appendix 13 to the Orders.

If upon the hearing of any petition the court shall be of opinion that notice ought to be served on any person who shall not have been served, or that notice of the application ought to be inserted in any newspaper, the court shall give directions accordingly, and the petition shall stand over generally or to such time as the court shall direct: (O. 18.)

Applications for re-investment need not be advertised: (*Re Sexton Barns Estate*, 6 L. T. Rep. N. S. 40.)

Where the parties themselves were the only persons interested, and the order was to sanction building leases, advertisements were dispensed with: (*Re Chilcott*, W. N. 1877, p. 259.)

Mistakes and irregularities in the advertisements have sometimes been overlooked: (*Re Bicknell*, L. Rep. 14 Eq. 467; *Re Burley*, 18 L. T. Rep. N. S. 458; *Re Helmsley*, 29 L. T. Rep. N. S. 173.)

When the petition is amended after advertisements have been issued, unless new facts and new parties are added, fresh advertisements are not required: (*Re Bunbury*, 11 L. T. Rep. N. S. 585.)

XV. LEAVE TO OPPOSE PETITION.

Any person or body corporate, whether interested in the estate or not,

may apply to the court by motion for leave to be heard in opposition to or in support of any application which may be made to the court under this Act; and the court is hereby authorised to permit such person or corporation to appear and be heard in opposition to or support of any such application, on such terms as to costs or otherwise, and in such manner as it shall think fit: (s. 31.)

When the court shall at the hearing have directed notice of any application to be inserted in any newspapers, any person may, within the time specified in the notice, apply to the court by motion, either *ex parte* or upon notice to the petitioner, for leave to be heard in opposition to or in support of the application, but if such motion shall be made *ex parte* and the court shall think fit to give such leave, it shall be subject to such order as the court shall think fit to make as to costs: (O. 19.)

Any such person having obtained leave under the last preceding order shall be at liberty, upon reasonable notice, to inspect and peruse the petition at the office of the solicitor for the petitioner, upon payment of a fee of 13s. 4d. on each inspection, and shall be entitled (either without or after such inspection) to be furnished with a copy of such petition upon such application, terms, and conditions, as are provided by rules 8, 9, 12, and 13 of Order V. of the Additional Rules of Court, under the Supreme Court of Judicature Act, 1875, dated 12th Aug. 1875: (O. 20; and see COPIES; COSTS.)

Any order made on an *ex parte* motion giving leave to such person to be heard on any application shall be served on the solicitor for the petitioner: (O. 21.)

XVI. ORDER.

1. HOW ENTITLED.

[See *sup.*, XIV. 2 (b).]

2. TO STATE NAMES OF PETITIONERS, &c.

Every order shall state, in addition to the names of the petitioners, the names of the persons other than the petitioners who concur or consent or to whom notice of the application has been given, or who (under Order 19) may have obtained leave to be heard in opposition to or in support of the application, and whether any notification was received from the persons to whom notice has been given, and if any has been received the purport thereof, and also the names of the persons, if any, notice to whom has been dispensed with, and whether the order is made subject to any and what rights, estate, or interest of any person whose concurrence or consent has been refused, or who shall not or shall not be deemed to have submitted his rights or interests to be dealt with by the court, or whose rights or interests ought, in the opinion of the court, to be excepted: (O. 24.)

As to entering the order, see JUDGMENT, XV.; PETITION, V.

In addition to the documents [usually left with the registrar there must be left] the affidavit of the service of the petition, and the *London Gazette* and newspapers containing the advertisement thereof: (Ch. Reg. Mar. 1860, r. 33.)

3. AS TO STIPULATIONS IN LEASE AND POWER OF LEASING.

In cases where the court authorises a lease the order shall direct that the lease shall contain such conditions as are required by the Act, and such other covenants, conditions, and stipulations as the court shall deem expedient with reference to the special circumstances, or may direct the same to contain such covenants, conditions, and stipulations as may be

approved by the judge at chambers without directing the lease to be settled by the judge: (O. 25.)

In powers of leasing, the provisions of s. 14 must be attended to: (see *sup.*, X. 7.)

4. DIRECTIONS AS TO EXECUTION OF DEED.

When a particular lease or contract for a lease has been approved by the court, the court shall direct what person or persons shall execute the same as lessor: (s. 12.)

On every sale or dedication to be effected as hereinbefore mentioned the court may direct what person or persons shall execute the deed of conveyance: (s. 22.)

The court has no power to direct one person out of several who are entitled to the legal estate to convey for all: (*Re Hole*, W. N. 1868, p. 70.)

Where after an order for sale one of the trustees died, the court directed a petition for the appointment of a new trustee to be presented: (*Scott v. Heisch*, 33 L. T. Rep. N. S. 498.)

5. CHARGING AND RAISING COSTS.

It shall be lawful for the court, if it shall think fit, to order that all or any costs or expenses of all or any parties of and incident to any application under this Act shall be a charge on the hereditaments which are the subject of the application, or on any other hereditaments included in the same settlement, and subject to the same limitations; and the court may also direct that such costs and expenses shall be raised by sale or mortgage of a sufficient part of such hereditaments, or out of the rents or profits thereof, such costs and expenses to be taxed as the court shall direct: (s. 41.)

The names of the persons advancing the money will be inserted in the order: (*Re Tunstall*, 14 L. T. Rep. N. S. 352.)

6. RECORDING EXERCISE OF POWER.

The court shall direct that some sufficient notice of any exercise of any of the powers conferred on it by [the] Act shall be placed on the settlement or on any copies thereof, or otherwise recorded in any way it may think proper, in all cases where it shall appear to the court to be practicable and expedient for preventing fraud or mistake: (s. 33.)

The order has been directed to be indorsed on the deed of settlement: (*Re Cross*, 27 Beav. 592; *Re Burley*, W. N. 1868, p. 148.)

In all cases in which land in a register county or district is affected by the exercise of any powers conferred on the court by the Act, and the court shall direct notice to be recorded, pursuant to the 33rd section of the Act, such notice may be given by directing a memorial of the order to be registered. And in all cases in which the court shall not think it practicable or expedient that notice under the said section should be recorded as therein mentioned, the order shall state that no record of the order need be made: (O. 23.)

XVII. HOW SALE CONDUCTED.

Every . . . sale shall be conducted and confirmed in the same manner as, by the rules and practice of the court for the time being, is or shall be required in the case of land sold under a decree of the court: (s. 16; and see PROPERTY.)

The court has power to authorise trustees to sell out of court generally, they bringing the proceeds into court; and to authorise a sale by public auction or private contract, subject to a reserve price settled in chambers: (*Re Adam's Settled Estates*, L. Rep. 9 Ch. Div. 116; 28 L. T. Rep. N. S. 877; but compare *Re Smith*, W. N. 1878, p. 196.)

As to when the deed must be settled by the judge, see DEEDS.

XVIII. PURCHASE MONEY.

1. TO WHOM PAID.

All money to be received on any sale effected under the authority of [the] Act or to be set aside out of the rent or payments reserved on any lease of earth, coal, stone, or minerals as aforesaid, may, if the court shall think fit, be paid

To any trustees of whom it may approve, or otherwise the same so far as relates to estates in England shall be paid

Into court, *ex parte* the applicant in the matter of [the Settled Estates Act, 1877]: (s. 34.)

2. INTERIM INVESTMENT.

Until the money can be applied as [mentioned *post*, 5] the same shall be invested, as the court shall direct, in some or one of the investments in which cash under the control of the court is for the time being authorised to be invested: (s. 36.)

Such investments are Bank Stock, East India Stock, Exchequer Bills, 2l. 10s. per Cent. Annuities, mortgages of freeholds or copyholds in England or Wales, Reduced 3l. per Cent. Annuities, and New 3l. per Cent. Annuities: (23 & 24 Vict. c. 38; Ch. O. Feb. 1st, 1861.)

The court has regard to the circumstances of each case in ordering investments, so as to deal fairly between tenants for life, or other limited holders, and remaindermen: (*Cockburn v. Peel*, 3 D. F. & J. 170; *Vidler v. Parrott*, 4 N. R. 392; *Mortimer v. Picton*, 9 L. T. Rep. N. S. 591; *Fluid v. Fluid*, 7 L. T. Rep. N. S. 590.)

The investment will be made according to the ordinary course of the court, and the practice of the office: (*Re Woodcock*, L. Rep. 13 Eq. 183; 25 L. T. Rep. N. S. 459; and see PAYMENT INTO AND OUT OF COURT.)

The order should specify the particular investments: (*Re Taylor*, W. N. 1880, p. 84.)

When the order for sale merely accelerated a power under the settlement, the proceeds of sale were ordered to be paid at once, and without any intermediate investment, to the trustees, to be held upon the trusts declared by the settlement concerning the purchase money: (*Re Morgan*, L. Rep. 9 Eq. 587; *Re Peacock*, 15 L. T. Rep. N. S. 266.)

3. INCOME OF INVESTMENTS.

The interest and dividends of such investments shall be paid to the person who would have been entitled to the rents and profits of the land if the money had been invested in the purchase of land: (s. 36.)

4. BY WHOM MONEY APPLIED.

The application of the money in manner aforesaid may, if the court shall so direct, be made by the trustees (if any) without any application to the court, or otherwise upon an order of the court upon the petition of the person who would be entitled to the possession or the receipt of the rents and profits of the land if the money had been invested in the purchase of land: (s. 35.)

Payment has been directed to be made to trustees approved by the court, even where some of the parties beneficially interested were under disability (*Hayward v. Smith*, W. N. 1869, p. 37; *Re Newman*, 31 L. T. Rep. N. S. 265; L. Rep. 9 Ch. App. 681); but not where some of the persons interested were married women resident in Australia: (*Aston v. Meredith*, L. Rep. 13 Eq. 492; 26 L. T. Rep. N. S. 281.)

5. HOW MONEY APPLIED.

Such money shall be applied as the court shall from time to time direct to some one or more of the following purposes: (namely,) . . .

The purchase or redemption of the land tax;

The discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid; or, affecting any other hereditaments subject to the same uses or trusts; or,

The purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid; or,

The payment to any person becoming absolutely entitled: (s. 34.)

Anything in the nature of an addition or augmentation of an estate may be sanctioned; thus the money may be expended in building or rebuilding houses or farm buildings (*Re Leigh*, L. Rep. 6 Ch. App. 887; 24 L. T. Rep. N. S. 467; *Re Leslie*, L. Rep. 2 Ch. App. 185; 34 L. T. Rep. N. S. 239; *Drake v. Trefusis*, L. Rep. 10 Ch. App. 364; 33 L. T. Rep. N. S. 85; *Donaldson v. Donaldson*, L. Rep. 3 Ch. App. 743; 34 L. T. Rep. N. S. 900); in making lateral additions to houses (*Re Speer*, L. Rep. 3 Ch. App. 262); in making drains: (*Re Leslie*, *sup.*; *Re Croker*, W. N. 1877, p. 38.)

The purchase money of part of a settled estate may be applied in payment of a sum assessed by a corporation, in pursuance of its statutory powers, upon the owners of another part of the settled estate, as their contribution towards the expenses of flagging and paving a street: (*Re Hilliard's Settled Estates*, 38 L. T. Rep. N. S. 93.)

Although the money has been allowed to be invested in repairs for the permanent improvement of the estate (*Re Clitheroe*, 20 L. T. Rep. N. S. 56; *Re Dummer's Will*, 2 De G. J. & S. 144; *Re Partington*, 1 N. R. 177; *Re Johnson*, L. Rep. 8 Eq. 348; *Ex parte Rector of Claypole*, L. Rep. 16 Eq. 584; 29 L. T. Rep. N. S. 51; *Re Newman*, L. Rep. 9 Ch. App. 681; 31 L. T. Rep. N. S. 265), it has lately been held that the money cannot be invested in repairs or improvements: (*Drake v. Trefusis*, L. Rep. 10 Ch. App. 364; 33 L. T. Rep. N. S. 85; *Re Leigh*, L. Rep. 6 Ch. App. 887; 24 L. T. Rep. N. S. 467.)

The money cannot be applied in recouping the tenant for life what he has expended: (*Re Leigh*, *sup.*; *Williams v. Aylesbury Railway Company*, L. Rep. 9 Ch. App. 684; 31 L. T. Rep. N. S. 521.)

Where there was no trustee of the settled estate sold, the court required new trustees to be appointed, and the new lands purchased were ordered to be conveyed to them: (*Re Sexton Barns Estate*, 10 W. R. 416.)

Trustees with a power of sale and to give receipts will be allowed to take out the money as persons absolutely entitled: (*Re Hobson*, L. Rep. 7 Ch. Div. 708; and see LANDS CLAUSES ACT.)

Where a tenant in tail wants payment out to himself, he must first execute a disentailing deed (*Re Broadwood*, L. Rep. 1 Ch. App. 438; *Re Reynolds*, L. Rep. 3 Ch. App. 61; overruling *Re Wood*, L. Rep. 20 Eq. 372); and produce satisfactory evidence that there are no incumbrances: (*Thornhill v. Millbank*, 10 L. T. Rep. N. S. 124.)

6. PAID IN RESPECT OF LIMITED INTEREST.

Where any purchase money paid into court under the provisions of [the] Act shall have been paid in respect of any lease for a life or lives or years, or for a life or lives and years, or any estate in land less than the whole fee simple thereof, or of any reversion dependent on any such lease or estate, it shall be lawful for the court, on the petition of any party interested in such money, to order that the same shall be laid out, invested, accumulated, and paid in such manner as the said court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate, or reversion, in respect of which such money shall have been paid, or as near thereto as may be: (s. 37.)

XIX. TIME.

The rules 1, 2, 3, and 6 of Order LVII. (as to time) in the schedule to the Supreme Court of Judicature Act, 1875, shall be applicable to these orders, and to all proceedings under the Act: (O. 26; and see TIME.)

XX. COSTS.

The fees and allowances to solicitors of the court in respect to proceedings under the Act shall be such as are provided by Order VI. of the Additional Rules of Court under the Supreme Court of Judicature Act, 1875, dated 12th Aug. 1875, and are applicable to such proceedings, and solicitors shall be entitled to charge and be allowed for a request and certificate under the 14th Order (of these Orders), and for attendances at the judges' chambers to procure the appointment of an examiner thereon, a fee of 13s. 4d. if the lower scale of fees is applicable, and 1l. 1s. in other cases: (O. 29; and see COSTS.)

XXI. FEES.

The fees to be taken by the officers of the court in respect to proceedings under the Act shall be such as are provided by the Orders under the Supreme Court of Judicature Act, 1875, dated 28th Oct. 1875, and are applicable to such proceedings; and every request under the 14th Order (of these Orders) shall bear a stamp of 2s. if the lower scale of fees is applicable, and 3s. in other cases: (O. 30; and see FEES.)

XXII. VALIDITY OF LEASE, &c.

After the completion of any lease or sale, or other act, under the authority of the court, and purporting to be in pursuance of this Act, the same shall not be invalidated on the ground that the court was not hereby empowered to authorise the same; except that no such lease, sale, or other act shall have any effect against such person as herein mentioned whose concurrence or consent ought to be obtained, or who ought to be served with notice, or in respect of whom an order dispensing with such service ought to be obtained in the case where such concurrence or consent has not been obtained and such service has not been made or dispensed with: (S. E. A., 1877, s. 40.)

[On a sale or dedication] the deed executed by such person or persons [as the Court directs] shall take effect as if the settlement had contained a power enabling such person or persons to effect such sale or dedication, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the court shall direct: (s. 22.)

The Act puts the purchaser, &c., in the same position as one under a sale made under the ordinary authority of the court (*Beioley v. Carter*, L. Rep. 4 Ch. App. 238; 20 L. T. Rep. N. S. 381; *Re Woodcock*, L. Rep. 3 Ch. App. 230; *Re Shephard*, L. Rep. 8 Eq. 571; 21 L. T. Rep. N. S. 525), or that, subject to the qualification in the Act, having obtained his conveyance, he has an unimpeachable title, notwithstanding formal irregularities, or an excess in the jurisdiction: (Dart. V. & P., 5th edit., 1180.)

But a purchaser may object, any time before completion, that the order for sale was in excess of the jurisdiction: (*Re Thompson*, Johns. 418; *Re Burdin*, 2 L. T. Rep. N. S. 70.)

XXIII. AMENDING ORDERS AS TO POWERS OF LEASING

[See *Sup. X.*, 7.]

SETTLEMENT.

OF PROPERTY.

[See INFANTS; MARRIED WOMEN.]

OF DEEDS.

[See DEEDS.]

OF ISSUES.

[See ISSUES.]

SET-OFF.

[See PLEADING, VII.]

SEVERANCE.**I. OF SEVERAL CAUSES OF ACTION.**

1. BY EXCLUDING SOME.

2. BY ORDERING SEPARATE TRIALS.

II. OF SET-OFF OR COUNTER-CLAIM FROM ORIGINAL CLAIM

[See PLEADINGS, VII., 17.]

III. OF DEFENDANTS IN THEIR DEFENCE.**I. OF SEVERAL CAUSES OF ACTION.**

1. BY EXCLUDING SAME.

Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of in one action, may at any time apply to the court or a judge for an order confining the action to such of the causes of action as may be conveniently disposed of in one proceeding: (O. XVII. r. 8; and see WRIT OF SUMMONS.)

If, on the hearing of such application as in the last preceding rule mentioned, it shall appear to the court or a judge that the causes of action are such as cannot all be conveniently disposed of in one action, the court or a judge may order any of such causes of action to be excluded, and may direct the statement of claim, or, if no statement of claim has been delivered, the copy of the writ of summons, and the indorsement of claim on the writ of summons, to be amended accordingly, and may make such order as to costs as may be just: (O. XVII., r. 9.)

2. BY ORDERING SEPARATE TRIALS, &c.

Subject to the following rules [of this order (as to which see WRIT OF SUMMONS)], the plaintiff may unite in the same action and in the same statement of claim several causes of action; but if it appear to the court or a judge that any such causes of action cannot be conveniently tried or disposed of together, the court or judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof: (O. XVII. r. 1.)

II. OF SET-OFF OR COUNTER-CLAIM FROM ORIGINAL CLAIM.

[See PLEADING, VII., 17.]

III. OF DEFENDANTS IN THEIR DEFENCE.

Parties in the same interest ought to join in their defence, or as co-plaintiffs, or will not be allowed costs; and the rule holds good as to a husband and wife, or a bankrupt and his trustee: (Seton, 879; *Mildmay v. Quicke*, L. Rep. 6 Ch. Div. 553; 46 L. J. 667, Ch.)

As to the costs of trustees severing, see COSTS, III., 2 (*Severance*); Seton, 483.

As to the costs when partners sever, see *Eden v. Naish* (L. Rep. 7 Ch. Div. 781).

SHARES.

CHARGING ORDER.

[See CHARGING STOCK; EXECUTION, XIX.]

RESTRAINING DEALINGS.

[See RESTRAINING ORDER.]

SHIP.

[See MERCHANT SHIPPING ACTS.]

SHORT CAUSE.

No cause ought to be set down "short," unless the evidence is by affidavit: (per Jessel, M.R., W. N. 1875, p. 193.)

A short cause should not occupy more than ten minutes: (17 Jur. 435.)

Causes for . . . hearing, or further consideration, and motions for [judgment] may be marked "short," on production of the certificate of the plaintiff's counsel, that the cause or motion is fit to be so heard, without the consent of the solicitors for any of the defendants: (Ch. Reg. March 15th, 1860, r. 10.)

Counsel's certificate is *prima facie* ground for setting down "short": (*Felstead v. Gray*, L. Rep. 18 Eq. 92.)

The court may dispense with the certificate: (*Hargreaves v. White*, 22 L. J. 640, Ch.)

As to marking further considerations "short," see FURTHER CONSIDERATION, V.

As to marking motions for judgment "short," see JUDGMENT, XII., (b).

Unless by consent of all parties, causes for original hearing will not be so marked for any day before that for which notice of trial is given: (Ch. Reg. March 15th, 1860, r. 10.)

The defendant must have notice of the cause being marked "short," and must produce an affidavit of such notice; otherwise the plaintiff cannot have judgment by default, if the defendant does not appear: (*Molesworth v. Snead*, 11 W. R. 934.)

If on the hearing the action is considered long, it will be sent into the general paper, and the plaintiff will be ordered to pay the costs of the day.

The defendant may show any other fair reason, at the hearing, why the matter should not be heard as a short cause: (*Felstead v. Gray, sup.*)

Malins, V.C., has decided that in short causes a statement of claim ought to be delivered, and has refused to make an order without one, even where the defendant has stated that he does not require one: (*Breton v. Mockett*, W. N. 1875. p. 255; 33 L. T. Rep. N. S. 684; *Boyes v. Cook*, W. N. 1876, p. 28; 33 L. T. Rep. N. S. 778.) The Master of the Rolls and Hall, V.C. have held that it is unnecessary: (*Taylor v. Duckett*, W. N. 1875, p. 193; *Green v. Coleby*, L. Rep. 1 Ch. Div. 693; 45 L. J. 383, Ch.)

SHORTHAND NOTES.

[See COSTS, III., 2.]

SHOW CAUSE.

[See MOTION, VII.]

SITTINGS.

I. ABOLITION OF TERMS.

II. PERIODS OF SITTING.

1. OF COURT OF APPEAL AND HIGH COURT.

2. FOR JURY TRIALS IN LONDON AND MIDDLESEX.

III. OFFICE OPEN DAYS AND HOURS.

IV. VACATIONS [see VACATIONS].

I. ABOLITION OF TERMS.

The division of the legal year into terms shall be abolished so far as it relates to the administration of justice; and there shall no longer be terms applicable to any sitting or business of the High Court of Justice, or of the Court of Appeal, or of any commissioners to whom any jurisdiction may be assigned under this Act; but in all other cases in which, under the law now existing, the terms into which the legal year is divided are used as a measure for determining the time at or within which any act is required to be done, the same may continue to be referred to for the same or the like purpose, unless and until provision is otherwise made by any lawful authority: (J. A. 1873, s. 26; *Christ's College, Brecknock, v. Martin*, L. Rep. 3 Q. B. Div. 16; 36 L. T. Rep. N. S. 537; 46 L. J. 591, Q. B.; 26 W. R. 637.)

And see *post*.

II. PERIODS OF SITTING.

1. OF COURT OF APPEAL AND HIGH COURT.

Subject to Rules of Court, the High Court of Justice and the Court of Appeal, and the judges thereof respectively, or any such commissioners as aforesaid, shall have power to sit and act, at any time, and at any place, for the transaction of any part of the business of such courts respectively, or of such judges or commissioners, or for the discharge of any duty which by any Act of Parliament, or otherwise, is required to be discharged during or after term: (J. A. 1873, s. 26.)

The sittings of the Court of Appeal and the sittings in London and Middlesex of the High Court of Justice shall be four in every year, viz., the Michaelmas sittings, the Hilary sittings, the Easter sittings, and the Trinity sittings: (O. LXI., r. 1.)

The Michaelmas sittings shall commence on the 2nd November, and terminate on the 21st December: (*Id.*)

The Hilary sittings shall commence on the 11th January, and terminate on the Wednesday before Easter: (*Id.*)

The Easter sittings shall commence on the Tuesday after Easter week and terminate on the Friday before Whitsunday: (*Id.*)

The Trinity sittings shall commence on the Tuesday after Whitsun week, and terminate on the 8th August: (*Id.*)

The days of the commencement and termination of each sitting shall be included in such sitting: (O. LXI., r. 3.)

2. FOR JURY TRIALS IN LONDON AND MIDDLESEX.

Subject to Rules of Court, sittings for the trial by jury of causes and questions or issues of fact shall be held in Middlesex and London, and such sittings shall, so far as is reasonably practicable, and subject to vacations, be held continuously throughout the year by as many judges as the business to be disposed of may render necessary: (J. A. 1873, s. 30.)

III. OFFICE OPEN DAYS AND HOURS.

The several offices of the Supreme Court shall be open on every day of the year, except Sundays, Good Friday, Monday and Tuesday in Easter week, Whit-Monday, Christmas Day, and the next following working day, and all days appointed by proclamation to be observed as days of general fast, humiliation, or thanksgiving: (O. LXI., r. 4.)

The offices of the Supreme Court (including the judges' chambers) shall close on Saturdays at two o'clock: (O. LXI., r. 4a., Feb. 1876.)

The office hours in the several offices of the Supreme Court, other than the Summons and Order, Crown Office, and Associates' Department of the Central Office, shall be from ten in the forenoon to four in the afternoon, except on Saturday and in Vacation, when the offices shall close at two in the afternoon. In the excepted departments the hours shall be from eleven in the forenoon to five in the afternoon, except on Saturday, and in vacation, when the hours shall be from eleven in the forenoon to three in the afternoon: (O. LXI., r. 4c; April, 1880.)

As to the office hours of the District Registries, see DISTRICT REGISTRIES, V.

IV. VACATIONS.

[See VACATIONS.]

SOLICITORS.

I. GENERAL PROVISIONS.

1. NAME AND PRIVILEGES OF SOLICITORS.
2. JURISDICTION OVER SOLICITORS AS OFFICERS.
3. REGISTRAR OF SOLICITORS.
4. ADAPTATION OF FORMER ENACTMENTS.

II. PROCEEDINGS AFFECTING STATUS.

1. CLERK'S APPEAL FROM EXAMINERS' DECISION.
2. ENROLMENT OF ARTICLES NUNC PRO TUNC.
3. STRIKING OFF ROLL.
 - (a) On Solicitor's Application.

(b) *For Misconduct.*

- (1) What Sufficient.
- (2) Who may Apply.
- (3) Notice of Motion.
- (4) Evidence.
- (5) Motion to Show Cause.
- (6) Order Nisi.
- (7) Showing Cause.
- (8) Reference to Chambers.
- (9) Order Absolute.

4. RE-ADMISSION.

- (a) *Where Allowed.*
- (b) *Notice of Application.*
- (c) *Affidavits.*
- (d) *Petition.*
- (e) *Order.*

5. TAKING OUT AND RENEWING CERTIFICATES.

6. APPEAL FROM REFUSAL OF CERTIFICATE.

III. RETAINER AND AUTHORITY.

1. HOW SOLICITOR RETAINED.
2. COMMENCING PROCEEDINGS WITHOUT AUTHORITY.
3. JOINT OR SEVERAL RETAINER.

IV. CHANGING SOLICITOR.

V. COSTS.

1. GENERAL RULES [see COSTS].
2. SPECIAL AGREEMENTS.
 - (a) *Power to Make.*
 - (b) *To be Signed by both Parties.*
 - (c) *Effect.*
 - (d) *Taxation.*
 - (1) General Rule.
 - (2) Where Costs incurred in Litigation.
 - (3) On Agreement by Guardian, Trustee, or Committee.
 - (4) After Payment.
 - (5) On Solicitor's Death or Disability [see *post* (f), (1).]
 - (6) On Change of Solicitor [see *post* (f), (2).]
 - (e) *How Enforced or Set Aside.*
 - (1) Motion or Petition.
 - (2) Order to Enforce.
 - (3) Order to Set Aside.
 - (f) *Part Performance.*
 - (1) Death or Disability of Solicitor.
 - (2) Change of Solicitor.
3. SECURITY FOR CHARGES, &C.
4. ALLOWING SPECIAL REMUNERATION.
5. ALLOWING INTEREST.
 - (a) *On Taxation.*
 - (b) *On Pronouncing Judgment or Order.*
6. LIEN.
 - (a) *General.*
 - (b) *Particular.*
7. CHARGE.
 - (a) *Jurisdiction.*
 - (1) Generally.
 - (2) Over what Property.
 - (3) What is Recovery or Preservation.
 - (4) For what Costs.
 - (b) *Application.*
 - (1) By whom Made.

- (2) Against whom Made.
 - (3) In what Division Made.
 - (4) When Made.
 - (5) How Made.
- (c) *Order*.
 - (1) *Form*.
 - (2) *Effect*.
- 8. REVIVING SUIT FOR COSTS.
- 9. RECOVERY.
 - (a) *In General*. [see COSTS, V., VII.]
 - (b) *By Uncertificated Solicitor or his Client*.
- 10. PAYMENT BY SOLICITOR.
- VI. PAYMENT OF MONEY AND DELIVERY OF PAPERS.
 - 1. JURISDICTION.
 - 2. APPLICATION.
 - (a) *By whom Made*.
 - (b) *Against whom Made*.
 - (c) *How Made*.
 - (d) *How Order Enforced*.
- VII. ENFORCING UNDERTAKING.
- VIII. DISCLOSURE AS TO WRIT.
 - 1. ENTERING APPEARANCE [see APPEARANCE, XIV.]
 - 2. GIVING NOTICE OF ORDER FOR DISCOVERY OR INSPECTION.

I. GENERAL PROVISIONS.

1. NAME AND PRIVILEGES OF SOLICITORS.

From and after the commencement of this Act all persons admitted as solicitors, attorneys, or proctors of or by law empowered to practise in any court, the jurisdiction of which is hereby transferred to the High Court of Justice or the Court of Appeal, shall be called solicitors of the Supreme Court, and shall be entitled to the same privileges and be subject to the same obligations, so far as circumstances will permit, as if this Act had not passed: (J. A. 1873, s. 87.)

All persons who from time to time, if this Act had not passed, would have been entitled to be admitted as solicitors, attorneys, or proctors of or been by law empowered to practise in any such courts, shall be entitled to be admitted and to be called solicitors of the Supreme Court, and shall be admitted by the Master of the Rolls, and shall, as far as circumstances will permit, be entitled as such solicitors to the same privileges and be subject to the same obligations as if this Act had not passed: (*Id.*)

2. JURISDICTION OVER SOLICITORS AS OFFICERS.

Any solicitors, attorneys, or proctors to whom this section applies shall be deemed to be officers of the Supreme Court; and that court, and the High Court of Justice, and the Court of Appeal respectively, or any division or judge thereof, may exercise the same jurisdiction in respect of such solicitors or attorneys as any one of Her Majesty's superior courts of law or equity might previously to the passing of this Act have exercised in respect of any solicitor or attorney admitted to practise therein: (J. A. 1873, s. 87.)

3. REGISTRAR OF SOLICITORS.

The registrar of attorneys and solicitors in England shall be called the registrar of solicitors: (J. A. 1875, s. 14.)

4. ADAPTATION OF FORMER ENACTMENTS.

The Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief

Baron, or any two of them, may, from time to time, by regulation, adapt any enactments relating to attorneys, and any declaration, certificate, or form required under those enactments, to the solicitors of the Supreme Court under sect. 87 of the principal Act (36 & 37 Vict. c. 66): (J. A. 1875, s. 14.)

The former enactments relating to attorneys have with some slight variation been retained: (See Rules of 2nd Nov. 1875.)

The words "solicitor of the Supreme Court" are to be read into the enactments instead of the word "attorney:" (Rules of 2nd Nov. 1875; 40 and 41.)

II. PROCEEDINGS AFFECTING STATUS.

1. CLERK'S APPEAL FROM EXAMINERS' DECISION.

Any person who has been refused a certificate of having passed an intermediate or final examination, and who objects to such refusal, whether on account of the nature or difficulty of the questions put to him by the examiners, or on any other ground whatsoever, shall be at liberty within one month next after such refusal to appeal by petition in writing to the Master of the Rolls against such refusal: (40 & 41 Vict. c. 25, s. 9.)

In the meantime, and until the Master of the Rolls otherwise directs, such petition shall, as to a final examination, be presented at the Petty Bag Office without the payment of any fee: (*Id.*)

A copy of such petition shall be left therewith, and shall be delivered by the Clerk of the Petty Bag to the secretary of the Incorporated Law Society: (*Id.*)

The Clerk of the Petty Bag shall notify to such secretary the day appointed for the hearing of the petition: (*Id.*)

The [petition] shall be heard by the Master of the Rolls on such day after the expiration of fourteen days from the day on which such petition was presented, and at such time as he may appoint: (*Id.*)

On the hearing of any petition under this section, the Master of the Rolls may make such order as to him may seem meet: (*Id.*)

When any person who has been refused a certificate of having passed his final examination, on appeal to the Master of the Rolls obtains an order for his admission, such order shall entitle him to a certificate from the Incorporated Law Society of his fitness and capacity to act as a solicitor, and in the usual business transacted by a solicitor, in the same manner as if he had passed his final examination: (*Id.*)

2. ENROLMENT OF ARTICLES NUNC PRO TUNC.

In case [the affidavit of due execution of articles] be not filed within . . . six months [from the date of the contract], the same may be filed . . . after the expiration thereof, but the service of [the clerk] shall be reckoned to commence, and be computed from, the day of filing such affidavit, unless [the court] shall otherwise order: (6 & 7 Vict. c. 73, s. 9.)

Where the delay has arisen from the illness, death, or neglect of the master, or of an agent, and in other cases of mistake or neglect, the court has ordered enrolment *nunc pro tunc*: (Cordery on Solicitors, 6.)

The application is by motion, supported by affidavit of the facts, and notice of the application must be given to the secretary of the Incorporated Law Society: (*Ex parte Blades*, 32 L. T. Rep. N. S. 33; Cordery, 8.)

3. STRIKING OFF ROLLS.

(a) On Solicitor's Application.

It is a matter of course to strike a solicitor off the Rolls at his own request: (Cordery, 236.)

The application is by motion : (*Re Sturdy*, 2 Jur. N. S. 452.)

An affidavit by the solicitor must be produced, stating that there is no complaint against him as a solicitor, and that he does not apprehend any : (Ch. Archb., 13th ed., 157.)

The affidavit need not state that the solicitor has taken out his certificate : (*Id.*)

The affidavit need not, though it usually does, state the ground of the application : (Cordery, 236.)

[The order] shall be filed with the Clerk of the Petty Bag, who shall thereupon make such entry as, or alteration in the said roll, as may be directed by such order, and inform the Registrar of Solicitors thereof : (Rules of 2nd Nov. 1875.)

(b) *For Misconduct.*

(1) *What Sufficient.*

Felony.—A solicitor will be struck off the roll for an indictable offence, after conviction, or though no indictment has been preferred : (Cord. 139.)

Professional Misconduct.—A solicitor will be struck off the roll for gross professional misconduct, as falsely representing that an injunction has been granted ; using an affidavit false to his knowledge on taxation of costs ; serving a vexatious writ in the name of another solicitor without his express authority ; fraudulently misappropriating moneys due to his client, or of which he is trustee, wilfully acting without authority ; betraying his client's confidence : (Cord. 139-40.)

Acting as Agent for Unqualified Person.—If any . . . solicitor shall wilfully and knowingly act as agent in any action or suit in any court of law or equity, or matter in bankruptcy, for any person not duly qualified to act as [a] solicitor . . . or permit or suffer his name to be in any way made use of in any such action, suit, or matter, upon the account or for the profit of any unqualified person, or send any process to such unqualified person, or do any other act thereby to enable such unqualified person to appear, act, or practise in any respect as [a] solicitor in any suit at law or in equity, knowing such person not to be duly qualified as aforesaid, and complaint shall be made thereof in a summary way to [the court], and proof made thereof upon oath to the satisfaction of the court that such . . . solicitor hath wilfully and knowingly offended therein as aforesaid, then and in such case every such solicitor . . . so offending shall and may be struck off the roll, and for ever after disabled from practising as [a] solicitor, and, in that case, and upon such complaint and proof made as aforesaid, it shall and may be lawful to and for the said court to commit such unqualified person, so acting or practising as aforesaid, to the prison of the said court, without bail or mainprize, for any term not exceeding one year : (6 & 7 Vict. c. 73, s. 32.)

Other Misconduct.—The jurisdiction is not limited to cases where the misconduct charged amounts to an indictable offence, or is professional in character, but extends to cases where the solicitor's conduct is such as to render him unfit to continue to be an officer of the court : (Cord. 142.)

But the question whether the misconduct was professional or not is material in determining whether the punishment is to be striking off or suspension : (*Id.* 143.)

A solicitor will not generally be struck off the roll for contempt, but in aggravated cases, as where the solicitor kept out of the way and refused to comply with an order for payment of money, or refused to answer matters in an affidavit, the court has ordered him in default of compliance to be struck off for contempt : (Cord. 140-1.)

(2) Who may Apply.

Any person damnified may apply against a solicitor under the summary jurisdiction in respect of graver offences; but it is usual to put the matter into the hands of the Incorporated Law Society: (Cord. 143.)

Where the trial of an action discloses misconduct, the court will order the solicitor to show cause why he should not be struck off the roll: (*Cave v. Cave*, 43 L. T. Rep. N. S. 158; 28 W. R. 798.)

In such a case the court communicates with the official solicitor, who instructs counsel to move for leave to serve notice of the motion to show cause: (*Cave v. Cave*, *sup.*)

(3) Notice of Motion.

Where application is intended to be made to any court for an order or rule to strike the name of any . . . solicitor (not being [a] solicitor making the application) off the roll . . . or for an order or rule to compel him to answer the matters of an affidavit, notice in writing shall be given to the registrar [of solicitors] of such intended application fourteen clear days at the least before such application shall be made: (37 & 38 Vict. c. 68, s. 7.)

The notice of the intended motion should be entitled in the action, if any, and in the matter of the solicitor: (Cord. 143-4.)

It must be served personally on the solicitor unless he is keeping out of the way, when substituted service at his last known place of abode will be ordered: (Cord. 145; *Re a Solicitor*, W. N. 1880, p. 36.)

If the motion is to be made within the last four days of the sittings, fourteen clear days' notice must be given to the solicitor: (*Id.*)

(4) Evidence.

The motion must be supported by affidavits which must charge the guilt explicitly, and not merely state suspicious facts: (Cord. 144.)

Copies of all affidavits intended to be used in support of [the] application shall be delivered to the registrar with the notice: (37 & 38 Vict. c. 68, s. 8; *sup.* (3).)

The court will not entertain any . . . application, except upon production of an affidavit proving that the notice required by [the] Act has been duly given, and that copies of all such affidavits have been duly delivered to the registrar: (37 & 38 Vict. c. 68, s. 9.)

In cases of conviction, an examined copy of the conviction must be produced: (Cord. 145.)

The affidavits should be entitled in the action, if any, and in the matter of the solicitor: (Cord. 144.)

The applicant is not entitled as of right to see the solicitor's affidavits in reply: (*Id.*)

(5) Motion to Show Cause.

In cases of mere suspicion, the application is made, in the first instance, for an order to answer matters in an affidavit: (Cord. 141.)

The application is by motion to show cause why the solicitor should not answer matters alleged against him in an affidavit, or why he should not be struck off the roll: (Cord. 144; 19 S. J. 635.)

It is not usual to mention the Solicitor's name: (*Id.*)

The Registrar may appear by counsel upon the hearing of any such application, and upon any other proceedings arising out of or in reference to the application: (37 & 38 Vict. c. 68, s. 10.)

(6) Order Nisi.

The order is *nisi* in the first instance: (*Re an Attorney*, 19 S. J. 635.)

(7) Showing Cause.

Where the solicitor is a convict, he may appear by solicitor or in person under *habeas corpus*: (Cord. 145.)

The registrar . . . may apply to the court to make absolute any rule *nisi* which may have been granted by the court in the matter of such application, or to make an order that the name of the solicitor be struck off the roll of solicitors of the said court, or, as the case may be, to order the solicitor to answer the matters of the affidavit, or such other order as to the court may seem fit (37 & 38 Vict. c. 68, s. 10.)

(8) Reference to Chambers.

The matter is frequently referred to chambers for report, and if additional evidence is given after the report, it will be referred back if necessary: (Cord. 145; 24 S. J. 73.)

The court will not at the hearing go behind the report: (*Id.*)

(9) Order Absolute.

When no cause is shown, the applicant should move *ex parte* on an affidavit of service, and the registrar's certificate of no cause shown, to make the order absolute: (Dan. 1439.)

The order cannot be made in the alternative, why the solicitor should not answer matters in an affidavit, or why he should not be struck off the roll; or that he should pay a sum of money or answer matters in an affidavit; but it may combine an order for payment and also to show cause: (Cord. 145.)

When the solicitor does not answer the matter of an affidavit, an order to show cause why he should not be struck off may be granted: (*Id.*)

When the solicitor answered incompletely, the court only enlarged the rule, to give the client the opportunity of making a further application: (Cord. 146.)

In some cases suspension only is ordered: (Cord. 142-3, 146; *Cave v. Cave, sup.*)

Where [the] court shall, upon motion, have ordered or directed a rule (whether *nisi* or absolute) or order to be drawn up for striking the name of [any] solicitor off the roll . . . or for compelling [a] solicitor to answer the matters of an affidavit, and such rule shall not have been drawn up by or on behalf of the person applying for the same within one week after the order or direction for drawing up the same shall have been made or given, it shall be lawful for the registrar to cause the rule or order to be drawn up, and all future proceedings thereupon shall be had and taken as if the application for the rule or order had in the first instance been made to the court by the registrar: (37 & 38 Vict. c. 68, s. 11.)

Where the name of any . . . solicitor is ordered to be struck off the roll . . . on the application of any other person, the rule or order for that purpose shall forthwith, and before the same is acted upon, be produced to the registrar: (23 & 24 Vict. c. 127, s. 24.)

All orders made by the High Court of Justice or the Court of Appeal, or any division or judge thereof, for striking any solicitor off the roll, or for suspending any solicitor from practice, or for re-admitting any solicitor or restoring the name of any solicitor to the roll, or for altering the name of any solicitor on the roll, or for any other purpose involving any alteration in or addition to the roll of the solicitors of the Supreme Court, shall be filed with the clerk of the petty bag, who shall thereupon make such entry on or alteration in the said roll as may be directed by such order, and inform the registrar of solicitors thereof: (Rules of 2nd Nov. 1875.)

It shall be lawful for the court to order the costs, charges, and expenses of the registrar of or relating to any of the matters aforesaid, to be paid by the solicitor against whom any such application is made or was intended to be made, or by the person by or on whose behalf the application is made or was intended to be made, or partly by the one and partly by the other of them: (37 & 38 Vict. c. 68, s. 10.)

4. RE-ADMISSION.

(a) *Where Allowed.*

In cases of misappropriation of money, it is a condition precedent to restoration, that the solicitor should have repaid the money, or at least made all the restitution in his power: and in the case of graver offences restoration will not be ordered: (see Cord. 146-7.)

(b) *Notice of Application.*

On an application to re-admit a solicitor of the Supreme Court who has been struck off the roll . . . the applicant shall, six weeks before the application is intended to be made, give notice thereof, as in the case of an original admission: (Rules of 2nd Nov. 1875.)

(c) *Affidavits.*

The affidavits in support of such application shall be filed at the Petty Bag Office, and a copy thereof shall at the same time be left with the Clerk of the Petty Bag, to be delivered by him to the Registrar of Solicitors: (*Id.*)

(d) *Petition.*

Any application for re-admission shall be by petition to the Master of the Rolls, to be presented to the Petty Bag Office without the payment of any fee, and a copy of such petition shall be served on the Registrar of Solicitors not less than fourteen days before the same shall be heard. On hearing such petition the Master of the Rolls may dispose of the same, or, if he shall think fit, may refer the same to any other division of the High Court of Justice: (*Id.*)

(e) *Order.*

The order for such re-admission . . . shall (if made) be drawn up (as the Master of the Rolls shall direct) on reading such affidavits, and an affidavit of such copies having been left and notices given in compliance with this order: (*Id.*)

As to filing the order, see *sup.*

All application to dispense with any rule or rules as to any re-admission . . . shall be made to the Master of the Rolls in such manner as he shall from time to time direct: (Rules of Nov. 2nd, 1875.)

5. TAKING OUT AND RENEWING CERTIFICATES.

If any solicitor of the Supreme Court, after having at any time taken out a stamped certificate, neglects for a whole year after the expiration thereof to renew the same for the following year, the registrar shall not afterwards grant a certificate to such solicitor, except under an order of the Master of the Rolls, and it shall be lawful for the Master of the Rolls to direct the registrar to issue a certificate to such person on such terms and conditions as he may think fit: (23 & 24 Vict. c. 127, s. 23; 40 & 41 Vict. c. 25.)

Six weeks' notice must be given, and the affidavits must be filed, and a copy left, as in the case of re-admission: (Rules of Nov. 2nd, 1875; see *sup.* 4.)

No petition or summons is necessary: (Dan. Forms, 1123.)

The order for such . . . taking out or renewal shall (if made) be drawn up (as the Master of the Rolls shall direct) on reading such affi-

davits, and an affidavit of such copies having been left, and notices given in compliance with [the] order: (Rules of 2nd Nov. 1875.)

Upon an application to dispense with the required notice of intention to take out or renew a certificate, a summons shall be served on the Registrar of Solicitors, calling on him to show cause within ten days why such taking out or renewal of certificate should not be allowed; and if no cause be shown to the satisfaction of the Master of the Rolls, he may, if he shall think proper, make an order for allowing such certificate to be issued: (*Id.*)

An application to dispense with any rule, or rules, as to any . . . taking out or renewal of certificates shall be made to the Master of the Rolls in such manner as he shall from time to time direct: (Rules of 2nd Nov. 1875.)

6. APPEAL FROM REFUSAL OF CERTIFICATE.

In case the Registrar shall decline to issue [a] certificate . . . the party . . . applying for the same . . . shall and may apply to the Master of the Rolls, who [may] make such order in the matter as shall be just, and . . . order payment of costs by and to either of the parties, if [he] shall think fit: (6 & 7 Vict. c. 78, s. 24.)

III. RETAINER AND AUTHORITY.

1. HOW SOLICITOR RETAINED.

Before the name of any person shall be used in any suit to be instituted in the . . . court, as next friend of any infant, married woman, or other party, or as relator in any information, such person shall sign a written authority to the solicitor for that purpose, and such authority shall be filed with the [writ]: (15 & 16 Vict. c. 86, s. 11.)

This section does not apply to petitions: (*Re Cartwright*, 8 W. R. 492.)

Save as above, a solicitor can be appointed by parol, but it is at his own risk: (Cord. 47.)

A general authority to act as solicitor does not justify the commencement of proceedings: (Seton, 636.)

A country solicitor authorised to commence proceedings may appoint a town agent: (Cord. 48, citing *Solley v. Wood*, 16 Beav. 370.)

A suit may be defended by a solicitor under a merely general authority: (Seton, 636; Dan. 260, 456; *Heinrich v. Sutton*, L. Rep. 6 Ch. App. 220.)

A retainer may be implied, as by the receipt of a fund out of court produced by an action: (Cord. 47; *Allen v. Bone*, 4 Beav. 493.)

But, if the authority is disputed, it is for the solicitor to prove it: (*Allen v. Bone*, *sup.*; *Bird v. Harris*, W. N. 1880, p. 166; 70 L. T. 25.)

The mere fact that the plaintiff knows that he has been made co-plaintiff, and has taken no active steps to have his name withdrawn, will not amount to acquiescence (*Hall v. Laver*, 1 Hare, 571); nor does payment into court in an action on a solicitor's bill admit retainer, so as to charge the defendant beyond the amount paid in: (Cord. 48.)

An authority to sue in the name of another under a power of attorney includes the appointment of a solicitor: (Cord. 49.)

A next friend of a married woman must act by a solicitor: (*Swann v. Swann*, 43 L. T. Rep. N. S. 530.)

2. COMMENCING PROCEEDINGS WITHOUT AUTHORITY.

Where a solicitor has commenced an action in the name of a plaintiff without authority, the plaintiff should serve notice of motion on the defendant, and on the solicitor, that the action may be dismissed, and that the solicitor may pay the costs of the plaintiff as between solicitor and client, and of the defendant as between party and party: (*Newbiggin-by-*

the Sea Gas Company v. Armstrong, L. Rep. 13 Ch. Div. 310; 41 L. T. Rep. N. S. 637; 49 L. J. 231, Ch.; 28 W. R. 217.)

For the form of order, see *Nurse v. Durnford*, L. Rep. 13 Ch. Div. 768; 41 L. T. Rep. N. S. 611; 49 L. J. 229, Ch.

A defendant may object that the action is brought without the authority of the nominal plaintiff: (see cases cited in *Turquand v. Fearon*, L. Rep. 4 Q. B. Div. 282.)

3. JOINT OR SEVERAL.

Each of several defendants employing one solicitor may on his retainer be liable for his own costs only, or all or several may be liable jointly, or one may have made himself liable for his own and another party's costs. If the liability be several the solicitor must charge against the client all the work he does for him severally, and his proportion of the several charges which are applicable to him and others. But if the liability be joint, the solicitor makes out one joint bill against all the clients, and his proceedings must be against them jointly: (see the taxing master's certificate in *Re Colquhoun*, 5 D. M. & G. 35.)

Where several defendants retain the same solicitor, unless a joint retainer is shown, each of them can only be charged with his proportion of the general costs of the proceedings taken on behalf of all: (*Re Colquhoun*, *sup.*)

Where two executors jointly retain a solicitor each is liable for all the costs, but is entitled to repayment out of the estate: (*Watson v. Row*, L. Rep. 18 Eq. 680.)

As to what amounts to a joint, and what to a separate, retainer, see *Watson v. Row*, *sup.*; *Re Allen*, L. Rep. 11 Ch. Div. 244.

Separate liability for costs must be set up by the clients at the trial, and cannot be raised for the first time on taxation: (*Burridge v. Bellew*, 32 L. T. Rep. N. S. 807.)

4. RETAINER BY LIQUIDATOR.

The solicitor appointed by an official liquidator has no claim on him personally for winding-up costs, though the liquidator has obtained an order for taxation and payment by himself: (*Ex parte Watkin*, L. Rep. 1 Ch. Div. 130.)

When the liquidator has been ordered to pay costs out of the assets, they are payable in priority to costs of winding-up: (*Re Home Investment Society*, L. Rep. 14 Ch. Div. 167.)

IV. CHANGING SOLICITOR.

A party suing or defending by a solicitor shall not be at liberty to change his solicitor in any cause or matter without an order of the court for that purpose, which may be obtained by motion or petition as of course; and until such order is obtained and served, and notice thereof given to the [Master of the Supreme Court], the former solicitor shall be considered the solicitor of the party: (C. O. 3, r. 3.)

Special orders are necessary in the case of special circumstances: (Cord. 65-6.)

Where the solicitor in a cause had been appointed by deed between the party and the solicitor, an order of course to change the solicitor was discharged with costs: (*Jenkins v. Bryant*, 3 Drew. 70, cited Jarm. 950.)

An order is irregular if obtained by one or more of several co-plaintiffs, who have jointly retained a solicitor: (Wms. Pet. 223.)

The order does not give to the solicitor a right to insist, as against his client, upon acting in the cause until removed by the order of the court: (*Ward v. Swift*, 6 Hare, 309.)

This order is necessary when the solicitor enters into partnership, if the name of the new partner is intended to be used (*Muttlebury v. Haywood*, 8 Jur. 1085); or where a solicitor desires to change his London agent (Dan. 1723) but not upon the death of a solicitor in a cause: (*Whalley v. Whalley*, 22 L. J. 632; 17 Jur. 254.)

A defendant to whose separate account a sum of money has been carried may, without order, petition for its payment out of court by a solicitor who was not his solicitor in the cause: (*Waddilove v. Taylor*, 12 Jur. 598, cited Jarm. 950.)

An order is not necessary when a solicitor enters into partnership subsequently to his appointment as solicitor to the party (Wms. Pet. 221-2); or where a party sues or defends in person and afterwards appoints a solicitor: (Dan. 1725.)

Where there has been a change of solicitors without order, service upon the old solicitors is regular: (*Wright v. King*, 9 Beav. 161; *Davidson v. Leslie*, Id. 104; *Grice v. Grice*, 32 L. J. 134, P. & M.)

In the case of death notice of the new appointment should be given to the other parties, and at the Central Office: (Dan. 1725.) If no new solicitor is appointed, and the party does not obtain an order to sue in person, the other parties may sue out a *subpœna* to name a new solicitor: (Cord. 65.)

The form of *subpœna* is given in Sched. E. 5 to the Consolidated Orders.

Where a defendant's solicitor died, and the plaintiff obtained an order that he might name a new one, which he failed to do, the court directed the accounts to be taken in his absence: (*Dean v. Lethbridge*, 26 Beav. 397.)

The representatives of a deceased plaintiff or any new plaintiff need not employ the former solicitor, and no order to appoint a new one is necessary, but notice of the appointment must be given to the other parties, and at the central office: (Dan. 1725.)

The order for changing a solicitor contains no provision as to the payment of the solicitor's costs: (*Grant v. Holland*, L. Rep. 3 C. P. Div. 180; and see *post*, V., 7.)

V. COSTS.

1. GENERAL RULES.

[See COSTS.]

2. SPECIAL AGREEMENTS.

(a) *Power to Make.*

A solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such solicitor, whether as solicitor or as an advocate or conveyancer, either by a gross sum, or by commission or percentage, or by salary or otherwise, and either at the same, or a greater, or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this Act contained: (33 & 34 Vict. c. 28, s. 4.)

In the construction of [the] Act, unless where the context otherwise requires. . . .

"Person" includes a corporation; [and] "Client" includes any person who, as a principal, or on behalf of another person, retains or employs, or is about to retain or employ, a solicitor, and any person who is or may be liable to pay the bill of a solicitor for any services, fees, costs, charges, or disbursements: (33 & 34 Vict. c. 28, s. 3.)

The Act does not apply to accounts between country solicitors and their town agents : (*Ward v. Eyre*, L. Rep. 15 Ch. Div. 130; 49 L. J. 657, Ch.; 28 W. R. 712; 43 L. T. Rep. N. S. 525.)

(b) *To be Signed by both Parties.*

The agreement must be signed by both parties : (Cord. 164.)

It is not sufficient if signed only by the solicitor, though assented to by the client : (*Re Lewis*, L. Rep. 1 Q. B. Div. 724.)

Letters or an account stated signed by the client are not enough : (*Re Vant*, Cord. 164; *Re Fernandes*, W. N. 1878, p. 57; 22 S. J. 348.)

Where there is a signed agreement within the Act, the provisions of 6 & 7 Vict. c. 73 [see COSTS] as to signing and delivery of a bill do not apply : (33 & 34 Vict. c. 28, s. 15.)

(c) *Effect.*

Such an agreement shall be deemed to exclude any further claim of the . . . solicitor beyond the terms of the agreement in respect of any services, fees, charges, or disbursements in relation to the conduct and completion of the business in reference to which the agreement is made, except such services, fees, charges, or disbursements, if any, as are expressly excepted by the agreement : (33 & 34 Vict. c. 28, s. 6.)

A provision in any such agreement that the . . . solicitor shall not be liable for negligence, or that he shall be relieved from any responsibility to which he would otherwise be subject as such . . . solicitor, shall be wholly void : (33 & 34 Vict. c. 28, s. 7.)

Such an agreement shall not affect the amount of, or any rights or remedies for the recovery of, any costs recoverable from the client by any other person, or payable to the client by any other person, and any such other person may require any costs payable or recoverable by him to or from the client to be taxed according to the rules for the time being in force for the taxation of such costs, unless such person has otherwise agreed : (33 & 34 Vict. c. 28, s. 5.)

Provided always that the client who has entered into such agreement shall not be entitled to recover from any other person under any order for the payment of any costs which are the subject of such agreement more than the amount payable by the client to his own . . . solicitor under the same : (33 & 34 Vict. c. 28, s. 5.)

Nothing in this Act contained shall be construed to give validity to any purchase by any . . . solicitor of the interest, or any part of the interest, of his client in any suit, action, or other contentious proceeding to be brought or maintained, or to give validity to any agreement by which a solicitor retained or employed to prosecute any suit or action, stipulates for payment only in the event of success in such suit, action, or proceeding : (33 & 34 Vict. c. 28, s. 11.)

Nothing in this Act contained shall give validity to any disposition, contract, settlement, conveyance, delivery, dealing, or transfer which may be void or invalid against a trustee or creditor in bankruptcy, arrangement, or composition, under the provisions of the laws relating to bankruptcy : (33 & 34 Vict. c. 28, s. 12.)

(d) *Taxation.*

(1) *General Rule.*

Except as in this part of this Act provided the bill of a . . . solicitor for the amount due under an agreement made in pursuance of the provisions of this Act shall not be subject to any taxation, nor to the provisions of 6 & 7 Vict. c. 73; and the Acts amending the same, respecting the signing and delivery of the bill of an attorney or solicitor : (33 & 34 Vict. c. 28, s. 15.)

(2) Where Costs incurred in Litigation.

Provided always that, when any such agreement shall be made in respect of business done, or to be done, in any action at law or suit in equity, the amount payable under the agreement shall not be received by the . . . solicitor until the agreement has been examined and allowed by a taxing officer of a court having power to enforce the agreement: (33 & 34 Vict. c. 28, s. 4.)

If it shall appear to such taxing officer that the agreement is not fair and reasonable, he may require the opinion of a court, or a judge, to be taken thereon by motion or petition: (33 & 34 Vict. c. 28, s. 4.)

The court's opinion cannot be taken until some money is payable under the agreement: (L. Rep. 1 Ch. Div. 573.)

Such court or judge shall have power either to reduce the amount payable under the agreement, or to order the agreement to be cancelled, and the costs, fees, charges, and disbursements in respect of the business done, to be taxed in the same manner as if no such agreement had been made: (33 & 34 Vict. c. 28, s. 4.)

(3) On Agreement by Guardian, Trustee, or Committee.

Where any such agreement is made by the client in the capacity of guardian, or of trustee, under a deed or will, or of committee of any person or persons whose estate or property will be chargeable with the amount payable under such agreement, or with any part of such amount, the agreement shall, before payment, be laid before the taxing officer of a court having jurisdiction to enforce the agreement: (33 & 34 Vict. c. 28, s. 10.)

Such officer shall examine the same, and may disallow any part thereof, or may require the direction of the court or a judge to be taken thereon by motion or petition: (33 & 34 Vict. c. 28, s. 10.)

If, in any such case, the client pay the whole, or any part, of the amount payable under the agreement, without the previous allowance of such officer, or court, or judge, as aforesaid, he shall be liable at any time to account to the person whose estate or property is charged with the amount paid, or with any part thereof, for the amount so charged: (33 & 34 Vict. c. 28, s. 10.)

If, in any such case, the . . . solicitor accept payment without such allowance, any court which would have had jurisdiction to enforce the agreement may, if it thinks fit, order him to refund the amount so received by him under the agreement: (33 & 34 Vict. c. 28, s. 10.)

(4) After Payment.

When the amount agreed for under any such agreement has been paid by or on behalf of the client, or by any person chargeable with or entitled to pay the same, any court or judge having jurisdiction to examine and enforce such an agreement, may, upon application by a person who has paid such amount, within twelve months after the payment thereof, if it appears to such court or judge that the special circumstances of the case require the agreement to be re-opened, re-open the same, and order the costs, fees, charges, and disbursements to be taxed, and the whole, or any portion, of the amount received by the . . . solicitor to be repaid by him on such terms and conditions as to the court or judge may seem just: (33 & 34 Vict. c. 28, s. 10.)

(5) On Solicitor's Death or Disability [see *post* (f) (1).](6) On Change of Solicitor [see *post* (f) (2).](e) *How Enforced or Set Aside.*(1) *Motion or Petition.*

No action or suit shall be brought or instituted upon any such agree-

ment; but every question respecting the validity or effect of any such agreement may be examined and determined, and the agreement may be enforced or set aside, without suit or action, on motion or petition of any person, or the representative of any person, a party to such agreement, or being or alleged to be, liable to pay, or being or claiming to be entitled to be paid, the costs, fees, charges, or disbursements in respect of which the agreement is made by the court in which the business, or any part thereof, was done, or a judge thereof, or if the business was not done in any court, then, where the amount payable under the agreement exceeds 50*l.*, by any Superior Court of Law or Equity, or a judge thereof, and where such amount does not exceed 50*l.*, by the judge of a County Court which would have jurisdiction in an action upon the agreement: (33 & 34 Vict. c. 28, s. 8.)

The prohibition against bringing an action applies only to enforcing payment, not to the entire agreement, and an action lies against the client for not employing the solicitor pursuant to the agreement: (*Rees v. Williams*, L. Rep. 10 Ex. 200.)

The other proceedings can only be taken when the agreement is admitted. If the client denies the existence of the agreement, not its validity, the question must be determined on a summons under 6 & 7 Vict. c. 73: (*Re Vant*, Cord. 166; see COSTS.)

(2) Order to Enforce.

Upon any such motion or petition as aforesaid, if it shall appear to the court or judge that such agreement is in all respects fair and reasonable between the parties, the same may be enforced by such court or judge by rule or order in such manner, and subject to such conditions, if any, as to the costs of such motion or petition, as such court or judge may think fit: (33 & 34 Vict. c. 28, s. 9.)

(3) Order to Set Aside.

If [upon such motion or petition] the terms of such agreement shall not be deemed by the court or judge to be fair and reasonable, the same may be declared void, and the court or judge shall thereupon have power to order such agreement to be given up to be cancelled, and may direct the costs, fees, charges, and disbursements incurred or chargeable in respect of the matters included therein to be taxed in the same manner and according to the same rules as if such agreement had not been made: (33 & 34 Vict. c. 28, s. 9.)

The court or judge may also make such order as to the costs of and relating to such motion or petition, and the proceedings thereon, as to the said court or judge may seem fit: (33 & 34 Vict. c. 28, s. 9.)

(f) Part Performance.

(1) Death or Disability of Solicitor.

Where a solicitor has made an agreement with his client in pursuance of the provisions of this Act, and anything has been done by such . . . solicitor under the agreement, and, before the agreement has been completely performed by him, such . . . solicitor dies or becomes incapable to act, an application may be made to any court which would have jurisdiction to examine and enforce the agreement by any party thereto, or by the representatives of any such party, and such court shall thereupon have the same power to enforce or set aside such agreement, so far as the same may have been acted upon, as if such death or incapacity had not happened: (33 & 34 Vict. c. 28, s. 13.)

And such court, if it shall deem the agreement to be in all respects fair and reasonable, may order the amount due in respect of the past performance of the agreement to be ascertained by taxation: (*Id.*)

The taxing officer, in ascertaining such amount, shall have regard, so far as may be, to the terms of the agreement, and payment of the amount found to be due may be enforced in the same manner as if the agreement had been completely performed by the . . . solicitor: (33 & 34 Vict. c. 28, s. 13.)

(2) Change of Solicitor.

If, after any such agreement as aforesaid shall have been made, the client shall change his . . . solicitor before the conclusion of the business to which such agreement shall relate (which he shall be at liberty to do notwithstanding such agreement) the . . . solicitor, party to such agreement, shall be deemed to have become incapable to act under the same within the meaning of sect. 13 . . . and upon any order being made for taxation of the amount due to such . . . solicitor in respect of the part performance of such agreement, the court shall direct the taxing master to have regard to the circumstances under which such change of . . . solicitor has taken place: (33 & 34 Vict. c. 28, s. 14.)

Upon such taxation the . . . solicitor shall not be deemed entitled to the full amount of the remuneration agreed to be paid to him, unless it shall appear that there has been no default, negligence, improper delay, or other conduct on his part affording reasonable ground to the client for such change of . . . solicitor: (33 & 34 Vict. c. 2, s. 14.)

3. SECURITY FOR CHARGES, &c.

An attorney or solicitor may take security from his client for his future fees, charges, and disbursements, to be ascertained by taxation or otherwise: (33 & 34 Vict. c. 28, s. 16.)

4. ALLOWING SPECIAL REMUNERATION.

Upon any taxation of costs, the taxing officer may, in determining the remuneration, if any, to be allowed to the attorney or solicitor for his services, have regard, subject to any general rules or orders hereafter to be made, to the skill, labour, and responsibility involved: (33 & 34 Vict. c. 28, s. 18.)

5. ALLOWING INTEREST.

(a) On Taxation.

Subject to any general rules or orders hereafter to be made, upon every taxation of costs, fees, charges, or disbursements, the taxing officer may allow interest at such rate, and from such time as he thinks just on moneys disbursed by the . . . solicitor for his client, and on moneys of the client in the hands of the . . . solicitor, and improperly retained by him: (33 & 34 Vict. c. 28, s. 17.)

Interest cannot be allowed on disbursements made before the passing of the Act: (*Ward v. Eyre*, L. Rep. 15 Ch. Div. 130; 49 L. J. 657, Ch.; 28 W. R. 712; 43 L. T. Rep. N. S. 525.)

(b) On Pronouncing Judgment or Order.

Whenever a [judgment] or order is made by the court . . . in which the payment of any costs previously taxed, either in the suit or proceeding in which such [judgment] or order is made, or in any other suit or proceeding, is ordered, and whether the certificate of such previous taxation have been made before the passing of this Act, or be made thereafter, it shall be lawful for the court or judge making such [judgment] or order, to order and direct the amount of such costs, as taxed, including the costs of taxation, as ascertained by the said certificate, to be paid, with interest thereon at the rate of four pounds per centum per annum, from the date of the certificate, the amount of such interest to be verified by affidavit and to be payable and recoverable out of the same fund or in the same manner as the amount of such costs: (23 & 24 Vict. c. 127, s. 27.)

6. LIEN.

(a) *General.*

A solicitor's general lien, for all costs due to him, is a mere passive right of retainer giving no right to a sale: (Cord. 211.)

It extends to all documents or other property coming to the solicitor in his character as such: (Fisher, 201; *Ex parte Newland*, L. Rep. 4 Ch. Div. 515.)

If, in the general course of dealing, the client from time to time hands papers to the solicitor, and does not get them again when the occasion that required them is at an end, the conclusion is that they are left with him on the general account: (Fisher, 202; *Ex parte Calvert*, L. Rep. 3 Ch. Div. 317.)

The lien is binding only to the extent of the client's interest in the deeds or property: (Fisher, 203.)

It is not lost by the possession being transferred to an agent or other person subject to the lien; by sale *pendente lite*; or by the fact that the debt is statute barred: (Cord. 211.)

See further, Fisher, 201-213; Cordery, 211-220.

(b) *Particular.*

A solicitor has a particular lien, independently of statute, on the judgment or property recovered by his exertions for the actual costs of recovery: (Cord. 211.)

This lien is only available against the balance ultimately payable to the client after adjusting the rights of the parties: (Cord. 221; Seton, 642.)

And set-off of costs in the same proceedings is allowed although the solicitor's lien may be thereby prejudiced, but not of costs in another action: (*Robarts v. Bueé*, L. Rep. 8 Ch. Div. 198; *Cattell v. Simons*, 6 Beav. 304; *Throckmorton v. Crowley*, L. Rep. 3 Eq. 196.)

The lien does not extend to real estate: (*Shaw v. Neale*, 6 H. of L. Cas. 581.)

This lien may be protected by a stop order; by *ex parte* injunction restraining payment of dividends to the client till the solicitor's petition to establish his lien can be served; by an action for fees: (Seton, 642-3.)

The court will not interfere with a *bonâ fide* compromise, although the solicitor's lien is prejudiced thereby, and although he has given notice of his claim: (Fisher, 164.)

Where the compromise is made collusively to deprive the solicitor of his lien, he may apply by summons, supported by affidavit showing the amount claimed, for payment of his costs and the costs of the summons by the plaintiff or defendant: (Cord. 225; Fisher, 165.)

In the case of a *bonâ fide* compromise the lien attaches to the money payable under it, though the issue of the action is unfavourable to the client, and the solicitor may retain the money if it pass through his hands: (Cord. 224.)

7. CHARGE.

(a) *Jurisdiction.*(1) *Generally.*

In every case in which [a] solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such solicitor entitled to a charge upon the property recovered or preserved: (23 & 24 Vict. c. 127, s. 28.)

Upon such declaration being made, such solicitor shall have a charge upon and against and a right to payment out of the property, of whatever

nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding: (*Id.*)

It shall be lawful for such court or judge to make such order or orders for taxation of, and for raising and payment of such costs, charges, and expenses out of the said property as to such court or judge shall appear just and proper: (*Id.*)

All conveyances and acts done to defeat, or which shall operate to defeat, such charge or right shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void, and of no effect as against such charge or right: (*Id.*)

No such order shall be made by any such court or judge in any case in which the right to recover payment of such costs, charges, and expenses is barred by any Statute of Limitations: (*Id.*)

(2)* Over what Property.

The section extends to real and personal property of all kinds, corporeal and incorporeal (*Foxon v. Gascoigne*, L. Rep. 9 Ch. App. 654); including a *chose in action*: (*Birchall v. Pugin*, L. Rep. 10 C. P. 397.)

The section does not extend to an easement: (*Foxon v. Gascoigne*, *sup.*)

The particular property recovered or preserved only can be charged (*Ex parte Thompson*, 3 L. T. Rep. N. S. 317); but it is immaterial that the client who employed the solicitor is not the beneficial owner of the whole property, and the charge will not affect the partial interest only, but the whole property recovered: (*Bulley v. Bulley*, L. Rep. 8 Ch. Div. 479.)

Where the person who employed the solicitor was one of four persons who took as tenants in common in tail with cross remainders over, and died before the order was made, the solicitor was held not entitled to a charge on any part of the estate: (*Berrie v. Howitt*, L. Rep. 9 Eq. 1; not approved in *Bulley v. Bulley*, *sup.*)

(3) What is Recovery or Preservation?

The following have been held to be "recovery:"

Ordinary foreclosure decree (*Wilson v. Round*, 4 Giff. 416; 9 L. T. Rep. N. S. 675);

Appointment of receiver adversely, or by consent, though the action was afterwards compromised (*Twynam v. Porter*, L. Rep. 11 Eq. 181; *Bailey v. Birchall*, 2 H. & M. 371);

Order under Declaration of Titles Act (*Pritchard v. Roberts*, L. Rep. 17 Eq. 222);

Judgment in an action for detinue, though the proceeds of the goods were not recovered in the action, but afterwards paid into court in an administration action (*Catlow v. Catlow*, L. Rep. 2 C. P. Div. 362);

Successful action against an incumbrancer whose incumbrance was valueless, but, before action, was a cloud on the plaintiff's title (*Jones v. Frost*, L. Rep. 7 Ch. App. 773);

Recovery of land in ejectment (*Ex parte Seaman*, 10 Jur. N. S. 593);

Proceedings under which the property was managed and retained (*Baile v. Baile*, L. Rep. 13 Eq. 497.)

Where the ordinary decree was made in an administration action against a trustee, and an order appointing new trustees was made, and afterwards no further proceedings were taken except by bringing in some accounts under the decree, it was held that no property had been recovered: (*Pinkerton v. Easton*, L. Rep. 16 Eq. 490.)

The following have been held to be "preservation:"

Establishing a defendant's rights in a foreclosure action, whereby the chance of foreclosure was lessened (*Scholefield v. Lockwood*, L. Rep. 7 Eq. 83);

Judgment in an administration action, though adverse to the client (*Smith v. Winter*, 18 W. R. 447);

Judgment dismissing with costs action to set aside post-nuptial settlement: (*Re Keane*, L. Rep. 12 Eq. 115.)

Successfully resisting a mandatory injunction in a light and air case is not preservation: (*Foxon v. Gascoigne*, *sup.*)

(4) For what Costs.

The costs must have been recovered in the particular proceedings in which the property was recovered or preserved (*Lucas v. Peacock*, 9 Beav. 177); except as between the town agent and the country solicitor: (*Lawrence v. Fletcher*, *inf.*)

(b) Application.

(1) By whom made.

Where costs have been ordered to be paid to a solicitor personally out of a fund in court, he cannot afterwards obtain a charging order (*Re Viney*, 18 L. T. Rep. N. S. 321); unless he has been discharged from being solicitor: (*Pilcher v. Arden*, *Re Brook*, L. Rep. 7 Ch. Div. 318; 38 L. T. Rep. N. S. 111; 47 L. J. 479, Ch.; 26 W. R. 273.)

The application may be made by the legal personal representatives of the solicitor (*Baile v. Baile*, L. Rep. 13 Eq. 497); or by a London agent in respect of an unascertained balance due to him by the country solicitor: (*Tardrew v. Howell*, 5 L. T. Rep. N. S. 276; 3 Giff. 381.)

And, so far as the country solicitor is concerned, the lien is general, and not confined to the costs in the proceedings in which the property has been recovered or preserved: (*Lawrence v. Fletcher*, L. Rep. 12 Ch. Div. 858; 41 L. T. Rep. N. S. 207.)

It is immaterial that the solicitor has been discharged from being solicitor in the cause: (*Pilcher v. Arden*, *sup.*)

(2) Against whom made.

An order may be made against a married woman's separate estate, though settled without power of anticipation: (*Re Keane*, L. Rep. 12 Eq. 115.)

A charge cannot be obtained against the property of an infant during his infancy, but may, on his coming of age, if he has adopted the action: (*Baile v. Baile*, *sup.*; *Bonser v. Bradshaw*, 4 Giff. 260.)

In the meantime an action for declaration of a lien may be sustained: (*Pritchard v. Roberts*, L. Rep. 17 Eq. 222.)

The Act gives a charge on the property preserved, irrespective of any question as to who is the owner of it, and the fact that the client by whom the solicitor was retained is not the beneficial owner of the whole property is immaterial. Therefore, where a solicitor has been retained by a person interested in an estate, as to two-fifths in his own right, and as to three-fifths as a trustee for others, and the whole estate has been preserved, the court will make an order under this statute, as against the *cestuis que trustent* charging the whole property preserved; and this charge will not be incumbered or affected with any equities that may exist between such trustee and his *cestuis que trustent*, even though the trustee were a defaulting trustee or bankrupt: (*Bulley v. Bulley*, L. Rep. 8 Ch. Div. 479; but see *Berrie v. Howitt*, *sup.*)

(3) In what Division made.

The application must be made to the division in which the action is

pending: (*Re Fiddey, Heinrich v. Sutton*, L. Rep. 6 Ch. App. 865; *Higgs v. Schrader*, L. Rep. 3 C. P. Div. 252; 47 L. J. 267, Ch.; 26 W. R. 831.)

Where an action commenced in the Chancery Division has been tried before a judge and jury, the trying judge alone can make the order: (*Owen v. Henshaw*, L. Rep. 7 Ch. Div. 385; 47 L. J. 426, C. P.; 26 W. R. 831; but see *Re Seaman, Wilson v. Hood*, 3 H. & C. 148; *Catlow v. Catlow*, L. Rep. 2 C. P. Div. 362.)

(4) When made.

The order may be made notwithstanding the client has died and his estate is the subject of an administration action: (*Re Seaman, Wilson v. Hood, sup.*)

It is no objection that the suit is no longer pending, although absolutely dismissed, or has never come to a hearing, or the property has been sold before the application: (*Jones v. Frost*, L. Rep. 7 Ch. App. 773; *Re Fiddey, sup.*)

As to the statute of limitation, see *sup.* (a) (1)

(5) How made.

The application may be by petition, motion, or summons: (Cord. 233.)

The proceedings are generally entitled in the action and in the matter of the solicitor: (*Id.*)

They need not be entitled either in the matter of the Act or of the solicitor: (*Hamer v. Giles*, L. Rep. 11 Ch. Div. 942; 41 L. T. Rep. N. S. 270; 48 L. J. 508, Ch.; 27 W. R. 834.)

The application for an order upon the interest of a party to an action in a fund in Court, is properly made by a petition in the action: (*Brown v. Trotman*, L. Rep. 12 Ch. Div. 880; 41 L. T. Rep. N. S. 179; 48 L. J. 862, Ch.; 28 W. R. 164.)

The application is usually made by petition (*Twynam v. Porter*, L. Rep. 11 Eq. 181); but an order has recently been made on summons: (*Hamer v. Giles, sup.*)

It has recently been held to be improper to serve the other parties to the action: (*Brown v. Trotman, sup.*, but see *Re Keame, sup.*)

(c) Order.

(1) Form.

The following form of order is given in Sched. H. 27 to the Rules of April, 1880:—

In the High Court of Justice.

Division.

18

No. .

Judge in Chambers.

Between

and

Plaintiff,

Defendant.

Upon hearing

day of

18, and

said

, and upon reading the affidavit of

filed the

It is ordered that the

the solicitor for the

in this action

shall have a charge upon
reference to this action.

for his costs, charges, and expenses of and in

Dated the

day of

18

(And see Seton, 643 *et seq.*)

The charging order ought not to direct a sale, but should contain a direction that either party may be at liberty to apply to the judge with reference to enforcing the charge by sale or otherwise: (*Pilcher v. Arden*; *Re Brook*, L. Rep. 7 Ch. Div. 318; 38 L. T. Rep. N. S. 111; 47 L. J. 479, Ch.; 26 W. R. 273.)

(2) Effect.

See the words of the section, *sup.* 1 (a).

The lien is binding against the client's trustee in bankruptcy, and is a first charge on assets recovered for an administratrix: (Cord. 230.)

Where an action was brought against a building society and two other defendants, in which the plaintiff claimed certain money standing in the name of one of the defendants in the books of the society, and, the defendants having obtained judgment in their favour, the solicitor of the two defendants presented a petition for a charging order on the fund, this was opposed by the building society on the ground that they had a lien on the fund for their costs, it was held, that the building society was in the position of debtor to one of the other defendants, and not of trustee, and consequently had no lien on the fund for their costs: (*Porter v. West*, 43 L. T. Rep. N. S. 569.)

Where there is a fund in court, the lien, independently of the statute and without any declaration, is an absolute first charge, and has priority over any other assignment or charging order obtained with or without notice, and with or without the solicitor's knowledge: (*Haymes v. Cooper*, 33 Beav. 431; Cord. 230; *Pilcher v. Arden*, *sup.*)

Where in an administration action the costs were ordered to be paid out to the plaintiff's solicitor out of a specified fund in court, and afterwards the plaintiff changed his solicitor, the former solicitor was held entitled to a charge on the interest of his former client in the funds in court generally, notwithstanding an assignment of which the solicitor had notice: (*Pilcher v. Arden*, *sup.*)

Where the fund is in court, the solicitor need not give notice of his charge to a person about to take an assignment of the property: (*Faithfull v. Ewen*, L. Rep. 7 Ch. Div. 495; 37 L. T. Rep. N. S. 805; 47 L. J. 457, Ch.; 26 W. R. 270; followed in *Shippey v. Grey*, *inf.*)

Solicitors who act for a plaintiff in an action in which he recovers damages are entitled to a charge or lien upon such damages for their costs in the action as against a judgment creditor of the plaintiff who has obtained an *ex parte* garnishee order before such costs have been taxed, and served it: (*Shippey v. Grey*, 42 L. T. Rep. N. S. 672; 49 L. J. 524, Q. B.; 28 W. R. 877.)

When a judgment creditor of the defendant in a partnership action obtained a garnishee order *nisi* to attach all moneys in the hands of the receiver in the action appearing to be due to the defendant on taking the accounts, and on the following day, before service of the order *nisi*, the defendant's solicitors obtained, on a summons served on the receiver, a charging order intitled in the action, declaring that they were entitled to a charge for their costs upon all moneys coming to the defendant under the action, and on the next day the garnishee order *nisi* was served on the receiver, and was subsequently made absolute—it was held that the solicitors were entitled to their costs in priority to the claim of the creditor under the garnishee order both under the Act and independently of it: (*Hamer v. Giles*, *sup.*; see also *Birchall v. Pugin*, L. Rep. 10 C. P. 397; 32 L. T. Rep. N. S. 495; *The Leader*, L. Rep. 2 A. & E. 314.)

A solicitor who has obtained a charging order is not entitled to appear in the subsequent proceedings, except at his own expense: (*Mildmay v. Quicke*, L. Rep. 6 Ch. Div. 553, 556.)

If the solicitor, subsequently to a charging order, obtains a stop order, he has to pay the costs: (*Id.*)

8. REVIVING SUIT FOR COSTS.

Whenever any decree or order shall have been made for payment of costs in any suit, and such suit shall afterwards become abated, it shall be

lawful for any person interested under such decree or order to revive such suit, and thereupon to prosecute and enforce such decree or order, and so on from time to time as often as any such abatement shall happen: (33 & 34 Vict. c. 28, s. 19.)

9. RECOVERY.

(a) *In General.* [See COSTS, V., VII.]

(b) *By Uncertificated Solicitor or his Client.*

No costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as a solicitor, without being duly qualified so to act, shall be recoverable in any action, suit, or matter, by any person or persons whomsoever: (37 & 38 Vict. c. 68, s. 12.)

A person shall be deemed to be duly qualified . . . if he shall have in force at the time at which he acts as a solicitor a duly stamped certificate authorising him so to do . . . or shall have been appointed to be solicitor of the Treasury, Customs, Ireland Revenue, Post-office, or any other branch of Her Majesty's Revenues, or of any public department, including the department of the Ecclesiastical Commissioners, and of the Governors of Queen Anne's Bounty, or if he be a clerk or officer appointed to act for the solicitor for any public department as [above described]: (*Id.*)

The successful party in a legal proceeding cannot, where the solicitor employed by him was uncertificated, recover his costs and disbursements from the party otherwise liable: (*Fowler v. Monmouthshire Canal Company*, L. Rep. 4 Q. B. Div. 334.)

10. PAYMENT BY SOLICITOR.

The court has no jurisdiction to make a solicitor pay the costs of an action rendered necessary by his having blundered: (*Clark v. Girdwood*, L. Rep. 7 Ch. Div. 23; 37 L. T. Rep. N. S. 614; 47 L. J. 116, Ch.)

The court disapproves of the practice of joining solicitors, not primarily liable, as parties, to make them liable for costs: (*Barnes v. Addy*, L. Rep. 9 Ch. App. 244.)

VI. PAYMENT OF MONEY AND DELIVERY OF PAPERS.

1. JURISDICTION.

As to solicitors being officers of the Supreme Court and amenable as such to its jurisdiction, see *sup.*, I., 2.

It shall be lawful for [the court or a judge] in the same cases in which they are authorised to refer a bill (see COSTS, V.) to make such order for the delivery by any . . . solicitor, or the executor, administrator, or assignee of any . . . solicitor of such bill . . . and for the delivery up of deeds, documents, or papers in his possession, custody, or power, or otherwise touching the same, in the same manner as has heretofore been done as regards such . . . solicitor by [the] courts and judges respectively when any such business has been transacted in the court in which such order was made: (6 & 7 Vict. c. 73, s. 37.)

It is discretionary in the court whether or not to add the order as to delivering up papers: (*Ex parte Jarman*, L. Rep. 4 Ch. Div. 835.)

Where subsequent costs have been properly incurred the order for taxation will be amended so as to include both bills: (*Id.*)

In such a case the order ought to omit the order for delivery of papers: (*Id.*)

The court will, before the completion of a taxation, order the delivery up of papers, either on payment into court of the amount claimed, or on

security being given for payment, or in case it appears from the solicitor's own account that a balance is due from him to his client: (Morg. & Ch. 12; *Republic of Costa Rica v. Erlanger*, W. N. 1879, p. 7.)

If the solicitor has a lien, documents will be ordered to be delivered to a new solicitor on an undertaking to return them: (Morg. & Ch. 13.)

An undertaking to produce the papers for taxation may be required: (*Republic of Costa Rica v. Erlanger, sup.*)

Independently of the statute, the court will on payment by the client of what is due to the solicitor, summarily order the latter to deliver up deeds and papers though no cause be pending, or pay over moneys received for the client, whether the solicitor is on the roll or not at the date of the application: (Cord. 132.)

But the order will not be made to the prejudice of a solicitor's lien, or where the order would cause him to commit a contempt of court: (Cord. 133.)

2. APPLICATION.

(a) *By whom made.*

The relation of solicitor and client must exist between the solicitor and the applicant: (See cases cited Cord. 133-4.)

(b) *Against whom made.*

The order may be made against all the partners of a firm severally where the money has constructively come into the hands of the firm, but not when it is only proved to have reached the hands of one member to whom the conduct was confined; and the client cannot apply summarily against the town-agent (in the absence of fraud), or against the solicitor's trustee in bankruptcy or personal representative: (Cord. 135.)

But under the statute it is different: (see *sup.* 1.)

(c) *How made.*

The application is by motion, after notice, supported by affidavits alleging the retainer and that the act was done under it: (Cord. 136.)

The papers must be entitled in the action, if any, and in the matter of the solicitor: (*Id.*)

As to an application under the statute, see *sup.* 1.

(d) *How Order enforced.*

The order is enforceable by attachment, whether for payment or delivery: (Cord. 136; EXECUTION, XII. 1 (i); XX.)

An order under the statute may be so enforced: (*Ex parte Belton*, 25 Beav. 368; *Re Bowen*, 11 W. R. 607.)

VII. ENFORCING UNDERTAKING.

The court will summarily enforce undertakings given by a solicitor in that character, whether given in an action or not: (Cord. 136.)

The application can be made to any judge of the High Court, but if given in an action, it should be made to the division of the High Court, or in the other court, in which the action is pending: (Cord. 138.)

The application must be supported by affidavit setting out the undertaking and such other facts as will enable the court to interfere: (*Id.*)

The order will be for an attachment.

As to breach of undertaking to appear, see APPEARANCE, XIV.

If the undertaking is to pay money, an order for payment must be obtained before an attachment is applied for: (see EXECUTION, XII., XX.)

VIII. DISCLOSURE AS TO WRIT.

Every solicitor whose name shall be indorsed on any writ of summons shall, on demand in writing made by or on behalf of any defendant

who has been served therewith or has appeared thereto, declare forthwith whether such writ has been issued by him or with his authority or privity; and if such solicitor shall declare that the writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the court or a judge: (O. VII., r. 1.)

IX. DEFAULT IN PROCEEDING:

1. ENTERING APPEARANCE.

[See APPEARANCE, XIV.]

2. GIVING NOTICE OF ORDER FOR DISCOVERY OR INSPECTION.

[Where an order for discovery or inspection by a party is made] a solicitor upon whom [such] an order . . . is served . . . who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment: (O. XXXI., r. 22.)

SPECIAL CASE.

I. IN WHAT CASES STATED.

1. BY CONSENT.
2. BY ORDER.
 - (a) Generally.
 - (b) In Interpleader.
3. ON TRIAL BY JURY.
4. BY REFEREE.
5. BY ARBITRATOR.

II. PROCEEDINGS GENERALLY.

III. AGREEMENT FOR PAYMENT OF MONEY ON JUDGMENT.

IV. PREPARATION AND FORM

1. PARAGRAPHS.
2. ALLEGATIONS.
3. PRINTING.
4. SIGNING.

V. FILING.

VI. AMENDMENT.

VII. ENTRY FOR ARGUMENT.

1. LEAVE NECESSARY WHERE PARTY UNDER DISABILITY.
2. HOW MADE.
3. WHEN MADE.

VIII. DELIVERING COPIES.

1. FOR USE OF JUDGES.
2. TO PARTIES [see COPIES].

IX. HEARING.

X. JUDGMENT.

XI. EXECUTION.

XII. APPEAL.

XIII. COSTS.

I. IN WHAT CASES STATED.

1. BY CONSENT OF PARTIES.

The parties may, after the writ of summons has been issued, concur in stating the questions of law arising in the action in the form of a special case for the opinion of the Court: (O. XXXIV., r. 1.)

2. BY ORDER.

(a) Generally.

If it appear to the court or a judge, either from the statement of claim or defence or reply or otherwise, that there is in any action a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a referee or an arbitrator, the court or judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the court, either by special case or in such other manner as the court or judge may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed: (O. XXXIV., r. 2.)

The special case may be ordered at any time after appearance, but will not be ordered before claim is delivered unless it is clearly shown that the questions are of law only, or that a decision on the question of law will render it unnecessary to go into the question of fact: (*Metropolitan Board of Works v. New River Company*, L. Rep. 1 Q. B. Div. 728; 2 Q. B. Div. 67.)

The special case may only be directed when the action has not yet come on for trial: (*Pooley v. Driver*, L. Rep. 5 Ch. Div. 459.)

But the court will at the trial of an action involving questions both of law and fact, decide the question of law first, if it appears that the decision of such question may render it unnecessary to try the question of fact: (*Id.*)

The Court of Appeal will not generally interfere with the discretion of the court below in ordering a special case to be stated: (*Metropolitan Board of Works v. New River Company*, L. Rep. 2 Q. B. Div. 67.)

Questions of law as to the construction of a will, as far as relevant on the facts stated on the pleadings, have been ordered to be set down for argument as if they were stated in a special case: (*Leadbeater v. Cross*, L. Rep. 2 Q. B. Div. 18, 21.)

Only such questions of law can properly be raised by special case as must necessarily arise in the action: (*Republic of Bolivia v. National Bolivian Navigation Company*, 24 W. R. 361.)

(b) In Interpleader.

In all cases of interpleader proceedings where the question is one of law, and the facts are not in dispute, the judge shall be at liberty, at his discretion, to decide the question without directing an action or issue, and if he shall think it desirable, to order that a special case be stated for the opinion of the court: (C. L. P. A. 1860, s. 15.)

The proceedings upon such case shall, as nearly as may be, be the same as a special case stated under the Common Law Procedure Act, 1852, and [appeal] may be brought upon a judgment upon such case: (C. L. P. A. 1860, s. 16; but compare O. XXXIV., r. 7, April, 1880, cited *inf.*)

3. ON TRIAL BY JURY.

When a difficulty in point of law arises at a trial by jury, the jury may find a verdict for the plaintiff stating the facts for the opinion of the court: (Ch. Archb. 12th ed. 452.)

The special case has, in general, to be determined by the judge who tried the cause: (Ch. Archb. 13th ed. 308.)

4. BY REFEREE.

[See REFEREES, VII.]

5. BY ARBITRATOR.

[See ARBITRATION, XII., XIII.]

II. PROCEEDINGS GENERALLY.

This order [Order XXXIV.] shall apply to every special case stated in an action, or in any proceeding incidental to an action. No special case shall hereafter be stated under the Act 13 & 14 Vict. c. 35: (O. XXXIV., r. 7, April, 1880.)

The Act referred to was that under which special cases were stated in Chancery. When the rules omit to provide expressly how a step is to be taken, the former practice at common law applies.

III. AGREEMENT FOR PAYMENT OF MONEY ON JUDGMENT.

The parties to a special case may, if they think fit, enter into an agreement in writing, which shall not be subject to any stamp duty, that on the judgment of the court being given in the affirmative or negative of the question or questions of law raised by the special case, a sum of money, fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, shall be paid by one of the parties to the other of them, either with or without costs of the action, and the judgment of the court may be entered for the sum so agreed or ascertained, with or without costs, as the case may be, and execution may issue upon such judgment forthwith, unless otherwise agreed, or unless stayed on appeal: (O. XXXIV., r. 6, April, 1880.)

IV. PREPARATION AND FORM.

1. PARAGRAPHS.

Every . . . special case shall be divided into paragraphs numbered consecutively: (O. XXXIV., r. 1; *sup.* II.)

2. ALLEGATIONS.

Every . . . special case: . . . shall concisely state such facts and documents as may be necessary to enable the court to decide the questions raised thereby: (O. XXXIV., r. 1; *sup.* I.)

3. PRINTING.

Every special case shall be printed by the plaintiff: (O. XXXIV., r. 3.)

4. SIGNING.

Every special case shall be . . . signed by the several parties or their solicitors: (O. XXXIV., r. 3.)

Signature of counsel is no longer necessary: (*Hare v. Hare*, W. N. 1876, p. 44.)

V. FILING.

Every special case . . . shall be filed by the plaintiff: (O. XXXIV., r. 3.)

VI. AMENDMENT.

The court or a judge may at any time and on such terms as to costs or otherwise as to the court or judge may seem just, amend any defect or error in any proceedings; and all such amendments may be made as may be necessary for the purpose of determining the real question or issue raised by or depending on the proceedings: (O. LIX., r. 2, April, 1880.)

The court will not, at the instance of one party, order the case to be amended so as to raise a question the other party has not agreed to raise: (*Mersey Dock Commissioners v. Jones*, 29 L. J. 239, C. P.; Ch. Archb. 731.)

VII. ENTRY FOR ARGUMENT.

1. LEAVE NECESSARY WHERE PARTY UNDER DISABILITY.

No special case in an action to which a married woman, infant, or

person of unsound mind is a party shall be set down for argument without leave of the court or a judge, the application for which must be supported by sufficient evidence that the statements contained in such special case, so far as the same affect the interest of such married woman, infant, or person of unsound mind, are true: (O. XXXIV., r. 4.)

2. HOW MADE.

Either party may enter a special case for argument by delivering to the proper officer a memorandum of entry, in the Form No. 13 in Appendix (B) hereto, and also if any married woman, infant, or person of unsound mind be a party to the action, producing a copy of the order giving leave to enter the same for argument: (O. XXXIV., r. 5.)

The next following is the form in appendix:

In the High Court of Justice,
Division.

1875. B. No.

Between A.B., Plaintiff,
and

C.D. and others, Defendants.

Set down for argument the special case filed in this action on the day
of , 187 X.Y., Solicitor for

Another form is given in schedule E. 30 to the Rules of April, 1880, and is as follows:

In the High Court of Justice.

Division.

18

No.

Between

and

Plaintiff,

Defendant.

Set down the dated the day of 18 , of Mr.
the referee in this for hearing as a special case.

Dated the day of 18 .

(Signed)
(Address)

3. WHEN MADE.

No motion or rule for a *concilium* shall be required, but all special cases shall be set down for argument, at the request of either party, *four clear days* before the day on which the same are to be argued, and notice thereof shall be given forthwith by such party to the opposite party: (R. G. H. T. 1853, r. 15.)

VIII. DELIVERING COPIES.

1. FOR USE OF JUDGES.

Printed copies for the use of the judges shall be delivered by the plaintiff: (O. XXXIV., r. 3.)

The copies should be delivered four clear days before the day appointed for argument: (R. G. H. T., 1853, r. 16.)

2. TO PARTIES.

[See COPIES.]

IX. HEARING.

A special case is heard and determined by a single judge in court, unless all the parties agree that the same be heard before a Divisional Court: (39 & 40 Vict. c. 59, s. 17; O. LVIIa., r. 1, Dec., 1876.)

Upon the argument of such case the court and the parties shall be at liberty to refer to the whole contents of such documents, and the court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial: (O. XXXIV., r. 1.)

As to the power of the court to decline to decide the questions raised by a special case, see *Bright v. Tyndall*, L. Rep. 4 Ch. Div. 189.

X. JUDGMENT.

[See *sup.*, III.; and JUDGMENT.]

It is proper, when an appeal is contemplated from a decision upon a special case in an action, and when the answers to the questions in effect decide the action, that the answers should be recorded in the form of declarations, and the action be set down *pro forma* on motion for judgment: (*Harrison v. The Cornwall Minerals Railway Company*, L. Rep. 16 Ch. Div. 66; 43 L. T. Rep. N. S. 496.)

And motion for judgment seems to be always necessary, unless there has been an agreement as mentioned, *sup.*, III.

XI. EXECUTION.

[See *sup.*, III.; and EXECUTION.]

XII. APPEAL.

An appeal lies from an order of a judge directing a special case (*Metropolitan Board of Works v. New River Company*, L. Rep. 2 Q. B. Div. 67); and from a decision on a special case: (*Cummins v. Fletcher*, L. Rep. 14 Ch. Div. 699.)

XIII. COSTS.

[See *sup.*, III.; and COSTS.]

[See also *sup.*, II. (a).]

SPECIAL JURY.

[See TRIAL.]

SPECIFIC PERFORMANCE.

I. JURISDICTION.

1. SPECIALLY ASSIGNED.
2. DISCRETION.
3. ENFORCING PART.
4. AGREEMENTS AS TO PERSONALTY.
5. INADEQUACY OF DAMAGES AND ABILITY TO ENFORCE JUDGMENT.
6. MUTUALITY OF REMEDY.
7. EFFECT OF WANT OF TITLE.
8. MISTAKE.
9. EFFECT OF DELAY.
10. DAMAGES IN LIEU OF SPECIFIC PERFORMANCE.

II. PARTIES.

III. WRIT OF SUMMONS.

IV. PLEADING.

V. PRELIMINARY REFERENCE AS TO TITLE.

1. POWER TO ORDER.
2. DUTY OF VENDOR.
3. WHERE REFERENCE ORDERED.
4. WHAT INQUIRIES MADE.
5. INCIDENTAL DIRECTIONS.

VI. DISMISSAL FOR WANT OF PROSECUTION.

VII. ORDERING PURCHASE MONEY INTO COURT.

VIII. ORIGINAL JUDGMENT.

1. WHERE CONTRACT DISPUTED.
2. WHERE TITLE ONLY IN QUESTION.
3. AFTER PRELIMINARY REFERENCE.
4. FOR DAMAGES [see *sup.* I., 10.]

IX. PROCEEDINGS ON REFERENCE AS TO TITLE.

1. DIRECTING ABSTRACT, &c., TO BE BROUGHT IN.
2. DISCUSSION OF TITLE.
3. CONVEYANCING COUNSEL.
4. CERTIFICATE.
 - (a) Making.
 - (b) Reviewing.

X. FURTHER CONSIDERATION.

1. GENERALLY.
2. PAYMENT BY INSTALMENTS.
3. INTEREST AND RENTS AND PROFITS.
4. DEPOSIT.

XI. PROCEEDINGS ON FURTHER ORDER.

XII. HOW JUDGMENT ENFORCED.

XIII. COSTS.

I. JURISDICTION.

1. SPECIALLY ASSIGNED.

All causes and matters for . . . the specific performance of contracts between vendors and purchasers of real estates, including contracts for leases [are assigned to the Chancery Division] : (J. A. 1873, s. 34.)

Where in an action, relating to land or a contract in respect of the same land brought in a common law division, the defendant sets up a counterclaim for specific performance of a contract, the action will be transferred to the Chancery Division (*Hillman v. Mayhew*, L. Rep. 1 Ex. Div. 132; *Holloway v. York*, L. Rep. 2 Ex. Div. 333); but where the specific performance counterclaimed for was of an agreement relating to other land than that which was the subject of the action, a transfer was refused : (*Storey v. Waddle*, L. Rep. 4 Q. B. Div. 289.)

2. DISCRETION.

The exercise of the jurisdiction is not a matter of right in the party seeking relief, but of discretion in the court (*Lamare v. Dixon*, L. Rep. 6 E. & I. App. 414); to be exercised, not arbitrarily, but according to fixed rules : (Dart, 5th edit., 994.)

Specific performance of an agreement relating to lands out of the jurisdiction may be ordered, where the parties are within the jurisdiction : (see *Penn v. Lord Baltimore*, 2 W. & T., L. C. 923, and notes.)

3. ENFORCING PART.

Where contemporaneous agreements or part of one agreement are held to be separable and not to constitute a single arrangement, specific performance may be ordered of one of them, although the remainder may be incapable of being enforced, or may not have been performed by the plaintiff : (Seton, 1296.)

4. AGREEMENTS AS TO PERSONALTY.

The jurisdiction is only exercised where damages would not be an adequate compensation or are incapable of proper assessment : (see the cases cited Dart, 5th edit., 985; Seton, 1287-8.)

5. INADEQUACY OF DAMAGES AND ABILITY TO ENFORCE JUDGMENT.

The court will only interfere where from the nature of the subject

matter there is no adequate relief in damages for breach of the agreement, and it can superintend and enforce the execution of the judgment (Seton, 1286 *et seq.*), but in the case of land the purchaser's right to sue can seldom if ever be questioned on this ground: (Dart, 5th edit., 985.)

6. MUTUALITY OF REMEDY.

The vendor's right to relief rests generally on the principle of mutuality: (Dart, 5th edit., 987-8.)

Agreements which at the time they are made are binding on one party only will not be enforced for want of mutuality, *e.g.*, an infant cannot sue: (Seton, 1291.)

The mere fact that the agreement is signed by the defendant only, does not cause a want of mutuality: (*Id.*)

7. EFFECT OF WANT OF TITLE.

Lord St. Leonards considered it doubtful whether in any case a man, knowing himself not to have any title has been allowed to enforce the contract by procuring a title before the inquiries as to title have been completed: (Dart, 1057.)

But specific performance has been decreed at the suit of a vendor, where (1) he contracted under the *bonâ fide* belief that he could make a title, and, on discovering that he had no title, procured the concurrence of the necessary parties; (2) where at the time of a contract to sell the fee simple, the vendor knew that he had a less interest, but relied on obtaining the remaindermen's concurrence; (3) where the vendor has contracted to sell under the *bonâ fide* belief that he is absolutely entitled, having only a partial interest, but becoming ultimately able to complete: (Dart, 1057-8.)

It is sufficient if the vendor has a good title at the hearing, except where time is of the essence of the contract, or where the defects are such as to affect the validity of the agreement, in which case they must be cured before the commencement of the suit, or before the repudiation of the agreement by the purchaser, unless the purchaser, instead of repudiating, treats the defects as matters of title only. So, too, the title may be made before the certificate: (Seton, 1302.)

A good title is first shown when the matters are duly set out in the abstract, and is made when they are proved: (Seton, 1302.)

As a general rule, a vendor will be compelled to convey his interest, if an imperfect one in the estate, if the purchaser choose to accept it without compensation: (Dart, 1063.)

He will be compelled to make good the contract out of any interest which he has subsequently acquired; or to procure the concurrence of parties who are bound to convey at his request: (*Id.*; *Willmott v. Barber*, L. Rep. 15 Ch. Div. 96; 43 L. T. Rep. N. S. 95; 28 W. R. 911.)

A vendor, professing to sell an unincumbered estate, but having only an equity of redemption, will generally be compelled to redeem the mortgage, and obtain a conveyance from the mortgagee: (Dart, 1063.)

Want of title to the entire interest contracted for is not a defence for the vendor, if the purchaser elects to take such estate as the vendor can convey, or to dispense with the concurrence of a person having a partial interest, upon being allowed an abatement from his purchase money: (Dart, 1087.)

Want of title to a considerable part of the estate is not necessarily a reason why the vendor should not convey the residue: (*Id.*; and see *Hooper v. Smart*, L. Rep. 18 Eq. 683; *Barker v. Cox*, L. Rep. 4 Ch. Div. 464.)

A purchaser cannot claim to take with an abatement in respect of an imperfection in title: (Dart, 1068.)

The court will not compel a defendant specifically to perform an agreement when the result would be to compel him to commit a breach of a prior agreement with another person: (*Willmott v. Barber, sup.*)

An agent purchasing may take any objection which his principal might, in respect of the circumstances of his adjoining property, if the ostensible as well as the real owner: (*Re Arnold; Arnold v. Arnold*, L. Rep. 14 Ch. Div. 270; 42 L. T. Rep. N. S. 705; 28 W. R. 635.)

8. MISTAKE.

The only cases in which relief will be granted to a purchaser on the ground of mistake, are those where the purchaser has been *bonâ fide* misled as to the nature or extent of that which he was buying; and the conduct of the vendors has been such as to put him off his guard and to contribute to the mistake: (*Tamplin v. James*, L. Rep. 15 Ch. Div. 215; 43 L. T. Rep. N. S. 520.)

9. EFFECT OF DELAY.

The right to relief may be lost by delay: (see cases cited Seton, 1295; *Windle v. Stephens*, 70 L. T. 25.)

10. DAMAGES IN LIEU OF SPECIFIC PERFORMANCE.

The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act, in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms* and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided: (J. A., 1873, s. 24, sub-s. 7.)

In all cases in which the [Chancery Division] has jurisdiction to entertain an application . . . for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such . . . specific performance, and such damages may be assessed in such manner as the court shall direct: (21 & 22 Vict. c. 27, s. 2.)

This section still applies: (see cases cited INJUNCTION, VI.)

Where specific performance is refused on the ground of mistake by the defendant, so that under the old practice a bill for specific performance would have been dismissed without prejudice to an action, the court will proceed to consider the question of damages: (*Tamplin v. James*, L. Rep. 15 Ch. Div. 215; 43 L. T. Rep. N. S. 520.)

Where an action is brought for specific performance, and specific performance is refused on the sole ground of a mistake by the defendant, the court ought to give the same damages as would, under the old practice, have been given in an action at law: (Per James, L.J., *Tamplin v. James, sup.*)

For form of order where damages are given in addition to specific performance, see Seton, 1285.

For form of order where damages are given in the alternative, see Seton, 1319.

Jessel, M.R., has directed the damages to be ascertained by an official referee: (*Stafford v. Coxon*, W. N. 1877, p. 138; 25 W. R. 788.)

II. PARTIES.

In general it is only necessary to make those persons parties who were parties to the contract; *e.g.*, a purchaser cannot join as co-defendant the receivers or stewards of the owners of the estate, although they are in that capacity possessed of the title deeds, delivery of which is sought by the suit: (Dart, 5th edit. 1004-5; but see PARTIES, II., 2.)

If the contract were entered into by an agent, and were under seal, the other party may insist upon the agent being included in any suit for specific performance by the principal: (Dart, 1007.)

If the contract be not under seal, if the agency be not apparent on the contract, the nominal contractor should (unless the plaintiff can prove the agency) be made a party, as a defendant, to bind his apparent interest, and the persons beneficially interested must also be made parties: (*Id.*)

An auctioneer is sometimes made a co-plaintiff with the vendor, upon the ground of his having an interest in the contract or of his liability to an action for deposit; but, if the agent has or claims no interest in the contract or the subject matter thereof, and is under no liability in respect of the contract, he is not a proper party, and probably he is not a proper party as a defendant in respect of supposed liability for damages or deposit: (Dart, 1007-8.)

When the deposit remains in the hands of the auctioneers, the practice is to apply for payment into court, and make them defendants if they refuse; but if it is a large sum they may properly be made defendants in the first instance: (*Earl of Egmont v. Smith*, L. Rep. 6 Ch. Div. 469.)

If the vendor die before completion, his personal representatives are *prima facie* the proper plaintiffs: (Dart, 1008.)

Unless the plaintiffs have power to convey the vendor's interest in the estate, the person in whom the same is vested, or who has power to convey it, must also be made a party: (*Id.*)

If they are devisees, or if the executors are empowered to sell, the heir is not a necessary party, unless there is reasonable ground for disputing the will: (*Id.*)

The personal representatives of the vendor and the persons who have power to convey his estate, are proper parties to a purchaser's action: (Dart., 1009.)

If the vendor has assigned his interest under the contract, the assignee or his personal representative must be a party: (*Id.*)

If the vendor has, subsequently to the contract, aliened or incumbered the property, the alienees or incumbrancers, if they took with notice, may be made defendants: (*Id.*)

If the purchaser die before completion, his heir or devisee (if the estate be one of inheritance) must sue, making the personal representatives parties if he seek payment of the purchase money out of the purchaser's personalty: (Dart, 1010-1.)

If the action is commenced by the vendor, the heir or devisee of the purchaser must be made a party, and also the purchaser's personal representatives: (Dart, 1011.)

If the purchaser has assigned the benefit of the contract, the suit against the vendor should be by the assignee, making the purchaser a defendant: (*Id.*)

But if the purchaser merely enters into an ordinary agreement for a sub-sale, agreeing himself to convey, and not that the original vendor shall convey, the sub-purchaser is not, generally, a necessary party: (*Id.*)

Where the purchaser's assignee has been accepted in his place by the vendor, the original purchaser should not be made a party to the vendor's suit: (*Id.*)

III. WRIT OF SUMMONS.

The following form of indorsement is given—

The plaintiff's claim is for specific performance of an agreement dated the day of , for the sale by the plaintiff to the defendant of certain [freehold] hereditaments at

(Rules of 1875, App. A. p. 2, s. 1.)

IV. PLEADING.

For the general rules, see PLEADING.

A vendor meaning to rely on the purchaser's waiver of his *prima facie* right to a marketable title, must allege or charge such waiver, and it is not sufficient to allege facts which if proved would be evidence of it. But it is improper to introduce general charges of waiver, unsupported by a statement of the particular facts: (Dart, 1013; Seton, 1300.)

A statement of claim which shows that a specified consent is requisite to enable the plaintiff to perform the contract, but omits to state that such consent has been obtained, is not demurrable: (Dart, 1013-4.)

When the contract is originally conditional, the performance of the condition should be alleged: (Dart, 1014.)

When the contract purports to be signed by an agent, the fact of the agency and his authority should be alleged: (*Id.*)

The plaintiff should state that he has performed, or been ready and willing to perform, his part of the agreement; and that there is no incapacity in the defendant to complete it: (*Id.*)

If damages are claimed, some special injury must be shown: (*Id.*)

It is usual, now, to claim specific performance, or, in the alternative, damages, especially when the right to the former relief is doubtful.

Questions of compensation must be put in issue by the pleadings: (Seton, 1317.)

V. PRELIMINARY REFERENCE AS TO TITLE.

1. POWER TO ORDER.

As to conditions precluding the purchaser from requiring a reference, see Seton, 1300 *et seq.*

Inquiries may be directed at any time: (see O. XXXIII., cited *sup.* p. 438.)

2. DUTY OF VENDOR.

In almost every case it is the duty of the vendor, where there is no question but that of title between him and the purchaser, to avail himself of the opportunity of having an immediate reference as to title, so as to save the multiplication of unnecessary costs: (per James, L.J., *Phillipson v. Gibbon*, L. Rep. 6 Ch. App. 428, 435.)

On the other hand, the object of granting the reference before the hearing is merely to save time, and will be refused where the plaintiff vendor has been guilty of delay: (Dart, 1097.)

3. WHERE REFERENCE ORDERED.

The reference, even under the old practice, might be made at the instance of either party, before the hearing, or at the plaintiff's instance before defence, unless the defendant's counsel could state that other matters were in question; and although the only question of title was one which might be conveniently determined at the hearing without a reference, or although specific performance were resisted on the ground that time was of the essence of the contract, and that a good title was not shown within the specified period: (Dart, 1095.)

If there are other grounds of defence, a preliminary reference will not be directed at the instance of either party, unless such grounds are manifestly frivolous: (*Id.*)

4. WHAT INQUIRIES MADE.

The order is to inquire whether a good case be made at the time of the reference (not the date of the contract), and, in case it shall appear that a good title can be made, an inquiry when it was first shown that such good title could be made: (Dan. 1112; Seton, 1297; Dart, 1098.)

The further inquiry is not directed when the contract itself is disputed (Dan. 852) or the court expressly directs such further inquiry to be omitted: (Dart, 1098.)

Generally, everything connected with the title may be made the subject of the reference (Seton, 1299-1300; *Phillipson v. Gibbon*, *sup.*; *Re Burroughes, Lynn, and Sexton*, L. Rep. 5 Ch. Div. 601); but a question, whether, assuming a breach of a covenant in a lease to be a continuing breach such as to render the purchaser liable to eviction immediately after completion, notwithstanding any waiver up to completion, the court would force the purchaser to accept the title, was held to be a question to be decided at the trial, and not on a reference as to title: (*Lawrie v. Lees*, L. Rep. 14 Ch. Div. 249; 42 L. T. Rep. N. S. 485; 28 W. R. 779; and see Dart, 1098.)

Where an inquiry is directed in general terms whether the vendor can make a good title, it must be understood to mean a good title having regard to the terms of the contract: (*Upperton v. Nickolson*, L. Rep. 6 Ch. App. 436; 25 L. T. Rep. N. S. 4.)

As to how the inquiries are worked out, see *post*, IX.

5. INCIDENTAL DIRECTIONS.

The order should also contain the usual directions for the production of deeds, &c., and for the examination of the parties on oath, and reserve further consideration which in itself includes the question of costs: (Dart, 1098.)

VI. DISMISSAL FOR WANT OF PROSECUTION.

Pending the reference as to title, the defendant cannot dismiss the action for want of prosecution: (Dart, 1099.)

VII. ORDERING PURCHASE MONEY INTO COURT.

Where the purchaser is in possession of the estate, without payment of the purchase money, and the possession is held contrary to the intention of the parties, or is held according to it, but the purchaser has exercised improper acts of ownership, he may, even before defence, be ordered, upon motion, to pay the purchase money into court: (Dart, 1089-1093.)

VIII. ORIGINAL JUDGMENT.

1. WHERE CONTRACT DISPUTED.

Where, by reason of the contract itself having been disputed, the action is heard before the reference, the practice is to declare absolutely that the plaintiff is entitled to a specific performance of the agreement, and to direct a reference to inquire whether a good title can be made; not to declare that the plaintiff is entitled, &c., if a good title can be made; and in such a case the court, in directing a reference, will not direct an inquiry as to when the title was first shown: (Dart, 1114; *Flood v. Pritchard*, 40 L. T. Rep. N. S. 873; Dan. 852.)

The court may reserve the cost of the inquiry: (*Slack v. Midland Railway Company*, L. Rep. 16 Ch. Div. 81; 43 L. T. Rep. N. S. 434.)

2. WHERE TITLE ONLY IN QUESTION.

The court will not, generally, permit the question whether a good title can be made, to be argued before it in the first instance, but will declare by the original judgment, if the title has not been established, the right to specific performance in case a good title can be shown: (Seton, 1299.)

3. AFTER PRELIMINARY REFERENCE.

Where there has been a preliminary inquiry as to title, a final judgment may be made at the hearing without reserving further consideration: (*Turquand v. Wilson*, L. Rep. 1 Ch. Div. 85.)

4. FOR DAMAGES.

[See *sup.* I., 10.]

IX. PROCEEDINGS ON REFERENCE AS TO TITLE.

1. DIRECTING ABSTRACT, &C., TO BE BROUGHT IN.

On the return of the summons to proceed on a judgment or order directing an inquiry [see CHAMBERS] as to title, the abstract and a written statement of objections and requisitions or points in dispute, are usually directed to be left at chambers, and a day is named to proceed thereon: (Dan. 1112.)

2. DISCUSSION OF TITLE.

On the day appointed, or an adjournment, the purchaser brings in his written objections, and the questions are discussed before the chief clerk or judge in chambers or in court: (Dan. 1112; Dart, 1099.)

3. CONVEYANCING COUNSEL.

The opinion of the conveyancing counsel of the court may be obtained: (see CONVEYANCING COUNSEL.)

When such opinion is obtained, the proceeding is renewed at chambers by appointment: (*Id.*)

4. CERTIFICATE.

(a) *Making.*

The chief clerk either certifies that a good title can be made, or that it cannot be made, in which case the certificate states the points in which the title is defective: (Dan. 1113; Dart, 1099.)

A purchaser cannot, on a certificate of defective title, insist on being discharged, if the title can be made good within a reasonable term: (Dan. 1113.)

As to what title will be forced on a purchaser, see Dart, 1099 *et seq.*

(b) *Reviewing.*

If, after a certificate of good title shown, any new fact appears by which the title is affected, the court will, on motion, direct the certificate to be reviewed (Dan. 1113, 1114), although the time for applying to discharge or vary the certificate has expired: (Dart. 1110.)

If, on application to vary a certificate in favour of a title, the court thinks the evidence in support is insufficient, it will direct review, on the application of the vendor, to give him an opportunity of producing further evidence: (*Id.*, and see Dart, 1110, 1111; Seton, 1300.)

The title will also be again referred at the vendor's request where an application to vary a certificate against the title is refused: (Seton, 1300.)

After a certificate of title has been directed to be varied, an application by the vendor to review must be made without delay, and the vendor must pay the costs of the order: (Dan. 1114.)

For form of order to review certificate against title shown, see Seton, 1298.

Where on an application to vary an unfavourable certificate, the vendor shows that he can clear up the objection, the court will

Dispose of the case ;

Let it stand over ;

Remit it to chambers for further consideration : (Dan. 1114.)

If an application to vary a favourable certificate is overruled, other objections to the title cannot be made : (Dan. 1114.)

If such an application is allowed, and a new abstract is delivered, further objections may be brought in : (*Id.*)

X. FURTHER CONSIDERATION.

1. GENERALLY.

No further consideration is necessary where a preliminary reference as to title has been had : (*Turquand v. Wilson*, L. Rep. 1 Ch. Div. 85.)

If the certificate be in favour of the title, and no application be made to discharge or vary it, a judgment for specific performance will be made on the hearing on further consideration : (Dart, 1109-1110.)

If the certificate be against the title, and there be no application to discharge or vary it, or if such application be unsuccessful, the vendor's action may be dismissed with costs on further consideration : (Dart, 1111.)

If, no application being made to discharge or vary the certificate, the cause comes on for further consideration, or for original hearing if the reference were made before the hearing, and the vendor can satisfy the court that he can remove the defect in the title—as where he can procure the concurrence of a party having an interest—specific performance will be adjudged without a reference back to chambers : (Dart, 1112.)

If, in a vendor's action, the purchaser be considered unable to pay what is due for purchase money, interest, and costs, the judgment may direct that in default of payment the premises be sold to satisfy the amount, and that the deficiency, if any, be paid by the purchaser : (Dart, 1117.)

2. PAYMENT BY INSTALMENTS.

Where the defendant became liable to the plaintiff under an agreement for purchase of certain leasehold premises, and an award of an arbitrator of certain differences arising on the agreement, for the payment of the balance of the purchase money by instalments, in an action for specific performance and payment of the instalments, the court gave judgment, ordering an account to be taken of instalments due, and the balance of the purchase money owing to be certified, reserved liberty to apply at chambers fourteen days after the certificate for an order for payment of the balance, declared a lien on the estate purchased for the balance, and reserved liberty to apply in respect of future instalments as they accrued due : (*Nives v. Nives*, 42 L. T. Rep. N. S. 832 ; L. Rep. 15 Ch. Div. 649.)

3. INTEREST AND RENTS AND PROFITS.

For the form of order directing interest to be computed, and for an account and deduction of rents and profits, see Seton, 1303.

Where there is no stipulation as to interest, the general rule is that the purchaser, when he completes after the time stipulated, shall be considered in possession from that time, and shall pay interest at 4l. per cent. on taking the rents and profits : (see Seton, 1308-9.)

After the time for completion, the vendor is accountable for rents and profits, but usually only for those actually received, unless he allows the

rents to fall into arrear, when he will be held accountable for the arrears: (Seton, 1309.)

4. DEPOSIT.

Where a vendor's suit is dismissed, after a certificate against the title, he will be ordered to return the deposit with interest at 4l. per cent: (Seton, 1312.)

As to payment of deposit by auctioneer, see *sup.*

XI. PROCEEDINGS ON FURTHER ORDER.

Upon the return of the summons, evidence of the amount due for purchase money, interest, and costs of suit is directed to be brought in, and if such costs are to be included, the inquiry is adjourned till after taxation; in other cases, a day is named to proceed on the account: (Dan. 1115.)

If the parties differ as to the conveyance, it is directed to be brought in and settled: (see DEEDS.)

The conveyance should be dated from the time when the title is first shown: (Seton, 1311.)

If there is a difficulty as to the time when the conveyance is to be delivered or purchase money paid, an order may be obtained, on motion or summons, with notice, appointing a time and place for the purpose: (Dan. 1116.)

XII. HOW JUDGMENT ENFORCED.

Where the defendant refuses to comply with the judgment the plaintiff may—

- (1) Obtain an order fixing time and place of payment and conveyance, or a period within which the judgment is to be obeyed, and on disobedience proceed by contempt;
- (2) (If a purchaser) obtain a vesting order;
- (3) Apply for an order rescinding the agreement;
- (4) (If a vendor) enforce his vendor's lien: (Seton, 1327.)

Where any [judgment] shall be made by any court of equity for the specific performance of a contract concerning any lands, it shall be lawful for the said court to declare that any of the parties to the said suit wherein such [judgment] is made are trustees of such lands or any part thereof, within the meaning of [the Trustees Act, 1850], or to declare concerning the interests of unborn persons who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such [judgment] is made, that such interests of unborn persons are the interests of persons who, upon coming into existence, would be trustees within the meaning of [the] Act, and thereupon it shall be lawful for the Lord Chancellor [on behalf of lunatics], or the [Chancery Division], as the case may be, to make such order or orders as to the estates, rights, and interests of such persons, born or unborn, as the said court or the said Lord Chancellor might, under the provisions of [the] Act, make concerning the estates, rights, and interests of trustees born or unborn: (Trustee Act, 1850, s. 30.)

After a judgment for a conveyance, a vesting order may be made in chambers: (see C. O. 35, r. 1; CHAMBERS.)

As to whether a vesting order can be made in case of an agreement to grant a lease, see cases cited Seton, 1329.

If a purchaser can be shown to be about to abscond without paying his purchase money, a writ of *ne exeat regno* may be obtained: (Dart, 1121.)

When the judgment directs possession to be delivered up, a writ of assistance or writ of possession may be obtained: (see EXECUTION.)

XIII. COSTS.

Costs were entirely in the discretion of the court, even before the passing of the Judicature Acts, and see now, COSTS III., 1 (a), and (e). They were generally given to the successful litigant: (Dart, 1123-6.)

A vendor obtaining a decree has been refused costs on the ground of his having unsuccessfully contended that the purchaser had waived his right to investigate the title, where the purchaser's objection to the title, although overruled, has been considered a fair objection; or has been overruled merely on the authority of an unreported decision; or has been occasioned by the vendor or his solicitor; or has arisen from a mutual misunderstanding: (Dart, 1126.)

A vendor who seeks specific performance should come prepared with his title; he ought to have it ready before he carries his estate to market. If he will sell it with a confused title he must be at the expense of clearing it: (*Wilson v. Allen*, 1 Jac. & W. 614; *Flood v. Pritchard*, 40 L. T. Rep. N. S. 873.)

In one case where the vendor's title was not shown until after action brought, Fry, J., gave judgment for specific performance without costs: (*Flood v. Pritchard*, *sup.*)

A vendor obtaining a decree has also been refused costs when he refused to furnish necessary evidence in support of the title (although the purchaser's requisition embraced unnecessary evidence); or where he has obtained a decree on the ground of the purchaser's acquiescence in a voidable contract: (Dart, 1126.)

The dismissal of a vendor's suit has been without costs when it was merely on the ground of his own *laches* in applying to the court, or of the title being merely doubtful, or on the ground of agency being denied, or of the general inaccuracy of the transactions relied on as constituting the contract, or upon a ground of defence which the purchaser did not resort to until after the institution of the suit: (Dart, 1126-7.)

A purchaser obtaining a decree has been refused costs on the ground of inadequacy of consideration; and where his suit has been dismissed costs were refused where the language of the agreement was not clear, when the ground of dismissal was delay: (Dart, 1127.)

Where a fatal objection was taken for the first time in chambers, no costs were given: (*Upperton v. Nicholson*, L. Rep. 6 Ch. App. 436.)

Costs were also refused where a defendant alleged fraud and failed to prove it in case of false defence; on ground of hardship of the case and novelty of the point: (Dart, 1128.)

Where the decisions are doubtful no costs will be given: (*Re Osborne to Rowlett*, L. Rep. 13 Ch. Div. 774; 42 L. T. Rep. N. S. 650; 49 L. J. 310, Ch.; 28 W. R. 365.)

Where the vendor has, by will subsequent to contract, devised the property in such a manner as to render a suit necessary his estate must bear the costs, but no costs will be given if the will be prior to the contract: (*Id.*)

Sometimes a successful litigant will be made to pay all or a proportionate part of the costs; thus, where a purchaser, plaintiff, aware of objections to the title requires a reference, and on the chief clerk certifying against the title waives his objection, he must pay the costs of the reference; and if prior to a vendor's action, the contract was resisted merely on the ground of title, and no title was shown before action, the

plaintiff obtaining a judgment must pay the costs up to the time when the title was shown : (*Wilson v. Allen*, *sup.* ; Dart, 1130.)

But where the validity of the contract was denied by the purchaser, but not successfully, Fry, J. gave judgment for the vendor without costs : (*Flood v. Pritchard*, *sup.* ; and compare *Smith v. Leigh*, Sug. 648, &c., cited Dart, 1130-1131.)

Where a vendor of land fails to make out a good title to the land sold, the purchaser is entitled to the costs of his action for specific performance, though he afterwards abandons his objection to the vendor's title. But his right to costs may be lost if he brings the action to a hearing to obtain a decision on a separate point on which he eventually fails : (*Ballard v. Shutt*, L. Rep. 15 Ch. Div. 122-; 43 L. T. Rep. N. S. 173 ; 49 L. J. 618, Ch.)

When a vendor of real estate brought an action for a declaration that the contract was at an end, and the purchaser counter-claimed for specific performance, and succeeded on both action and counter-claim, he was held entitled to deduct his costs from his purchase money in priority to a mortgage by the plaintiff, made after the contract for sale, but before the commencement of action : (*Green v. Sevin*, L. Rep. 13 Ch. Div. 589 ; 41 L. T. Rep. N. S. 724 ; 49 L. J. 166, Ch.)

STAYING PROCEEDINGS.

I. JURISDICTION.

1. WHERE ACTION FORMERLY RESTRAINED BY INJUNCTION.
2. WHERE PROCEEDINGS COMMENCED WITHOUT AUTHORITY.
 - (a) *Of Solicitor.*
 - (b) *Of Plaintiff.*
 - (1) Generally [see SOLICITOR].
 - (2) Original Summons.
 - (3) Married Woman.
3. WHERE SATISFACTION MADE OR OFFERED.
 - (a) *Generally.*
 - (b) *Writ for Liquidated Demand.*
 - (c) *Administration Summons*
 - (d) *Landlord's Actions to Recover Possession.*
 - (1) On Non-payment of Rent.
 - (2) On Breach of Insurance Covenant.
 - (e) *Mortgagee's Action to Recover Possession.*
4. FOR DEFAULT.
 - (a) *In Payment of Costs of Former Proceedings.*
 - (b) *In Giving Security for Costs.*
 - (c) *In Giving Discovery.*
 - (1) As to Partnership Constitution.
 - (2) On Interrogatories or as to Documents.
5. ON CESSER OF INTEREST.
6. FOR ABUSE OF PROCESS [see ABUSE OF PROCESS].
7. BY CONSENT.
8. WHERE SPECIAL CASE ORDERED.
9. AFTER ORDER ON ADMINISTRATION SUMMONS.
10. ON CONSOLIDATION OF ACTIONS [see CONSOLIDATION].
11. AFTER AGREEMENT TO REFER [see ARBITRATION, XIX].
12. BY ORDER FOR NEW TRIAL [see NEW TRIAL, IV., 2].
13. PENDING APPEAL [see APPEAL, VI., 14].

II. APPLICATION.

1. WHERE MADE.

2. HOW MADE.

III. PARTIAL STAY.

I. JURISDICTION.

1. WHERE ACTION FORMERLY RESTRAINED BY INJUNCTION.

No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: (J. A. 1873, s. 24, sub-s. 5.)

The Court of Bankruptcy and the Exchequer Division still retain the power to restrain actions in the Supreme Court of Judicature in certain cases: (see INJUNCTION, I.)

Provided always, that nothing in this Act contained shall disable either of the said courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit: (J. A. 1873, s. 24, sub-s. 5.)

Any person, whether a party or not to any such cause or matter, who would have been entitled if this Act had not passed, to apply to any court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule, or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the court shall thereupon make such order as shall be just: (J. A. 1873, s. 24, sub-s. 5.)

As to the cases in which courts of equity would restrain proceedings at law, see *The Earl of Oxford's case*, 1 Ch. Rep. 1; 2 W. & T. L. C. (4th ed.) 601, and notes; Companies Act, 1862, ss. 85, 87, 197, 202.

An action by the executors of a will against testator's widow to recover bonds belonging to the deceased, has been stayed during the pendency of an administration suit, in which the question was, whether the will was to be administered by French or English law: (*Geohagan v. Dormer*, W. N. 1875, p. 229.)

Where an executor mortgaged and the mortgagee and the equitable tenant for life leased the property, and the mortgagee brought an action to recover the land from the lessee, on the ground of forfeiture, the executor obtaining leave to defend as landlord, an order to stay, on an administration action being afterwards begun by the executor, was set aside on appeal: (*Crowle v. Russell*, L. Rep. 4 C. P. Div. 186; 27 W. R. 84.)

Where judgment has been recovered in an action, and an action for an account between plaintiff and defendant is pending, the former proceedings will be stayed on payment of the amount of the judgment into court: (*Keevers v. Michell*, W. N. 1876, p. 53.)

An action of trover against executors will not be stayed during an administration action (*Wood v. Wakefield*, W. N. 1875, p. 238); nor will an action for non-delivery of goods be stayed until a bill given by the plaintiff to the defendant becomes due: (*Frakes v. Breslow*, W. N. 1875, p. 239.)

2. WHEN PROCEEDINGS COMMENCED WITHOUT AUTHORITY.

(a) *Of Solicitor.*

Every solicitor whose name shall be indorsed on any writ of summons shall, on demand in writing made by or on behalf of any defendant who has been served therewith or has appeared thereto, declare forthwith whether such writ has been issued by him or with his authority or privity; and if such solicitor shall declare that the writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the court or a judge: (O. VII., r. 1.)

(b) *Of Plaintiff.*

(1) Generally.

[See SOLICITOR.]

(2) Original Summons.

Where a summons originating proceedings is filed without authority, an application to take it off the file, or to stay proceedings, as regards the applicant, should be made by summons: (Dan. 1051.)

(3) Married Woman.

If the next friend of a married woman, who is not an infant, commences an action without her consent, she may, upon motion, obtain the dismissal of the suit with costs, which the next friend has to pay, but this right does not exist for the benefit of a defendant: (See PARTIES, I., 14.)

A writ, issued by a next friend of a married woman without the employment of a solicitor, will, with all subsequent proceedings, be set aside with costs, to be paid by the person issuing it: (*Swann v. Swann*, 43 L. T. Rep. N. S. 530.)

3. WHERE SATISFACTION MADE OR OFFERED.

(a) *Generally.*

Where the defendant offers to comply with the plaintiff's demand, and would have done so, if asked, before the action was commenced, the court will stay all further proceedings without costs: (*Rudd v. Rowe*, L. Rep. 10 Eq. 610.)

Where the principal relief is conceded after action brought, the plaintiff may go on for costs alone: (See COSTS, II.)

(b) *Writ for Liquidated Demand.*

Wherever the plaintiff's claim is for a debt or liquidated demand only, the indorsement, beside stating the nature of the claim, shall state the amount claimed for debt, or in respect of such demand, and for costs respectively, and shall further state that, upon payment thereof within four days after service, or in case of a writ not for service within the jurisdiction, within the time allowed for appearance, further proceedings will be stayed. . . . The defendant may, notwithstanding such payment, have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's solicitor shall pay the costs of taxation: (O. III., r. 7.)

If the amount is paid afterwards, and no return of the money is offered, proceedings will be stayed: (*Hodding v. Starchfield*, 7 M. & G. 957.)

If a smaller sum than that claimed is paid, it should be into court, and a copy of the receipt should be sent to the plaintiff's solicitor, but no order to stay will be issued (W. N. 1875, p. 201). If the plaintiff does not recover more, he will have to pay the defendant's costs: (*Watson v. Coleman*, 7 M. & G. 424; *Clerk v. Daun*, 3 Dowl. 573.)

(c) *Administration Summons.*

If the defendant submits, at the hearing, or by taking out a summons

for the purpose, to pay the plaintiff's claim and costs, the proceedings will be stayed: (Dan. 1075.)

(d) *Landlord's Actions to Recover Possession.*

(1) *On Non-Payment of Rent.*

If the tenant or his assignee do or shall, at any time before the trial in [an action by the landlord for recovery of land for non-payment of rent], pay or tender to the lessor or landlord, his executors or administrators, or his or their [solicitors] in that cause, or pay into the court where the same cause is depending, all the rents and arrears, together with the costs, then and in such case all further proceedings . . . shall cease and be discontinued: (C.L.P.A., 1852, s. 212.)

A sub-lessee is an assignee within the section, and may apply for a stay: (*Doe d. Wyatt v. Byron*, 1 C. B. 623.)

So may a mortgagee: (*Doe d. Whitfield v. Roe*, 3 Taunt. 402; cited Day.)

Relief will be granted where the tender of rent has been made before the action is actually commenced: (*Goodright v. Noright*, 2 W. Bl. 746.)

Upon applying, the rent should be calculated to the last rent day, and not to the day of computing: (*Doe d. Harcourt v. Roe*, 4 Taunt. 883.)

The court or a judge may give relief in a summary manner, upon rule or summons, subject to appeal, and subject to the same terms and conditions in all respects, as to payment of rent, costs, and otherwise, as, formerly in the Court of Chancery: (C.L.P.A., 1860, s. 1; and see *sup.*)

This enables the court to give relief any time within six months after execution executed: (see C.L.P.A., 1852, s. 210, which limited the Chancery jurisdiction to that time.)

(2) *On Breach of Insurance Covenant.*

A court of equity shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has, in the opinion of the court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the court in conformity with the covenant to insure, upon such terms as to the court may seem fit: (22 & 23 Vict. c. 35, s. 4.)

The court shall not have power under this Act to relieve the same person more than once in respect of the same covenant or condition, nor shall it have power to grant any relief under this Act where a forfeiture under the covenant in respect of which relief is sought shall have been already waived out of court in favour of the person seeking the relief: (22 & 23 Vict. c. 35, s. 6.)

The preceding provisions shall be applicable to leases for a term of years absolute, or determinable on a life or lives or otherwise, and also to a lease for the life of the lessee, or the life or lives of any other person or persons: (22 & 23 Vict. c. 35, s. 9.)

Where such relief shall be granted, the court or a judge shall direct a minute thereof to be made by indorsement on the lease or otherwise: (C.L.P.A., 1860, s. 3.)

(e) *Mortgagee's Action to Recover Possession.*

Where an action . . . shall be brought by any mortgagee, his heirs, executors, administrators, or assignees, for the recovery of the possession of any mortgaged lands, tenements, or hereditaments, and no suit shall be then depending in any . . . court of equity in . . . England, for or touching the foreclosing or redeeming of such mortgaged lands,

tenements, or hereditaments, if the person having right to redeem such mortgaged lands, tenements, or hereditaments, and who shall appear and become defendant in such action, shall, at any time pending such action pay unto such mortgagee, or, in case of his refusal, shall bring into court, where such action shall be depending, all the principal moneys and interest due on such mortgage, and also all such costs as have been expended in any suit . . . upon such mortgage (such money for principal, interest, and costs to be ascertained and computed by the court where such action is or shall be depending, or by the proper officer by such court to be appointed for that purpose), the moneys so paid to such mortgagee, or brought into such court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the court shall and may discharge every such mortgagor or defendant of and from the same accordingly; and shall and may by rule of the same court compel such mortgagee, at the costs and charges of such mortgagor, to assign, surrender, or reconvey mortgaged lands, tenements, and hereditaments, and such estate and interest as such mortgagee has therein, and deliver up all deeds, evidences, and writings in his custody, relating to the title of such mortgaged lands, tenements, and hereditaments unto such mortgagor who shall have paid or brought such moneys into the court, his heirs, executors, or administrators, or to such other person or persons as he or they shall for that purpose nominate or appoint: (C.L.P.A., 1852, s. 219.)

Nothing [in sect. 219] shall extend to any case where the person against whom the redemption is [claimed] shall (by writing under his hand, or the hand of his . . . agent, or solicitor, to be delivered before the money shall be brought into such court, . . . to the solicitor for the other side) insist, either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage, or shall be admitted on the other side; or to any case where the right of redemption to the mortgaged lands and premises in question in any cause or suit shall be controverted or questioned by or between different defendants in the same cause or suit; or shall be any prejudice to any subsequent mortgage or subsequent incumbrance: (C. L. P. A. 1852, s. 220.)

(a) *In Payment of Costs of Former Proceedings.*

Where a plaintiff has made default in payment of the costs of a former suit against the same defendant, or the person whom he represents, for the same purpose, the defendant may, after the amount has been ascertained by taxation, obtain an order on motion, after notice, staying all further proceedings until the plaintiff has paid such costs: (Dan. 696.)

Where the same object may be obtained under two different modes of proceedings, if the first is adopted and then abandoned, and the second adopted, the proceedings in the second may be stayed until the costs of the first are paid: (Dan. 697; *Hankin v. Turner*, 39 L. T. Rep. N. S. 611.)

Where an action for administration in the Chancery Division by the alleged next of kin was dismissed for want of prosecution, and the plaintiff afterwards commenced an action in the Probate Division for revocation of the letters of administration (which had been granted to another alleged next of kin), an order to stay till payment of the costs in the Chancery Division was refused: (*Hankin v. Turner*, *sup.*)

Where an order allowing a demurrer to a statement of claim gave liberty to amend on payment of costs, an order was made staying pro-

ceedings until the costs had been paid: (*White v. Bromige*, W. N. 1878, p. 28; 38 L. T. Rep. N. S. 413; 26 W. R. 312.)

Where, after great delay, the costs still continue unpaid, the court will order the plaintiff to pay them within a limited time, or, in default, that the second action or the proceedings be dismissed: (Dan. 697; *White v. Bromige*, *sup.*)

(b) *In giving Security for Costs.*

Where a plaintiff fails to comply with an order to give security for costs, the court has a discretion to dismiss the action for want of prosecution: (see COSTS, I., 1, (g).)

Any person against whom an action . . . of tort may be brought in [the High Court, may] make an affidavit that the plaintiff has no visible means of paying the defendant should a verdict be not found for the plaintiff, and thereupon a judge . . . shall have power to make an order that unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of one of the Masters . . . or satisfy the judges that he has a cause of action fit to be prosecuted in the [High] Court, all proceedings in the action shall be stayed [or the action may be ordered to be remitted for trial in a County Court]: (30 & 31 Vict. c. 142, s. 10; and see TRANSFER.)

(c) *In Giving Discovery.*

(1) *As to Partnership Constitution.*

When a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitors shall, on demand in writing by or on behalf of any defendant, declare forthwith the names and places of residence of all the persons constituting the firm. And if the plaintiffs or their solicitors shall fail to comply with such demand, all proceedings in the action may, upon an application for that purpose, be stayed upon such terms as the court or judge may direct: (O. VII., r. 2.)

(2) *On Interrogatories or as to Documents.*

If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents . . . he shall . . . if a plaintiff be liable to have his action dismissed for want of prosecution: (O. XXXI., r. 20.)

In a suit by a foreign government or a corporation proceedings will be stayed until it has named a proper person to make discovery: (*Republic of Peru v. Weguelin*, L. Rep. 20 Eq. 140; *Republic of Costa Rica v. Erlanger*, L. Rep. 1 Ch. Div. 171; 45 L. J. 145, Ch.)

5. ON CESSER OF INTEREST.

Where a person believed to be next of kin and holding letters of administration commenced an action for administration after notice of the claim of another person, and the letters of administration of the former were revoked and granted to the latter, the former administration proceedings were stayed: (*Houseman v. Houseman*, L. Rep. 1 Ch. Div. 535.)

6. FOR ABUSE OF PROCESS.

[See ABUSE OF PROCESS.]

7. BY CONSENT.

By consent, the action may be dismissed or the proceedings stayed, on motion of course, or petition of course at the Rolls, or on special motion or petition, or on summons, on any terms which may be agreed upon. Where any parties are not *sui juris*, or are executors or trustees, the court must be satisfied of the propriety of the agreement: (Dan. 696; and see COMPROMISE.)

8. WHERE SPECIAL CASE ORDERED.

If the court or a judge [make an order for a question of law to be raised by special case or otherwise] all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed: (O. XXXIV., r. 2.)

9. AFTER ORDER ON ADMINISTRATION SUMMONS.

Where under the order on administration summons the same relief can be obtained as in an administration action subsequently commenced, the latter proceedings will be stayed: (Dan. 1076.)

10. ON CONSOLIDATION OF ACTIONS.

[See CONSOLIDATION.]

11. AFTER AGREEMENT TO REFER.

[See ARBITRATION, XIX.]

12. BY ORDER FOR NEW TRIAL.

[See NEW TRIAL, IV., 2.]

13. PENDING APPEAL.

[See APPEAL, VI., 14.]

II. APPLICATION.

1. WHERE MADE.

The application must be made in the Division in which the action or other proceeding to be stayed is pending even in the case of an action against a company in course of being wound-up, or the personal representative of a deceased person whose estate is being administered (*Garbutt v. Fawcus*, L. Rep. 1 Ch. Div. 155; 45 L. J. 133, Ch.; *Re People's Garden Company*, L. Rep. 1 Ch. Div. 44; 45 L. J. 129, Ch.; *Re South of France Pottery Works Syndicate*, W. N. 1877, p. 205; *Wright v. Redgrave*, L. Rep. 11 Ch. Div. 24); whether the application is made before or after execution perfected by seizure: (*Re Artistic Colour Printing Company*, L. Rep. 14 Ch. Div. 502; 42 L. T. Rep. N. S. 802.)

Bacon, V.C., prior to the decision of the Master of the Rolls lastly cited, granted an injunction in a winding-up to restrain the sheriff from proceeding to a sale under an execution perfected by seizure before the commencement of the winding-up: (*Re Perkins Beach Lead Mining Company*, L. Rep. 7 Ch. Div. 371.)

As to the power of transferring actions in other divisions to the Chancery Division after winding-up or administration orders, see TRANSFER.

Until such a transfer is made, the division in which the action is pending, may stay proceedings: (*Walker v. Banagher Distillery Company*, L. Rep. 1 Q. B. Div. 129; 45 L. J. 135, Ch.; *Rose v. Gardden Lodge Company*, L. Rep. 3 Q. B. Div. 236.)

Where a cause is transferred from one judge of the Chancery Division to another for hearing only, the judge to whom the cause is transferred has jurisdiction to hear an application to stay proceedings pending an appeal from his judgment: (*Orr-Ewing and Co. v. Johnston and Co.*, 41 L. T. Rep. N. S. 467.)

As to the court to which application must be made when an appeal is pending, see APPEAL, VI., 14.

2. HOW MADE.

The application is generally by motion on notice. Where a petition for winding up is pending, the application to stay an action against the company may be made by *ex parte* motion, but notice of the order must be

given to the plaintiff: (*Masbach v. James Anderson and Co.*, W. N. 1877, p. 252; 37 L. T. Rep. N. S. 440.)

When the plaintiff attempts to go on in contravention of an agreement to compromise, proceedings may be stayed on summons (*Hakes v. Hodgkins*; *Eden v. Naish*, L. Rep. 7 Ch. Div. 781; 47 L. J. 326, Ch.; 26 W. R. 392).

[See also *sup.* I.]

III. PARTIAL STAY.

An action may be partially stayed: (*Re Aird*, W. N. 1878, p. 24.)

STOCK.

[See CHARGING STOCK; EXECUTION, XIX.; RESTRAINING ORDER; TRUSTEES.]

STOP ORDER.

I. ON FUND IN COURT.

1. WHO MAY OBTAIN ORDER.

2. APPLICATION.

(a) *When Made.*

(b) *How Made.*

3. EVIDENCE.

4. ORDER.

(a) *Leaving with Paymaster-General.*

(b) *Effect.*

5. DISCHARGING ORDER OR DEALING WITH FUND.

6. COSTS.

II. ON DOCUMENTS IN COURT.

I. ON FUND IN COURT.

1. WHO MAY OBTAIN ORDER.

Any person, although not a party to the cause or proceeding in which a fund in court is standing, who has become entitled to any such fund, or a share thereof, or to any lien or charge thereon, may apply to the judge to whose court the cause or proceeding is attached, for an order to prevent the fund in question from being paid out, or otherwise dealt with, without notice to the applicant: (*Dan.* 1543.)

2. APPLICATION.

(a) *When Made.*

The court will not grant a stop-order to enforce a mere claim until the applicants have, by some independent proceedings, established their right to attach the fund in court: (see *Widgery v. Tepper*, L. Rep. 6 Ch. Div. 364; and compare *Hopewell v. Barnes*, L. Rep. 1 Ch. Div. 630.)

(b) *How Made.*

Whether the assignor of the fund concurs or not, the application must be made by summons: (*Seton*, 803, citing *Wrench v. Wynne*, 17 W. R. 198; *Walsh v. Wason*, 22 W. R. 676.)

If a petition be presented, the applicant may be ordered to pay the extra costs thereby occasioned: (*Wellesley v. Mornington*, 41 L. J. 776, Ch.)

Any person presenting a petition, or taking out a summons for any such order as aforesaid, shall not be required to serve such petition or summons upon the parties to the cause, or upon the persons interested in such parts of the stocks, funds, shares, securities, or moneys, as are not sought to be affected by any such order: (C. O. 26, r. 2.)

The applicant must pay the costs of such other parties, if they are served: (Dan. 1545.)

It is still necessary to serve the person whose interest is intended to be affected with a summons presented by the assignee alone: (*Id.*)

3. Evidence.

The affidavits must show the title of the person the payment of whose fund is to be restrained, although not necessarily the particular share of the fund to which he is entitled. The assignee's title must also be shown, either by proving it strictly, or by the assignor joining as applicant, or admitting the fact: (Dan. 1544.)

The Paymaster-General's certificate of the fund in court must also be procured: (Ayck. 482.)

4. ORDER.

(a) Leaving with Paymaster-General.

The order, when passed and entered, or an office copy, must be left at the Chancery Pay Office: (Dan. 1546.)

The Paymaster-General will delay parting with a fund if he has received notice of an intended application for a stop-order: (*Id.*)

(b) Effect.

A stop-order does not decide anything as to the right of the parties: (Dan. 1545.)

An incumbrancer, who has obtained a stop-order, and left it at the Chancery Pay Office, thereby obtains priority over a previous incumbrancer who has not done so, but the priority only extends to the charge in respect of which the stop-order was obtained: (Dan. 1546.)

A solicitor's lien, on a fund recovered by his exertions, has priority over a stop-order obtained by an assignee from his client: (*Haymes v. Cooper*, 33 Beav. 431; Dan. 1546.)

The fund will not be paid out or otherwise dealt with until it is either directly discharged, or some order is made expressly directing the fund to be dealt with notwithstanding the stop-order: (Dan. 1546-7.)

The obtaining of a stop-order does not give the person, if not a party to the action, the right to appear on further consideration, except at his own cost: (*Mildmay v. Quicke*, L. Rep. 6 Ch. Div. 553.)

5. DISCHARGING ORDER OR DEALING WITH FUND.

A person who has obtained a stop-order must be served with any application to deal with the fund, and at the hearing of the application the court will either (1) discharge the order, or (2) direct payment to the party who obtained it, or (3) if the rights of the parties cannot then be satisfactorily ascertained, will direct the fund to be retained in court for a limited time, to give the claimant an opportunity of taking the necessary steps for asserting the claim: (Dan. 1547.)

A stop-order may also be discharged on petition or summons: (Dan. 1547a.)

6. COSTS.

Where any stocks, funds, shares, securities, or moneys, are standing in the name of the [Paymaster-General] in trust in or to the general credit of any cause or matter, or to the account of any class of persons, and an order is made to prevent the transfer or payment of such stocks, funds, shares, securities, or moneys, or any part thereof without notice to the

assignee of any person entitled in expectancy or otherwise to any share or portion of such stocks, funds, shares, securities, or moneys, the person by whom any such order shall be obtained, or the shares of such stocks, funds, shares, securities, or moneys affected by such order, shall be liable, at the discretion of the court or the judge at chambers, as the case may be, to pay any costs, charges, and expenses, which, by reason of any such order having been obtained, shall be occasioned to any party to the cause or matter, or any person interested in any such stocks, funds, shares, securities, or moneys: (C. O. 26, r. 1.)

Where an incumbrancer of a fund in court obtains an order for payment, out of such fund, of his principal and interest and his costs as mortgagee, the expenses of obtaining a stop-order will not be allowed on taxation, unless expressly mentioned in the order: (Ayck. 483, citing *Waddilove v. Taylor*, 6 Ha. 307.)

The costs of obtaining a stop-order are only allowed under special circumstances: (Ayck. 483; *Mildmay v. Quicke*, L. Rep. 6 Ch. Div. 553.)

II. ON DOCUMENTS IN COURT.

An order may be obtained to stay the delivery out, without notice to the applicant, of documents deposited in the Central or the Chancery Pay Office: (Dan. 1547.)

SUBPÆNA.

[See EVIDENCE, II., 5 (e).]

SUMMONS.

[See CHAMBERS; WRIT OF SUMMONS.]

TAXATION OF COSTS.

[See COSTS, IV., V.]

TERMS.

[See TIME, II.]

TEST ACTION.

[See CONSOLIDATION.]

THIRD PARTY NOTICES.

[See PLEADING, XVI.]

TIME.

I. INTERPRETATION.

1. TIME OF DAY.
2. DAYS.
3. CLEAR DAYS.
4. MONTH.

II. PARTIAL ABOLITION OF TERMS.

III. PERIODS EXCLUDED IN COMPUTING TIME.

1. SUNDAYS, &c.
2. LONG VACATION.

IV. SERVICE OF NOTICES, &c.

V. ENLARGING AND ABRIDGING.

1. BY ORDER.
2. BY CONSENT.

I. INTERPRETATION.

1. TIME OF DAY.

Whenever any expression of time occurs in any Act of Parliament, deed, or other legal instrument, the time referred to shall, unless it is otherwise specifically stated, be held, in the case of Great Britain, to be Greenwich mean time, and, in the case of Ireland, Dublin mean time: (The Statutes (Definition of Time) Act, 1880, 43 & 44 Vict. c. 9, s. 1.)

2. DAYS.

Where any limited time from or after any date or event is appointed or allowed for doing any act or taking any proceeding, and such time is not limited by hours, the computation of such limited time shall not include the day of such date, or of the happening of such event, but shall commence at the beginning of the next following day; and the act or proceeding shall be done or taken at the latest on the last day of such limited time according to such computation: (C. O. 37, r. 9.)

3. CLEAR DAYS.

Where the days are expressed to be clear days, the time is to be exclusive of both the first and last days: (Per Romilly, M.R., in *Watson v. Eales*, 23 Beav. 300; per Coleridge, J., *Liffin v. Pitcher*, 1 Dowl. N.S. 769; *Daubney v. Shuttleworth*, L. Rep. 1 Ex. Div. 53.)

4. MONTH.

Where, by these rules, or by any judgment or order given or made after the commencement of the Act, time for doing any act or taking any proceeding is limited by months, not expressed to be lunar months, such time shall be computed by calendar months: (O. LVII., r. 1.)

II. PARTIAL ABOLITION OF TERMS.

The division of the legal year into terms shall be abolished so far as relates to the administration of justice; and there shall no longer be terms applicable to any sitting or business of the High Court of Justice, or of the Court of Appeal, or of any Commissioners to whom any jurisdiction may be assigned under this Act; but, in all other cases in which, under the law now existing, the terms into which the legal year is divided are used as a measure for determining the time at or within which any act is required to be done, the same may continue to be referred to for the same or the like purpose, unless and until provision is otherwise made by any lawful authority: (J. A. 1873, s. 26.)

As to measuring time by terms, see *Christ's College, Brecknock, v. Martin*, L. Rep. 3 Q. B. Div. 16; 36 L. T. Rep. N. S. 536; 46 L. J. 591, Q. B.; 25 W. R. 637.

Subject to rules of court, the High Court of Justice and the court of Appeal, and the judges thereof respectively, or any such commissioners as aforesaid, shall have power to sit and act, at any time and at any place, for the transaction of any part of the business of such courts respectively, or of such judges or commissioners, or for the discharge of any duty which by any Act of Parliament, or otherwise, is required to be discharged during or after term: (J. A. 1873, s. 26.)

III. PERIODS EXCLUDED IN COMPUTING TIME.

1. SUNDAYS, &c.

Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time: (O. LVII., r. 2.)

Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken on the day on which the offices shall next be open: (O. LVII., r. 3.)

Where the time for moving expired on a Sunday, it was held that the motion could be made on the next day on which the court sat: (*Taylor v. Jones*, 45 L. J. 110, C. P.)

2. LONG VACATION.

The time of the long vacation shall not be reckoned in the computation of the times appointed or allowed by the rules for filing, amending, or delivering any pleading, unless otherwise directed by a court or a judge: (O. LVII., r. 5.)

The time is not excluded in other cases: (*Crom v. Samuels*, L. Rep. 2 C. P. Div. 21.)

No pleadings shall be amended or delivered in the long vacation, unless directed by a court or judge: (O. LVII., r. 4.)

IV. SERVICE OF NOTICES, &c.

Service of pleadings, notices, summonses, orders, rules, and other proceedings shall be effected before the hour of six in the afternoon, except on Saturdays, when it shall be effected before the hour of two in the afternoon. Service effected after six in the afternoon on any weekday except Saturday shall be deemed to have been effected on the following day. Service effected after two in the afternoon on Saturday shall be deemed to have been effected on the following Monday: (O. LVII., r. 8, April, 1880.)

V. ENLARGING AND ABRIDGING.

1. BY ORDER.

A court or a judge shall have power to enlarge or abridge the time appointed by the rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed: (O. LVII., r. 6.)

Where the time for appealing will expire before the Court of Appeal will sit, the time ought to be extended as a matter of course: (*Walling-*

ford v. Mutual Society, L. Rep. 5 App. Cas. 685; 43 L. T. Rep. N. S. 258.)

The order has no application where one act is ordered by the rules to be done before another act: (*Re Pilcher*; *Pilcher v. Hinds*, L. Rep. 11 Ch. Div. 905; 40 L. T. Rep. N. S. 422, 832; 48 L. J. 512, 587, Ch.)

Where the time has elapsed through a mistake of the party as to the meaning of a rule, the court will not extend the time: (*International Financial Society v. City of Moscow Gas Company*, L. Rep. 7 Ch. Div. 241.)

In case of a slip the time has been extended: (*Canadian Oil Wells Corporation v. Hay*, W. N. 1878, p. 107.)

The court cannot extend the time to renew a writ, where the claim, without renewal, would be barred by the statute: (*Doyle v. Kaufman*, L. Rep. 3 Q. B. Div. 7, 340.)

See, also, cases cited DISMISSING ACTION; *Stirling v. Du Barry*, L. Rep. 5 Q. B. Div. 65.

After the time has expired the court has a discretion which will be exercised in favour of enlarging time whenever justice requires, although the proceedings have technically expired: (*Burke v. Rooney*, L. Rep. 4 C. P. Div. 226; 48 L. J. 601, C. P.; 27 W. R. 915; *Carter v. Stubbs*, 70 L. T. 25, 78; W. N. 1880, p. 183.)

The costs of an application to extend the time for taking any proceeding shall, in the absence of an order by the court or a judge directing by whom they are to be paid, be in the discretion of the taxing master: (Add. Rules, Aug. 1875, r. 22a, April, 1880.)

The following form of order is given:

In the High Court of Justice.

	Division.	18	No. .
	Master in Chambers.		
Between			Plaintiff,
	and		Defendant.
Upon hearing	, and upon reading the affidavit of		filed the
day of	18 , and		
It is ordered that the	shall have	time	and that the
costs of this application be			
	Dated the	day of	18 .
	(Rules of April, 1880, Sched. H. 3.)		

2. BY CONSENT.

The time for delivering or amending any pleading may be enlarged by consent in writing, without application to the court or a judge: (O. LVII., r. 6a, April, 1880.)

TRADE MARKS.

- I. DEFINITION OF A TRADE MARK.
- II. NECESSITY FOR REGISTRATION.
- III. PROCEDURE IN THE REGISTRY.
 1. APPLICATION.
 2. CLASSIFICATION OF COTTON MARKS.
 3. ADVERTISEMENT.
 4. OPPOSITION.

(a) To Original Entry on Register.

(b) To Subsequent Entries on Register.

5. REGISTRATION.

- (a) *In What Cases.*
- (b) *Date.*
- (c) *Mode.*

6. REFUSAL TO REGISTER.

- (a) *In what Cases.*
- (b) *Certificate.*

7. CONTINUANCE OF TRADE MARK ON REGISTER.

8. RESTORATION OF TRADE MARK TO REGISTER.

9. CANCELLATION OF ENTRY ON REGISTER.

IV. PROCEDURE IN COURT.

1. DEFINITION OF "COURT."

2. IN WHAT CASES APPLICATION MADE.

3. MODE OF APPLICATION.

4. ORDINARY FORMS OF APPLICATION.

- (a) *By Applicant for Registration.*
- (b) *By Opponent or Person Aggrieved.*

5. POWERS OF THE COURT.

6. COSTS.

7. NOTICE TO REGISTRAR.

I. DEFINITION OF A "TRADE-MARK."

For the purposes of the Trade Marks Registration Act, 1875, a trade-mark consists of one or more of the following essential particulars, that is to say:

- (1) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or,
- (2) A written signature, or copy of a written signature, of an individual or firm; or,
- (3) A distinctive device, mark, heading, label, or ticket;
And there may be added to any one or more of the said particulars any letters, words, or figures, or combination of letters, words, or figures; also
- (4) Any special and distinctive word or words, or combination of figures or letters, used as a trade-mark before the passing of the Trade Marks Registration Act, 1875, may be registered as such under that Act.

(Trade Marks Registration Act 1875, s. 10.)

II. NECESSITY FOR REGISTRATION.

From and after the first day of July, 1877, a person shall not be entitled to institute any proceeding to prevent or to recover damages for the infringement of any trade mark as defined by the Trade Marks Registration Act, 1875, until and unless such trade mark is registered in pursuance of that Act, or until and unless, with respect to any trade mark in use before the passing of that Act, registration shall have been refused: (Trade Marks Registration Act, 1876, s. 1.)

III. PROCEDURE IN THE REGISTRY.

1. APPLICATION.

A person, whether a British subject or an alien, desiring to register a trade mark, shall apply to the Registrar by sending him,

- (1) A *Statement*, which is to be dated and signed by the applicant, and is to contain the following particulars;
 - (a) The name and address and calling of the applicant.

- (b) The description of the trade mark to be registered, the description to be in writing, and accompanied, when practicable, by a representation of the mark in duplicate.
- (c) The class, or classes, of goods (and the description, or descriptions, of goods separately for each class [Registrar's Instructions]), for which the mark is to be registered.
- (d) In the case of an old mark, a description of the goods for which it has been used, and the length of user.
- (2) A Declaration verifying the statement, and declaring that, to the best of the applicant's knowledge and belief, he is lawfully entitled to use the trade mark.
- (3) The prescribed fee, *i.e.*, on application :

	£	s.	d.
(a) For one trade mark for one or more articles in one class	1	0	0
(b) For more than one trade mark for one or more articles in one class, for each additional trade mark after the first	0	10	0
(c) For a trade mark in respect of goods in different classes, for every class after the first	0	2	0

(Rules 5—9 and 2nd Schedule.)

Any proprietor of a cotton mark not specified in the second class in the list made out by the Committee of Experts may apply to be registered as proprietor of such cotton mark in manner and subject to the conditions in which he may apply to be registered as proprietor of any other trade mark: (Rule 62.)

In case of application for *old cotton marks*, three representations of the mark must be sent to the Manchester office: (Rule 58.)

The terms employed by the applicant for a trade mark in describing his mark are to be construed in accordance with the evidence of persons versed in the particular trade: (*Mitchell v. Henry*, 43 L. T. Rep. N. S. 186; L. Rep. 15 Ch. Div. 181.)

2. CLASSIFICATION OF COTTON MARKS.

The cotton marks of which representations have been sent in to the Manchester office shall be divided by the Committee of Experts, appointed by the Commissioners of Patents, into two classes—the first class consisting of such of the said cotton marks as are, in the opinion of the Committee, trade marks within the meaning of the Trade Marks Registration Act, 1875, and the second class consisting of such of the said cotton marks as are not, in the opinion of the Committee, trade marks within the meaning of the Act: (Rule 59.)

It is not the function of the Committee of Experts to decide questions of title between rival claimants of cotton marks: (*Ex parte Ede Bros. and Co.*, 28 W. R. 436.)

The decision of the Committee is not final, but is subject to revision by the court: (*Orr-Ewing and Co. v. Registrar of Trade Marks*, L. Rep. 4 App. Cas. 479; *Re Orr-Ewing*, 28 W. R. 412; *Re Dugdale*, 28 W. R. 436.)

3. ADVERTISEMENT.

As soon as may be after the receipt of an application, the Registrar shall require the applicant to insert an advertisement of the application in the *Trade Marks Journal*, and the applicant may be required to furnish the printer with a wood-block or electrotype of the trade mark: (Rules 13—15.)

When the application is for the registration of a cotton mark, a similar

advertisement is to be inserted in the *Journal*, specifying further the places in London and Manchester respectively where a specimen of such mark is deposited for exhibition: (Rule 1 of Feb., 1877.)

Where the registrar takes objection to a proposed trade mark, by reason of its similarity to a registered mark, or otherwise, he does not usually advertise the mark. Advertisement is an indispensable preliminary to registration: (*Re Meikle*, 24 W. R. 1067.)

4. OPPOSITION.

(a) *To Original Entry on Register.*

A notice of opposition to the registration of a trade mark may be given by sending to the registrar, together with the prescribed fee (*i.e.*, 2*l.* for each trade mark opposed—2nd schedule), a written notice of opposition in duplicate. The registrar shall send one copy of such notice to the applicant.

Within three weeks of such application, or such further time as the registrar may allow, the applicant may send to the registrar a counter-statement, and if he does not do so shall be deemed to have withdrawn his application.

If the applicant sends in a counter-statement, the registrar shall require the opponent to give security for costs, and if such security is not given within fourteen days, or such further time as the registrar may allow, the opposition shall be deemed to be withdrawn.

If the opponent duly gives security, the registrar shall send him one copy of the counter-statement, and thereupon the case shall be deemed to stand for the determination of the court: (Rule 16.)

(b) *To Subsequent Entries on Register.*

Any person may send, with the prescribed fee (*i.e.*, 2*l.*—2nd Schedule), notice to the registrar of his desire to oppose the registration of any assignee or transmittee, or any alteration of the register. The registrar shall give to the applicant for such registration or alteration the like notice, and may require security for costs in like manner as in the case of a notice of opposition to the original registration of a trade mark.

The registrar in such case may, if he think fit, require the parties interested to submit their claims to the court: (Rule 38.)

5. REGISTRATION.

(a) *In what Cases.*

On the expiration of three months from the date of the first appearance of the advertisement in the *Trade Marks Journal*, the registrar may, if he is satisfied that the applicant is entitled to registration, register the trade mark in respect of the description of goods for which he may be entitled to be registered, and the applicant as the proprietor thereof, on payment of the prescribed fee, *i.e.*, for the registration of:

	£	s.	d.
(1) One trade mark	1	0	0
(2) Each additional mark after the first, where the same person is registered at the same time for more than one trade mark.....	0	10	0
(3) One mark in each class after the first, where the same person is registered at the same time for the same trade mark in respect of goods in different classes	0	2	0

(Rule 17 and 2nd Schedule.)

Where each of several persons claims to be registered as proprietor of the same, or a nearly identical trade mark in respect of the same goods or goods belonging to the same class, the registrar shall use his discretion as to registering all or any of such trade marks, either unconditionally or on the condition of the introduction of such variations (if any) or other-

wise as he thinks fit, or the registrar may, if in any case he thinks it expedient, submit or require the claimants to submit their rights to the court: (Rule 18.)

Any person to whom a Sheffield corporate mark (*i.e.*, a Cutlers' Company's mark) legally belongs shall be entitled to have the same mark registered also as a trade mark under this Act in respect of any particular goods or classes of goods in the same manner and upon the same terms and conditions in and upon which he might have registered the same if it were not a Sheffield corporate mark: (T.M.R. Act, 1875, s. 9.)

Trade marks for which application has been made for any particular goods or class of goods specified in the Cutlers' Company Act, 1860, s. 2, may be registered after the expiration of six weeks after notice given of the application to the Cutlers' Company, and no objection raised: (T.M.R. Act, 1875, s. 9; Rules 51-53.)

On the expiration of three weeks from the date of the first appearance of the advertisement of a cotton mark in the *Trade Marks Journal*, the registrar may, if he is satisfied that the applicant is entitled to registration, register such mark in respect of the description of goods for which he may be entitled to be registered, and the applicant as the proprietor thereof, on payment of the prescribed fee: (Rule 2 of Feb., 1877.)

(b) Date.

The date on which the statement relating to the application for registry was received by the registrar shall be deemed to be the date of the registry: (Rule 20.)

(c) Mode.

Upon registering any trade mark the registrar shall enter in the register the date and such other particulars as he may think necessary, including the name and address of the proprietor: (Rule 20.)

Registration of cotton marks is usually effected by depositing a specimen of the mark at the Patent Office Museum, South Kensington, and also at the Trade Marks Registry at London and Manchester, and the same is the case with other marks incapable of registration in the ordinary way by advertisement in black and white in the *Trade Marks Journal*. In marks registered by deposit colour is essential: (*Mitchell v. Henry*, 43 L. T. Rep. N. S. 186; L. Rep. 15 Ch. Div. 181; *Re Robinson*, 29 W. R. 31.)

6. REFUSAL TO REGISTER.

(a) In what Cases.

(1) When the trade mark sought to be registered is not a trade mark as defined by T. M. R. Act, 1875, s. 10, registration must be refused: (*Ex parte Stephens*, L. Rep. 3 Ch. Div. 659; 24 W. R. 819; *Re Mitchell*, L. Rep. 7 Ch. Div. 36.)

(2) Where each of several persons claims to be registered as proprietors of the same trade mark, the registrar may refuse to comply with the claims of any of such persons until their rights have been determined by the court, and the registrar may himself submit or require the claimants to submit in the prescribed manner their rights to the court: (T. M. R. Act, 1875, s. 5; and see Rule 18.)

(3) Where a trade mark has been already registered in respect of any goods or description of goods belonging to one particular class, and if such mark have been removed from the register, then for five years after the date of such removal, a trade mark identical with such trade mark, or so nearly resembling the same as to be calculated to deceive, shall not, without leave of the court, be registered in the name of another person as proprietor thereof with respect to any goods in that class: (T. M. R. Act, 1875, s. 6; rules 19, 33.)

(4) It shall not be lawful to register as part of or in combination with a trade mark any words the exclusive use of which would not, by reason of their being calculated to deceive or otherwise, be deemed entitled to protection in a court of equity; or any scandalous designs: (T. M. R. Act, 1875, s. 6.)

(5) When the registration of a trade mark is opposed, the registrar cannot register the mark until the decision of the court has been obtained: [see OPPOSITION.]

(6) The registrar shall not, without the special leave of the court, to be given only in cases where the applicant proves his right, in respect of any goods or classes of goods with respect to which a Sheffield corporate mark (*i.e.*, a Cutlers' Company's mark) shall have been assigned and actually used, and of which mark a copy or description or notice of the assigning thereof shall have been delivered or given to the registrar, register a trade mark identical with such Sheffield corporate mark, or so nearly resembling the same as to be calculated to deceive: (T. M. R. Act, 1875, s. 9.)

(7) It shall not be lawful for the registrar to register any person as proprietor of any cotton mark in the second class of the list formed by the Committee of Experts, except in pursuance of an order of the court: (Rule 62; *Re Orr-Ewing and Co.* (2), 28 W. R. 412.)

(b) Certificate.

When an application by any person to register as a trade mark a device, mark, name, word, combination of words, or other matter or thing proposed for registration as a trade mark, which has been in use as a trade mark before the passing of the Trade Marks Registration Act, 1875, has been refused, it shall be the duty of the registrar, on request, and on payment of the prescribed fee (*i.e.*, for certificate of refusal to register one trade mark—1*l.*; for certificate of refusal, at the same time, for more than one trade mark, for each additional mark after the first, 10*s.*—2nd schedule), to give to the applicant a certificate of such refusal, and a certificate so granted shall be conclusive evidence of such refusal: (T. M. R. Act, 1876, s. 2.)

7. CONTINUANCE OF TRADE MARK ON REGISTER.

Unless the registered proprietor of a trade mark pays a continuance fee (*i.e.*, 2*l.*—2nd schedule) before the expiration of fourteen years from the date of registration, the registrar may, after the end of three months from the expiration of such fourteen years, remove the mark from the register, and so from time to time at the expiration of every period of fourteen years: (Rule 30.)

If before the expiration of the said three months the registered proprietor pays the said fee, together with the additional prescribed fee (*i.e.*, 1*l.*—2nd schedule) the registrar may, without removing such trade mark from the register, accept the said fee as if it had been paid before the expiration of the said fourteen years: (Rule 31.)

8. RESTORATION OF TRADE MARK TO REGISTER.

Where after the three months from the expiration of fourteen years from the date of registration a trade mark has been removed from the register for non-payment of the prescribed fee, the Commissioners of Patents, or one of them, may, if they are satisfied that it is just so to do, restore such trade mark to the register on payment of the prescribed additional fee (*i.e.*, 2*l.*—2nd schedule), and compliance with such conditions as they may think just: (Rule 32.)

9. CANCELLATION OF ENTRY ON REGISTER.

The registered proprietor of a trade mark may at any time send to the

registrar an application to cancel the entry of such trade mark upon the register; such application to be accompanied by the prescribed fee (*i.e.*, 5s.—2nd schedule) and by a declaration made by the applicant, stating his name and address, and that he is the person whose name appears upon the register as the proprietor of the said trade mark; and thereupon the registrar may, if satisfied of the truth of the statement made by the applicant, cancel the entry of such trade mark: (Rule of Feb. 1878.)

IV. PROCEDURE IN COURT.

1. DEFINITION OF "COURT."

The court, for the purposes of [the Trade Marks Registration Act, 1875] is . . . the Chancery Division of Her Majesty's High Court of Justice: (Rule 42.)

An order of the House of Lords, on appeal, must be made an order of the Chancery Division, to become effective: (*Re Orr-Ewing and Co.*, 28 W. R. 412.)

2. IN WHAT CASES APPLICATION MADE.

(a) If the name of a person who is not for the time being entitled to the exclusive use of a trade mark in accordance with the Trade Marks Registration Act, 1875, or otherwise in accordance with law, is entered on the register of trade marks as a proprietor of such trade mark.

(b) If the registrar refuses to enter on the register as proprietor of a trade mark the name of any person who is for the time being entitled to the exclusive use of such trade mark in accordance with the Trade Marks Registration Act, 1875, or otherwise in accordance with law.

(c) If any mark is registered as a trade mark which is not authorised to be so registered under the Trade Marks Registration Act, 1875.

(d) If each of several persons claims to be registered as proprietor of the same trade mark: (T. M. R. Act, 1875, s. 5.)

3. MODE OF APPLICATION.

An application to the court (*i.e.*, by the person seeking registration, see *Re Simpson, Davies, and Sons*, 42 L. T. Rep. N. S. 675; L. Rep. 15 Ch. Div. 525), under the Trade Marks Registration Act, 1875, and the rules, may, subject to rules of court under the Supreme Court of Judicature Act, 1875, be made by motion, or by application in chambers, or in such other manner as the court may direct: (Rule 43.)

Where the registrar refuses to comply with the claims of any persons until their rights have been determined by the court, the manner in which the rights of such claimants may be submitted by the registrar, or, if the registrar so require, by the claimants to the court shall, unless the court otherwise order, be by a special case; and such special case shall be filed and proceeded with in like manner as any other special case submitted to the court, or in such other manner as the court may direct: (Rule 44; *Ex parte Grimshaw*, W. N. 1877, p. 24.)

The special case may be agreed to by the parties, or, if they differ, may be settled by the registrar: (Rule 45.)

Although a special case is directed by the rules as above stated, that course of proceeding is practically obsolete, and the proper course in all cases is for the opponent to apply to the judge by summons in chambers for a direction as to the manner in which the case shall be tried; upon which the usual practice (at the Rolls) is for the applicant to be directed to apply for registration by a summons, to be adjourned into court. In some cases a motion may be directed: (*Re Simpson, Davies, and Sons*, 42 L. T. Rep. N. S. 675; L. Rep. 15 Ch. Div. 525.)

4. ORDINARY FORMS OF APPLICATION.

(a) *By Applicant for Registration.*

(1) To direct the registrar to proceed with the application, notwithstanding the opposition of the registrar, whether based on—

- (i.) A contention that the mark is not within the definition in the Trade Marks Registration Act, 1875 (*Ex parte Stephens*, L. Rep. 3 Ch. Div. 659; *Re Barrows*, L. Rep. 5 Ch. Div. 353); or
- (ii.) A contention that the mark is too similar to a mark already on the register (*Re Hargreaves*, L. Rep. 11 Ch. Div. 669); or
- (iii.) A contention that the mark, being a cutlery mark, is too similar to a Sheffield corporate mark; or
- (iv.) A relegation of the mark, being a cotton mark, by the Manchester Committee of Experts, to the second class, or B. list: (*Orr-Ewing v. Registrar of Trade Marks*, L. Rep. 4 App. Cas. 479.)

Two clear days' notice must be given to the registrar, and the application must be supported* by an affidavit by the applicant, stating the facts: (*Ex parte Stephens*, 24 W. R. 819.)

(2) To direct the registrar to proceed with the application, notwithstanding the opposition of a person aggrieved, whether based on—

- (i.) A contention that the mark is common to the public or the trade; or
- (ii.) A contention that the mark is too similar to the opponent's registered mark; or
- (iii.) A contention that the mark, being a cutlery mark, is too similar to the opponent's Sheffield mark.

(3) To obtain leave for the registrar to alter a registered trade mark; but such alteration must not extend to any one or more of the essential particulars: (Rule 35.)

(b) *By Opponent or Person Aggrieved.*

(1) To direct the registrar to remove a registered trade mark from the register, for any of the reasons in (a) (2) *supra*: (*Re Hyde and Co.*, L. Rep. 7 Ch. Div. 724; *Rose v. Evans*, 48 L. J. 618, Ch.)

(2) To direct the registrar to remove a registered trade mark from the register on the ground, after the expiration of five years from the date of registration, that the registered proprietor is not engaged in any business concerned in the goods within the same class as the goods with respect to which a trade mark is registered: (Rule 34.)

(3) In some cases applications have been made to restrain the applicant from proceeding with his application for registration for reasons in (a) (2), *sup*: (*Re Farina*, 26 W. R. 261; 27 *Ib.* 456; *Re Worthington*, L. Rep. 14 Ch. Div. 9); but it has been decided that such applications, and therefore, as it seems, also applications to limit the registration, if granted, in respect of the articles for which it is registered, or the mode of user, and applications to refuse leave to the registrar to alter a registered trade mark, are irregular, as the applicant for registration should take the initiative: (*Re Simpson, Davies, and Sons*, 42 L. T. Rep. N. S. 675; L. Rep. 15 Ch. Div. 525.)

5. POWERS OF THE COURT.

The court may either refuse an application to rectify the register, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may award damages to the party aggrieved.

The court may, in any proceeding under the Trade Marks Registration Act, 1875, s. 5, decide any question as to whether a mark is or is not such a trade mark as is authorised to be registered under that Act, also any question relating to the right of any person who is a party to such proceeding to have his name entered on the register of trade marks, or to

have the name of some other person removed from such register, also any other question that it may be necessary or expedient to decide for the rectification of the register..

The court may direct an issue to be tried for the decision of any question of fact which may require to be decided for the purposes of the Trade Marks Registration Act, 1875, s. 5: (T. M. R. Act, 1875, s. 5.)

The court cannot order a trade mark to be registered without the preliminary advertisement being inserted in the *Trade Marks Journal*: (*Re Meikle*, 24 W. R. 1067.)

Where the applicant has used several marks differing only in non-essential particulars, representative registration may be granted: (*Re Barrows*, L. Rep. 5 Ch. Div. 353; *Re Brook*, 26 W. R. 791.)

Where the applicant has used his trade mark in a limited manner, registration may be granted subject to limitations as to the mode, place, &c., of the user, to be embodied in a note entered in the register: (*Re Whiteley*, 43 L. T. Rep. N. S. 627; *Re Sykes*, 43 L. T. Rep. N. S. 626.)

6. COSTS.

The only costs which can be given by the court on an opposed application for registration are the costs of the proceedings subsequent to security for costs being given by the opponent under rule 16: (*Re Brandreth*, L. Rep. 9 Ch. Div. 618.)

When an application is opposed, the general rule is that costs follow the event, and this is so when a registered mark is removed from the register by parties who allowed it to be placed there without opposition: (*Re Hyde and Co.*, L. Rep. 7 Ch. Div. 724.)

If an applicant takes advantage of the strict letter of the Trade Marks Registration Act, 1875, to obtain registration of a mark objectionable in some respect, the applicant, though successful, will have to pay the costs of an opposed application to the court: (*Re Maignen*, 28 W. R. 759.)

In cases where the registrar is debarred from registering without the leave of the court, *e.g.*, where the Committee of Experts have placed a cotton mark in the second class, he is entitled to his costs of appearing on the application, whatever the issue may be: (*Re Orr-Ewing and Co.* (2), 28 W. R. 412.)

It seems that in ordinary cases where the registrar has refused registration, the court will not give costs against him, though his decision is reversed, and although he has unsuccessfully appealed from the judge's decision: (*Re Rotherham*, 43 L. T. Rep. N. S. 1; L. Rep. 14 Ch. Div. 585.)

7. NOTICE TO REGISTRAR.

Whenever any order has been made rectifying the register, the court shall by its order direct that due notice of such rectification be given to the registrar. The registrar, on receiving notice, will forthwith rectify the register in accordance with the order: (T. M. R. Act, 1875, s. 5, and Rule 36.)

TRANSFER.

- I. GENERAL POWER,
- II. FROM ONE DIVISION TO ANOTHER.

1. WHERE ACTION, &C., COMMENCED IN WRONG DIVISION.

- (a) *Application.*
- (b) *Effect on Previous Proceedings.*

2. IN OTHER CASES.

- (a) *When Ordered.*
- (b) *How Made.*

- (1) By Lord Chancellor.
- (2) By Court where Action Pending.
- (3) By Court of Appeal.
- (4) By Judge after Winding-up, or Administration Order.
- (5) By Order for Trial by Jury.

III. FROM ONE JUDGE OF CHANCERY DIVISION TO ANOTHER.

IV. FROM AND TO DISTRICT REGISTRIES.

1. FROM DISTRICT REGISTRY TO LONDON.

- (a) *By Defendant as of Right.*
- (b) *In Other Cases.*
- (c) *Transmission of Documents and Copies of Entries.*
- (d) *Proceedings after Transfer.*

4. FROM LONDON TO DISTRICT REGISTRY.

V. FROM AND TO COUNTY COURT.

1. FROM COUNTY COURT TO HIGH COURT.

- (a) *By Order of the High Court.*
 - (1) *In Equity Cases.*
 - (2) *In Case of Counter-claim not within Jurisdiction.*
 - (3) *In other Cases.*
- (b) *By Order of the County Court.*

2. FROM HIGH COURT TO COUNTY COURT.

I. GENERAL POWER.

Any cause or matter may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by such authority and in such manner as rules of court may direct, from one division or judge of the High Court of Justice to any other division or judge thereof, or may by the like authority be retained in the division in which the same was commenced, although such may not be the proper division to which the same cause or matter ought, in the first instance, to have been assigned: (J. A. 1873, s. 36.)

II. FROM ONE DIVISION TO ANOTHER.

1. WHERE ACTION, &c. COMMENCED IN WRONG DIVISION.

(a) *Application.*

If any plaintiff or petitioner shall at any time assign his cause or matter to any division of the said High Court to which, according to the rules of court or the provisions of the principal Act or this Act, the same ought not to be assigned, the court, or any judge of such division, upon being informed thereof, may, on a summary application at any stage of the cause or matter, direct the same to be transferred to the division of the said court to which, according to such rules or provisions, the same ought to have been assigned, or he may, if he think it expedient so to do, retain the same in the division in which the same was commenced: (J. A. 1875, s. 11, sub-s. 2.)

A summary application is by summons, not *ex parte*: (*Blewitt v. Dowling*, W. N. 1875, p. 202.)

When issues of fact in a Chancery action are to be tried by a jury and a judge of another division, the action ought to be transferred to the latter division: (*Clements v. Norris*, W. N. 1878, p. 4.) The trial by jury of the whole action itself operates as a transfer: (see *post*, 2 (b) (5).)

A petition for a charging order under 23 & 24 Vict. c. 127, will be ordered to be transferred to the judge who presided at the trial: (*Owen v. Henshaw*, W. N. 1877, p. 269.)

An action brought in a common law division in respect of what was, substantially, a breach of an order of the Chancery Division, was transferred to the Chancery Division: (*Johnson v. Moffat*, W. N. 1876, p. 21.)

Where a plaintiff claimed under an alleged will which had not been proved, the Master of the Rolls declined to grant probate, and ordered the action to stand over for probate proceedings to be taken: (*Pinney v. Hunt*, L. Rep. 6 Ch. Div. 98.)

When an action assigned to the Admiralty Division was not within the old jurisdiction of the Court of Admiralty, the judge refused to retain it: (*The Seaham*, 40 L. T. Rep. N. S. 38.)

See also, as to retaining an action, *The Fulica*, W. N. 1880, p. 172.

(b) *Effect on previous Proceedings.*

All steps and proceedings whatsoever taken by the plaintiff or petitioner or by any other party in any such cause or matter, and all orders made therein by the court or any judge thereof before any such transfer, shall be valid and effectual to all intents and purposes in the same manner as if the same respectively had been taken and made in the proper division of the said court to which such cause or matter ought to have been assigned: (J. A. 1875, s. 11, sub-s. 2.)

2. IN OTHER CASES.

(a) *When Ordered.*

A transfer will only be ordered when it is clearly advantageous: (*Cannot v. Morgan*, L. Rep. 1 Ch. Div. 1.)

An application to transfer from the Chancery Division to the Queen's Bench Division, on the ground that the plaintiff had not paid the costs of an action commenced in the latter division, was refused: (*Id.*)

Where in an action commenced in a common law division a party may become entitled to relief, to effect which the Chancery Division has the only requisite machinery, the action will be transferred to the Chancery Division: (*Holloway v. York*, L. Rep. 2 Ex. Div. 333; 25 W. R. 403.)

But a defendant cannot, by counter-claiming for a matter within the specially assigned jurisdiction of the Chancery Division, give himself a right to insist that an action commenced in a common law division shall be transferred to the Chancery Division (*Storey v. Waddle*, L. Rep. 4 Q. B. Div. 289), nor can the right to such a transfer be obtained by commencing a cross action in the Chancery Division if the common law division can do complete justice in its own action: (*Standard Discount Company v. Barton*, 37 L. T. Rep. N. S. 581.)

(b) *How Made.*

(1) By Lord Chancellor.

Any action or actions may be transferred from one division to another of the High Court . . . by an order of the Lord Chancellor, provided that no transfer shall be made from or to any division without the consent of the president of the division: (O. LI., r. 1.)

Where all parties consent the Lord Chancellor directs the transfer on written application to his secretary; in other cases the application must be made in court: (L. Rep. 1 Ch. Div. 41.)

The consent of the Lord Chancellor will be signed on the order by his principal secretary, and stamped with his official stamp: (Seton, 320.)

The Lord Chancellor has no power to stay proceedings: (*Re Sharp*, Seton, 320.)

(2) By Court where Action Pending.

Any action may, at any stage, be transferred from one division to another by an order made by the court or any judge of the division to which the action is assigned: Provided that no such transfer shall be made without the consent of the president of the division to which the action is proposed to be transferred: (O. LI., r. 2.)

A judge of one division cannot be transferred to another division under this rule: (*Chapman v. Real Property Trust*, L. Rep. 7 Ch. Div. 732.)

The application must be made on notice to the other parties: (*Humphries v. Edwards*, 45 L. J. 112, Ch.)

A judge of the Queen's Bench, the Common Pleas, or the Exchequer Division, when sitting at chambers, may transfer an action from any other of such divisions to the Chancery Division: (*Hillman v. Mayhew*, L. Rep. 1 Ex. Div. 132.)

Any action transferred to the Chancery Division or the Probate Division, shall, by the order directing the transfer, be directed to be assigned to one of the judges of such division to be named in the order: (O. LI., r. 3.)

The consent of the president is not a condition precedent, but the order is not effectual until such consent is obtained: (*Humphreys v. Edwards*, 45 L. J. 112, Ch.; *Holmes v. Harvey*, 35 L. T. Rep. N. S. 600; 25 W. R. 80.)

(3) By Court of Appeal.

In case of refusal to transfer, the Court of Appeal may order the transfer: (*Holloway v. York*, L. Rep. 2 Ex. Div. 333; 25 W. R. 403; but it is doubtful whether the consent of the president of the court below must not be obtained: (*Storey v. Waddle*, L. Rep. 4 Q. B. Div. 289; 27 W. R. 289.)

(4) By Judge after Winding-up or Administration Order.

When an order has been made by any judge of the Chancery Division for the winding-up of any company under the Companies Acts 1862 and 1867, or for the administration of the assets of any testator or intestate, the judge in whose court such winding-up or administration shall be pending shall have power, without any further consent, to order the transfer to such judge of any action pending in any other division brought or continued by or against such company, or by or against the executors or administrators of the testator or intestate whose assets are being so administered, as the case may be: (O. LI., r. 2A, June, 1876.)

Where a company was being wound-up in the Chancery Division, and the business was being carried on by the liquidator, against whom an action was brought in the Exchequer Division for injuries sustained through the negligence of the company, a motion to transfer the action to the Chancery Division was refused, the plaintiff undertaking to amend his writ by claiming against the liquidator personally, the plaintiff's rights against the company in the winding-up not being prejudiced: (*Re Thames Ferry Company*, 40 L. T. Rep. N. S. 422; 27 W. R. 503.)

Proceedings by a local board in the Queen's Bench Division to enforce an award against an executor may be transferred, but the court cannot give leave to the board to be admitted as a creditor for the amount claimed: (*West v. Downman*, W. N. 1879, pp. 13, 84; L. Rep. 14 Ch. Div. 111, 114.)

A judge of the Chancery Division, in whose court an administration action is pending, can order the transfer to himself of such actions only, brought in other divisions against the executor of the person whose estate is being administered, as are brought against him *quâ* executor: (*Chapman v. Mason*, 40 L. T. Rep. N. S. 678.)

Bacon, V.C. refused to order that, after transfer, proceedings in the action should be stayed: (*Re Timms*, 38 L. T. Rep. N. S. 679; 47 L. J. 831, Ch.; 26 W. R. 692); but Jessel, M.R. has by the same order of transfer ordered a stay of proceedings: (*Re Stubbs*, L. Rep. 8 Ch. Div. 154.)

The application may be made by motion *ex parte*: (*Re Landore Siemens Steel Company*, L. Rep. 10 Ch. Div. 489; 40 L. T. Rep. N. S. 35; 27 W. R. 304; *Field v. Field*, W. N. 1877, p. 98; *Whitaker v. Robinson*, W. N. 1877, p. 201.)

Where an order *nisi* to sign judgment had been obtained in the creditor's action, leave was given to prove for the amount in the administration action: (*Re Stubbs*, L. Rep. 8 Ch. Div. 154; 47 L. J. 671, Ch.)

(5) By Order for Trial by Jury.

When an action, commenced in the Chancery Division, has been tried by jury before one of the judges of a common law division, it is thenceforth transferred to the division to which the judge belongs, and an application for a new trial must therefore be made to a divisional court of that division. But this does not apply to an action in which an issue has been directed by a judge of the Chancery Division. The action in that case still remains attached to the Chancery Division: (*Jones v. Baxter*, L. Rep. 5 Ex. Div. 275; 28 W. R. 817; and see NEW TRIAL.)

III. FROM ONE JUDGE OF CHANCERY DIVISION TO ANOTHER.

Any action or actions may be transferred . . . from one judge to another of the Chancery Division by an order of the Lord Chancellor: (O. LI., r. 1.)

Where an action was brought and judgment given in the court of Malins, V.C., for administration of A.'s personalty and for an inquiry whether his moiety of certain realty had become assets of his partnership business with B., and B. brought an action in the Rolls to wind up the partnership, Cairns, L.C. ordered the second action to be transferred to Malins, V.C., but refused to make any consolidation order: (*Davis v. Davis*, 48 L. J. 40, Ch.)

In the Chancery Division, a transfer of a cause from one judge to another may by the same or a separate order be ordered to be made, or to be deemed to have been made, for the purpose only of trial or hearing, and in such case the original and any further hearing shall take place before the judge to whom the cause has been transferred, but all other proceedings therein, whether before or after the hearing or trial of the cause shall be taken and prosecuted in the same manner as if such cause had not been transferred from the judge to whom it was assigned at the time of transfer, and as if such judge had made the decree or judgment, if any, made therein, unless the judge to whom the cause is transferred shall direct that any further proceedings therein before or after the hearing or trial therein shall be taken and prosecuted before himself or before an official or special referee: (O. LI., r. 1A., June, 1877.)

Actions transferred to Mr. Justice Fry are, until further order, deemed to be so transferred only for the purpose of trial or hearing: (Order of L. C., 19th June, 1877, W. N. 1877, p. 307.)

A Vice-Chancellor from whom a cause has been transferred has no power to direct a summons to be heard before Mr. Justice Fry: (*Lloyd v. Jones*, L. Rep. 7 Ch. Div. 390; 37 L. T. Rep. N. S. 524; 47 L. J. 470, Ch.; 26 W. R. 262.)

The Court of Appeal cannot, even with the consent of both parties and both judges, order a transfer of an action or petition from one judge of the Chancery Division to another: (*Re Hutley*, L. Rep. 1 Ch. Div. 11; 45 L. J. 79, Ch.; *Re Boyd's Trusts*, L. Rep. 1 Ch. Div. 12.)

IV. FROM AND TO DISTRICT REGISTRIES.

1. FROM DISTRICT REGISTRY TO LONDON.

(a) *By Defendant as of Right.*(1) *In What Cases.*

In any action which would, under the . . . rules, proceed in the district registry, any defendant may remove the action from the district registry as of right in the cases, and within the times, following:

Where the writ is specially indorsed under Order III., r. 6, and the plaintiff does not within four days after the appearance of such defendant give notice of an application for an order against him under Order XIV. [see JUDGMENT]; then such defendant may remove the action as of right at any time after the expiration of such four days, and before delivering a defence, and before the expiration of the time for doing so:

Where the writ is specially indorsed and the plaintiff has made such application as in the last paragraph mentioned, and the defendant has obtained leave to defend in manner provided by Order XIV.; then such defendant may remove the action as of right at any time after the order giving him leave to defend, and before delivering a defence, and before the expiration of the time for doing so:

Where the writ is not specially indorsed any defendant may remove the action as of right at any time after appearance, and before delivering a defence, and before the expiration of the time for doing so: (O. XXXV., r. 11.)

(2) *Application.*

Any defendant desirous to remove an action as of right under the last preceding rule may do so by serving upon the other parties to the action, and delivering to the district registrar, a notice, signed by himself or his solicitor, to the effect that he desires the action to be removed to London, and the action shall be removed accordingly: (O. XXXV., r. 12.)

(3) *Power to Restrain notwithstanding Notice of Formal Defendant.*

If the court or a judge shall be satisfied that the defendant giving such notice is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, such court or judge may order that the action may proceed in the district registry notwithstanding such notice: (O. XXXV., r. 12.)

(b) *In other Cases.*

Any party to an action in which a writ of summons shall have been issued from any such district registry shall be at liberty at any time to apply, in such manner as shall be prescribed by rules of court, to the High Court, or to a judge in chambers of the division of the said High Court to which the action may be assigned, to remove the proceedings from such district registry into the proper office of the said High Court; and the court or judge may, if it be thought fit, grant such application: (J. A. 1873, s. 65.)

In any case not provided for by the last two preceding rules [see *sup.* (a)] any party to an action proceeding in a district registry may apply to the court or a judge, or to the district registrar, for an order to remove the action from the district registry to London, and such court, judge, or registrar, may make an order accordingly, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall seem just: (O. XXXV., r. 13.)

A motion in the court in London stops all further proceedings in the district registry: (*Dyson v. Pickles*, 27 W. R. 376.)

(c) Transmission of Documents and Copies of Entries.

Whenever any proceedings are removed from the district registry to London, the district registrar shall transmit to the proper officer of the High Court of Justice all original documents (if any) filed in the district registry; and a copy of all entries in the books of the district registry of the proceedings in an action: (O. XXXV., r. 14.)

And in such case the proceedings and such original documents, if any, as may be filed therein shall upon receipt of such order be transmitted by the district registrar to the proper office of the said High Court: (J. A., 1873, s. 65.)

(d) Proceedings after Transfer.

[Where a transfer is ordered] the said action shall thenceforth proceed in the said High Court, in the same manner as if it had been originally commenced by a writ of summons issued out of the proper office in London; or the court or judge, if it be thought right, may thereupon direct that the proceedings may continue to be taken in such district registry: (J. A., 1873, s. 65.)

2. FROM LONDON TO DISTRICT REGISTRY.

Any party to an action proceeding in London may apply to the court or a judge for an order to remove the action from London to any district registry, and such court or judge may make an order accordingly, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall seem just: (O. XXXV., r. 13.)

V. FROM AND TO COUNTY COURTS.

1. FROM COUNTY COURT TO HIGH COURT.

(a) By Order of the High Court.

(1) In Equity Cases.

Any [judge of the Chancery Division], on the application at chambers of any party to any suit or matter pending under this Act, shall have power, then and there, or, if he shall think fit, after hearing a summons served upon the other party or parties, to transfer the same to the . . . Chancery [Division] upon such terms, if any, as to security for costs or otherwise, as he may think fit: (28 & 29 Vict. c. 99, s. 3.)

Where a plaint had been filed in a County Court against five defendants, of whom one only, who was in the plaintiff's interest, had a residence in the district, the plaint was ordered to be transferred: (*Baker v. Wait*, L. Rep. 9 Eq. 103.)

Where any order is made by the High Court, or any division or judge thereof, for the transfer of any proceeding from the County Court to the High Court under the 90th section of the Supreme Courts of Judicature Act, 1873 [see *post* (2)] or under sect. 3 of the County Court Acts, 1865, then, subject to such order, the record in such proceedings shall be transmitted by the registrar in the following manner: The registrar shall make and certify under his hand office copies of all entries of record in the books of the court, and shall forthwith transmit by post or otherwise such copies, together with all such documents as shall have been filed in the action, to the proper officer of the High Court: (C. C. R., 1875, O. 20, r. 7.)

Such copies and the cost of transmission shall be paid for by the parties on whose application the transfer has been made, and the registrar may require deposit of the cost of making such copies and transmissions before making or transmitting the same: (C. C. R., 1875; O. 20, r. 7.)

(2) In Case of Counter-claim not within Jurisdiction.

Where, in any proceeding before any such inferior court, any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the court, such defence or counter-claim shall not affect the competence or the duty of the court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto; but no relief exceeding that which the court has jurisdiction to administer shall be given to the defendant upon any such counter-claim. Provided always, that in such case it shall be lawful for the High Court, or any division or judge thereof, if it shall be thought fit, on the application of any party to the proceeding, to order that the whole proceeding be transferred from such inferior court to the High Court, or to any division thereof; and in such case the record in such proceeding shall be transmitted by the registrar, or other proper officer, of the inferior court to the said High Court; and the same shall thenceforth be continued and prosecuted in the said High Court as if it had been originally commenced therein: (J. A., 1873, s. 90; and see C. C. R., 1875, O. 20, r. 7, cited *sup.* (1).)

An inferior court has jurisdiction to entertain a claim set up by way of counter-claim, although it is in respect of matters which arose beyond its local jurisdiction; but the power to grant relief in respect of such counter-claim is limited to the same amount which the plaintiff has claimed in the action: (*Davis v. Flagstaff Silver Mining Company of Utah*, L. Rep. 3 C. P. Div. 228; 38 L. T. Rep. N. S. 769; 47 L. J. 503, C. P.; 26 W. R. 431.)

(3) In Other Cases.

No plaint entered in any [County] Court . . . shall be removed or removable from the said court into the [High Court] by any writ or process, unless the debt or damage claimed shall exceed 5*l.*, and then only by leave of a judge of the [High Court] in cases which shall appear to the judge fit to be tried in [the High Court], and upon such terms as to payment of costs, giving security for debt or costs, or such other terms as he shall think fit: (9 & 10 Vict. c. 108, s. 38.)

Any action commenced in a County Court for a claim not exceeding 5*l.* may be removed by a writ of *certiorari* into [the High Court] if such . . . court or a judge of [the High Court] shall deem it desirable that the cause shall be tried in [the High Court], and if the party applying for such writ shall give security, to be approved by one of the masters of [the Supreme Court], for the amount of the claim, and the costs of the trial, not exceeding in all 100*l.*, and shall further assent to such terms, if any, as the [High Court] or judge shall think fit to impose: (19 & 20 Vict. c. 108, s. 38; and see CERTIORARI.)

If in any action of contract the plaintiff shall claim a sum exceeding 20*l.*, or if in any action of tort the plaintiff shall claim a sum exceeding 5*l.*, and the defendant shall give notice that he objects to the action being tried in the County Court, and shall give security, to be approved of by the registrar, for the amount claimed, and the costs of trial in [the High Court] not exceeding in the whole the sum of 150*l.*, all proceedings in the County Court in any such action shall be stayed: (19 & 20 Vict. c. 108, s. 39.)

(b) By Order of the County Court.

If during the progress of any suit or matter it shall be made to appear to the court that the subject matter exceeds the limit in point of amount to which the jurisdiction of the County Courts is hereby limited, it shall not affect the validity of any order or decree already made, but it shall be

the duty of the court to direct the said suit or matter to be transferred to the [Chancery Division], and thereupon the said suit or matter shall proceed in such one of the [judges'] courts as the Lord Chancellor may by general order direct, and such [judge] shall have power to regulate the whole of the procedure in the said suit or matter when so transferred. Provided always that it shall be lawful for any party to apply to such [judge of the Chancery Division] at chambers for an order authorising and directing the suit or matter to be carried on and prosecuted in the County Court notwithstanding such excess in the amount of the limit to which jurisdiction in the matter is hereby given to the County Courts, and the [judge], if he shall deem it right to summon the other parties or any of them to appear before him for that purpose, after hearing such parties, or on default of the appearance of all or any of them, shall have full power to make such order: (28 & 29 Vict. c. 99, s. 9.)

If during the progress of any action upon any claim or title, or to obtain any relief, remedy, or redress which might respectively before the 1st Nov. 1875, have been the subject of a plaint or petition in equity, it shall be made to appear that the subject matter of the plaintiff's claim exceeds the amount to which the jurisdiction of the court is limited, the judge, if requested, may forthwith make an order for the transfer of the action to the Chancery Division of the High Court of Justice, but, if not so requested, the order shall not be made before fifteen days at least: (C. C. R. 1875, O. 20, r. 5.)

The registrar shall make and file a copy of such order, and shall transmit the order by post or otherwise, to the proper officer of the Chancery Division of the High Court of Justice, and shall also send notice, by post or otherwise, of the fact, to all parties and persons entitled to be served with a copy of the order: (C. C. R. 1875, O. 20, r. 5.)

If during the progress of taking any accounts or making any inquiries in any action for any claim, right, redress, or remedy which might before the commencement of the Supreme Court of Judicature Act, 1873, have been enforced in equity, it shall appear to the registrar that the subject matter of the action exceeds the amount to which the jurisdiction of the court is limited, he may, if he thinks fit, proceed with and complete the particular account or inquiry, but he shall at the next sitting of the court present a certificate of the state of the proceedings in the action, and if the judge shall be of opinion that such excess exists, he shall make an order of transfer as under the last preceding rule: (C. C. R. 1875, O. 20, r. 6.)

Where a plaintiff commences an action in the County Court, which at the hearing is transferred to the High Court of Justice because the subject-matter is in amount beyond the jurisdiction of the County Court, he must pay the costs of the hearing in the County Court under any circumstances: (*Ward v. Wyld*, L. Rep. 5 Ch. Div. 779; 37 L. T. Rep. N. S. 68; 25 W. R. 866.)

2. FROM HIGH COURT TO COUNTY COURT.

The provisions contained in . . . the seventh, eighth, and tenth sections of the County Courts Acts, 1867, shall apply to all actions commenced or pending in the said High Court of Justice in which any relief is sought which can be given in a County Court: (J. A. 1873, s. 67.)

Where, in any action of contract brought or commenced in [the High Court of Justice] the claim endorsed on the writ does not exceed fifty pounds, or where such claim, although it originally exceeded fifty pounds, is reduced by payment, an admitted set-off or otherwise, to a sum not exceeding fifty pounds, it shall be lawful for the defendant in the action, within eight days from the day upon which the writ shall have been served

upon him, if the whole or part of the demand of the plaintiff be contested, to apply to a judge at chambers for a summons to the plaintiff to show cause why such action should not be tried in the County Court, or one of the County Courts, in which the action might have been commenced; and, on the hearing of such summons, the judge shall, unless there be good cause to the contrary, order such action to be tried accordingly, and thereupon the plaintiff shall lodge the original writ and the order with the registrar of the County Court mentioned in the order, who shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the registrar to both parties or their [solicitors], and the cause, and all proceedings therein, shall be heard and taken in such County Court as if the action had been originally commenced in such County Court; and the costs of the parties in respect of proceedings subsequent to the order of the judge of the Superior Court shall be allowed according to the scale of costs in use in the County Courts, and the costs of the proceedings previously had in the Superior Court shall be allowed according to the scale in use in such latter court: (30 & 31 Vict. c. 142, s. 7.)

A claim for 50*l.*, and interest until payment or judgment, is a claim exceeding 50*l.*: (*Insley v. Jones*, L. Rep. 4 Ex. Div. 16; 48 L. J. 222, Ex.)

When the amount is reduced below 50*l.* by payment after action brought, there is no power to transfer: (*Osborne v. Homburg*, L. Rep. 1 Ex. Div. 48; *Foster v. Usherwood*, L. Rep. 3 Ex. Div. 1; 47 L. J. 30, Ch.; 26 W. R. 91.)

See also, as to what constitutes a claim for 50*l.*, *Verbeeck v. Huinex*, 70 L. T. 26.

Where any suit or proceeding shall be pending in the Chancery [Division], which suit or proceeding might have been commenced in a County Court, it shall be lawful for any of the parties thereto to apply at Chambers to the judge to whose court the said suit or proceeding shall be attached to have the same transferred to the County Court, or one of the County Courts, in which the same might have been commenced, and such judge shall have power upon such application, or without such application if he shall think fit, to make an order for such transfer, and thereupon such suit or proceeding shall be carried on in the County Court to which the same shall be ordered to be transferred, and the parties thereto shall have the same right of appeal that they would have had had the suit or proceeding been commenced in the County Court: (30 & 31 Vict. c. 142, s. 8.)

It shall be lawful for any person against whom an action for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort, may be brought in [the High Court of Justice], to make an affidavit that the plaintiff has no visible means of paying the costs of the defendant should a verdict be not found for the plaintiff, and thereupon a judge of the court in which the action is brought shall have power to make an order that, unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of one of the masters of the said court, or satisfy the judge that he has a cause of action fit to be prosecuted in the [High] Court, all proceedings in the action shall be stayed, or, in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the judge as aforesaid, that the cause be remitted for trial before a County Court to be therein named; and thereupon the plaintiff shall lodge the original writ and the order with the registrar of such County Court, who shall appoint a day for the hearing of

the cause, notice whereof shall be sent by post or otherwise by the registrar to both parties, or their [solicitors]; and the County Court so named shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed, by a memorandum signed by them, that the said County Court should have power to try the said action, and the same had been commenced by plaint in the said County Court; and the costs of the parties in respect of the proceedings subsequent to the order of the judge of the [High] Court shall be allowed according to the scale of costs in use in the County Courts, and the costs of the proceedings in the [High] Court shall be allowed according to the scale in use in such latter court: (30 & 31 Vict. c. 142, s. 10.)

The form of order is given in Schedule H. 43 to the Rules of April, 1880.

Any judge sitting at chambers has power to make the order for security, but such order may be reviewed by the court: (*Owens v. Woosman*, L. Rep. 3 Q. B. 160.)

Where a plaintiff failed to give security, but failed to lodge the writ and order with the registrar, it was held that the action remained in the High Court, and that the court could extend the time for giving security: (*Welply v. Buhl*, L. Rep. 3 Q. B. Div. 80, 253; 38 L. T. Rep. N. S. 114; 26 W. R. 300.)

When an action has been transferred under this section the court in which it was originally brought has no further jurisdiction, and cannot tax the costs: (*Moody v. Steward*, L. Rep. 6 Ex. 35.)

As to lodging the order, writ, and statement with the registrar, see C. C. R. 1875, O. 20, r. 1; and as to receiving the pleadings, see *Johnson v. Palmer*, L. Rep. 4 C. P. Div. 258.)

When in any action of contract brought in [the High Court] the claim indorsed on the writ does not exceed 50*l.*, or when such claim, though it originally exceeded 50*l.* is reduced by payment into court, payment, an admitted set-off, or otherwise, to a sum not exceeding 50*l.*, a judge of [the High Court] on the application of either party, after issue joined, may, in his discretion, and on such terms as he shall think fit, order that the cause shall be tried in any County Court which he shall name: (19 & 20 Vict. c. 108, s. 26.)

Thereupon the plaintiff shall lodge with the Registrar of [the County] Court such order and the issue: (*Id.*)

As to the proceedings in the County Court, see the same section and C. C. R. 1875, O. 20, rr. 1-3.

If no terms are imposed by the order, the parties are entitled to a trial by jury: (*Ford v. Taylor*, L. Rep. 3 C. P. Div. 21; 37 L. T. Rep. N. S. 431; 47 L. J. 116, C. P.; 26 W. R. 170.)

After [the hearing in the County Court] the registrar shall certify the result to the [Central Office], and judgment in accordance with such certificate shall be signed in [the High Court]: (19 & 20 Vict. c. 108, s. 26.)

And see COUNTY COURTS, II.

TRIAL.

I. NOTICE OF TRIAL.

1. WHEN GIVEN.
 - (a) *By Plaintiff.*
 - (b) *By Defendant.*
2. TO SPECIFY MODE OF TRIAL.
3. TO STATE WHETHER FOR TRIAL OF ACTION OR ISSUES.
4. FORM.
5. HOW MANY DAYS NOTICE.
6. SERVICE.
7. PROOF OF SERVICE [see JUDGMENT, I., 5].
8. FOR WHAT SITTINGS IT OPERATES.
 - (a) *In London or Middlesex.*
 - (b) *Elsewhere.*
9. COUNTERMANDING.
10. WHEN IT CEASES TO HAVE EFFECT.

II. CROSS NOTICE FOR JURY.

1. BY DEFENDANT.
2. BY PLAINTIFF.

III. CHANGING MODE OF TRIAL.

IV. ENTRY FOR TRIAL.

1. WHEN MADE.
2. BY WHOM MADE.
 - (a) *In London or Middlesex.*
 - (b) *Elsewhere.*
3. WHERE MADE.
 - (a) *Trials by Judge Alone.*
 - (1) *In London.*
 - (2) *In District Registry.*
 - (b) *Trials by Judge and Jury.*
 - (c) *Before Official Referee* [see REFEREES].
4. HOW MADE.
 - (a) *Form of Entry.*
 - (b) *Certificate of Master, Request, &c.*
 - (c) *Preliminary List Where Jury Trial Entered with District Registrar.*
 - (d) *Delivering Copies of Pleadings.*
 - (e) *Marking Cause for Jury Trial at Defendant's Instance.*
 - (f) *Lists for Trial.*
 - (1) *In London or Middlesex.*
 - (2) *At the Assizes.*
 - (3) *Adding Cases for Jury Trial at Defendant's Instance.*

V. MARKING "SHORT" [see SHORT CAUSE].

VI. WITHDRAWAL OF AND EXPUNGING CASES.

VII. MANNER OF TRIAL.

1. OF ACTION.
2. OF ISSUES.
3. OF QUESTIONS OF FACT IN DIFFERENT WAYS OR ONE BEFORE ANOTHER.
4. OF SEVERAL CAUSES OF ACTION.

VIII. PLACE OF TRIAL.

1. HOW FIXED.
2. CHANGING.

IX. TRIAL BY JUDGE ALONE.

1. HOW PROCURED.
 - (a) *By Notice of Trial.*

- (b) *By Order.*
- (c) *By Setting Down in Chancery.*
- (d) *By Agreement to Take Evidence by Affidavit.*

2. HOW TRIAL TAKES PLACE.

- (a) *Before One Judge Only.*
- (b) *Publicity of Proceedings.*
- (c) *Default of Appearance of Parties* [see JUDGMENT, I., 5.]
- (d) *Addresses of Counsel and Order of Proceedings.*
- (e) *Ordering Witnesses Out of Court.*
- (f) *Adjournment and Postponement.*
- (g) *Judgment, Further Consideration, and Motion for Judgment.*

X. TRIAL BEFORE JUDGE AND ASSESSORS.

XI. TRIAL BY JURY.

1. HOW PROCURED.
2. WHEN HAD AS OF RIGHT.
3. WHEN ORDERED.
 - (a) *General Power.*
 - (b) *Order to Specify Reason.*
4. WHERE TRIAL TAKE PLACE.
5. WHAT JURY TRIED BEFORE.
6. VIEW BY JURY.
7. POSITION OF JUDGE.
 - (a) *Before What Judge Tried.*
 - (b) *Leaving Issues to and Directing Jury.*
 - (c) *Adjournment and Postponement.*
 - (d) *Judgment, Further Consideration, Motion for Judgment, Reserving Points, Directing Further Argument, Setting Aside Judgment.*

XI. TRIAL BY OFFICIAL OR SPECIAL REFEREE [see REFEREE].

XII. PROCEEDINGS AFTER TRIAL.

XIII. NEW TRIAL [see NEW TRIAL].

I. NOTICE OF TRIAL.

1. WHEN GIVEN.

(a) *By Plaintiff.*

Subject to the following rules [of O. XXXVI., see *post*] the plaintiff may, with his reply, or at any time after the close of the pleading [see PLEADINGS], give notice of trial of the action: (O. XXXVI., r. 3.)

Notice may be given with the reply, although the reply does not formally close the pleadings: (*Asquith v. Molineaux*, W. N. 1880, p. 156.)

Notice of trial shall be given before entering the action for trial: (O. XXXVI., r. 10.)

Subject to the provisions of the following rules [of O. XXXVI.] if the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as a court or judge may allow, give notice of trial (O. XXXVI., r. 4), the defendant, instead of giving notice of trial, may apply to the court or judge to dismiss the action for want of prosecution; and, on the hearing of such application, the court or a judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the court or judge may seem just: (O. XXXVI., r. 4a, June, 1876; and see DISMISSING ACTION; JUDGMENT.)

(b) *By Defendant.*

Subject to the provisions of the following rules [of O. XXXVI.], if the plaintiff does not within six weeks after the close of the pleadings,

or within such extended time as the court or judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial: (O. XXXVI., r. 4.)

Notice of trial shall be given before entering the action for trial: (O. XXXVI., r. 10.)

2. TO SPECIFY MODE OF TRIAL.

[The plaintiff may by his notice of trial] specify one of the modes [of trial] mentioned in rule 2: (O. XXXVI., r. 3; see *post*, VII.)

Where an interpleader issue has been prepared under 1 & 2 Will. 4, c. 58, the trial cannot take place before a judge, even when notice for such a trial is given: (*Hamlyn v. Betteley*, W. N. 1880, p. 163.)

[The defendant may by his notice of trial] specify one of the modes mentioned in rule 2: (O. XXXVI., r. 4; see *post*, VII.)

It is useless to give notice of trial of an action before a referee (see REFEREES, III.); and if such a notice be given, an order to change the mode of trial will be made with costs: (*Braginton v. Yates*, W. N. 1880, p. 150.)

3. TO STATE WHETHER FOR TRIAL OF ACTION OR ISSUES.

Notice of trial shall state whether it is for the trial of the action or of issues therein; and in actions in the Queen's Bench, Common Pleas, and Exchequer Divisions, the place and day for which it is to be entered for trial: (O. XXXVI., r. 8, as amended by r. 8a, Dec. 1875.)

4. FORM.

It may be in the form No. 14 in Appendix B. [to the Rules of 1875], with such variations as circumstances may require: (O. XXXVI., r. 8.)

In an action in the Chancery Division, marked with the name of Hall, V.C., a notice of trial "by a judge in Middlesex" was held sufficient: (*Harris v. Gamble*, L. Rep. 7 Ch. Div. 877; 38 L. T. Rep. N. S. 253; 47 L. J. 344, Ch.; 26 W. R. 251.)

5. HOW MANY DAYS NOTICE.

Ten days notice of trial shall be given, unless the party to whom it is given has consented to take short notice of trial; and shall be sufficient in all cases, unless otherwise ordered by the court or a judge. Short notice of trial shall be four days notice: (O. XXXVI., r. 9; and see TIME.)

6. SERVICE.

Every pleading or other document required to be delivered to a party, or between parties, shall be delivered in the manner now in use to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor, but if no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer: (O. XIX., r. 6, and see TIME.)

Where an action proceeds in a district registry all pleadings and other documents required to be filed shall be filed in the district registry: (O. XIX., r. 29.)

7. PROOF OF SERVICE.

[See JUDGMENT, I., 5.]

8. FOR WHAT SITTINGS IT OPERATES.

(a) In London or Middlesex.

Notice of trial for London or Middlesex shall not be or operate as for any particular sittings; but shall be deemed to be for any day after the expiration of the notice on which the action may come on for trial in its order upon the list: (O. XXXVI., r. 11, and see SITTINGS.)

(b) *Elsewhere.*

Notice of trial elsewhere than in London or Middlesex shall be deemed to be for the first day of the then next assizes at the place for which notice of trial is given: (O. XXXVI., r. 12.)

9. COUNTERMANDING.

No notice of trial shall be countermanded, except by consent, or by leave of the court or a judge, which leave may be given subject to such terms as to costs, or otherwise, as may be just: (O. XXXVI., r. 13, and see DISCONTINUANCE AND WITHDRAWAL.)

10. WHEN IT CEASES TO HAVE EFFECT.

Unless within six days after notice of trial is given the cause shall be entered for trial by one party or the other, the notice of trial shall be no longer in force. This rule is not to apply . . . to trials not in London or Middlesex: (O. XXXVI., r. 10A, Dec. 1875.)

II. CROSS NOTICE FOR JURY.

1. BY DEFENDANT.

Subject to the provisions of the following rules [of O. XXXVI.] the defendant may, upon giving notice within four days from the time of the service of the notice of trial, or within such extended time as a court or judge may allow, to the effect that he desires to have the issues of fact tried before a judge and jury, be entitled to have the same so tried: (O. XXXVI., r. 3.)

The defendant has a right to have the action tried by a jury (*Sugg v. Silver*, L. Rep. 1 Q. B. Div. 362; *Wedderburn v. Pickering*, L. Rep. 12 Ch. Div. 769; 41 L. T. Rep. N. S. 523) subject to r. 26 (*post*, IX., 1(b)).

The defendant must first give notice out of court requiring generally that "the issues of fact" in the action (not specifying what issues) shall be tried before a judge and jury (per *Fry, J., Powell v. Williams*, L. Rep. 12 Ch. Div. 234; 40 L. T. Rep. N. S. 679; 27 W. R. 796); but in a previous case before Bacon, V.C., no objection seems to have been raised because the only notice given was a notice of motion for a direction for such trial: (*West v. White*, L. Rep. 4 Ch. Div. 631; 36 L. T. Rep. N. S. 631.)

And *Fry, J.*, has held such a notice of motion if given within four days to be a sufficient expression of desire within the rule, but the defendant, for his irregularity in not giving the notice out of court and in specifying the particular issues, was deprived of his costs of the motion: (*Powell v. Williams, sup.*)

It has been the general practice for the defendant, besides giving the notice required by the rule, to apply for an order for trial before a judge and jury (see r. 27, cited *post*; the cases already cited; and *Ruston v. Tobin*, L. Rep. 10 Ch. Div. 559; 40 L. T. Rep. N. S. 111; 27 W. R. 588), but it seems doubtful whether any such order is necessary where there is no absolute right to a trial by jury, unless a counter notice for an order for trial by a judge alone is given by the plaintiff, as in *Wedderburn v. Pickering (sup.)*; and it is unnecessary where the parties have an absolute right to a trial by jury: (see *Swindell v. Birmingham Syndicate, inf.*; *post*, IV., 3, (2).)

Where there are two or more defendants the court will not generally comply with the request of one only to have a trial by jury unless it thinks that the case comes within r. 27: (*Mirehouse v. Barnett*, 47 L. J. 689, Ch.; 26 W. R. 690; *Back v. Hay*, L. Rep. 5 Ch. Div. 435; and see *post*, X., 3.)

The refusal of one defendant to accede to the request does not, *per se*, prevent the action from being tried before a jury, but it imposes on the defendant who desires such a trial the duty of showing that it is more convenient: (*Mirehouse v. Barnett, sup.*)

If after notice given the opposite party desires the trial to be without a jury, he should, unless the party giving the notice has a right to a jury, apply for an order under r. 26 (*Wedderburn v. Pickering, sup.*)

Unless the parties have an absolute right to a trial by jury, the court has a discretion, which must not be exercised capriciously, but with which the Court of Appeal will not ordinarily interfere, whether it will make an order under r. 26, after such notice under r. 3: (*Clarke v. Cookson, L. Rep. 2 Ch. Div. 746*; *34 L. T. Rep. N. S. 646*; *Swindell v. Birmingham Syndicate, L. Rep. 3 Ch. Div. 127*; *35 L. T. Rep. N. S. 111*; *Wedderburn v. Pickering, Powell v. Williams, Ruston v. Tobin, sup.*)

2. BY PLAINTIFF.

Subject to the provisions of the following rules [of O. XXXVI., where the defendant gives notice of trial] the plaintiffs on giving notice within the time fixed by rule 3 [*i.e.*, four days from the time of the service of the notice of trial, or within such extended time as a court or judge may allow], that he desires to have the issues of fact tried before a judge and jury, [may] be entitled to have the same so tried: (O. XXXVI., r. 4, and see *sup.* 1.)

III. CHANGING MODE OF TRIAL.

In any case in which neither the plaintiff nor defendant has given notice under the preceding rules that he desires to have the issues of fact tried before a judge and jury [see *sup.* I., 2; II.], or in any case within the 57th section of the Act [see REFEREES], if the plaintiff or defendant desires to have the action tried in any other mode than that specified in the notice of trial, he shall apply to the court or a judge for an order to that effect, within four days from the time of service of the notice of trial, or within such extended time as a court or judge may allow: (O. XXXVI., r. 5.)

As to the application of the rule, in cases of references, see REFEREES, III.

If a party gives notice of trial of an action before a referee, an order with costs will be made on motion for trial before a judge alone: (*Braginton v. Yates, W. N. 1880, p. 150.*)

A party cannot apply under this rule to change the mode proposed by his own notice of trial: (*Lascelles v. Butt, L. Rep. 2 Ch. Div. 588*; *35 L. T. Rep. N. S. 122*; *Sugg v. Silber, L. Rep. 1 Q. B. Div. 362.*)

The change must be one which the court or judge has power to order against the will of the other party, and the court cannot take away from a party the right to a trial by jury where, under the old practice, he had an absolute right to such a trial: (*Sugg v. Silber, sup.*)

In other cases there is a discretion in the court: (see *sup.*, II., 1.)

Where an action is set down in the Chancery Division, it should not be sent to be tried by a judge and jury without its being clearly settled what is to be tried by the jury: (per Malins, V.C., *Pilley v. Baylis, L. Rep. 5 Ch. Div. 241, 247.*)

IV. ENTRY FOR TRIAL.

1. WHEN MADE.

Unless within six days after notice of trial is given the cause shall be entered for trial by one party or the other, the notice of trial shall be no longer in force: (O. XXXVI., r. 10A, Dec. 1875.)

This rule is not to apply . . . to trials not in London or Middlesex: (*Id.*; and see *post*, 2.)

A cause cannot be entered for trial before the pleadings are closed: (*Metropolitan Inner Circle Railway Company v. Metropolitan Railway Company*, L. Rep. 5 Ex. Div. 96; 42 L. T. Rep. N. S. 590; 28 W. R. 510.)

2. BY WHOM MADE.

(a) *In London or Middlesex.*

If the party giving notice of trial for London or Middlesex omits to enter the action for trial on the day or day after giving notice of trial, the party to whom notice has been given may, unless the notice has been countermanded under the last rule [see *sup.* I., 9] within four days enter the action for trial: (O. XXXVI., r. 14.)

Actions in the Chancery Division for trial by jury are to be set down in Middlesex, unless, in the statement of claim, or by order, another place is named: (*Clarke v. Cookson*, L. Rep. 2 Ch. Div. 746; 34 L. T. Rep. N. S. 646; *Warner v. Murdoch*, L. Rep. 4 Ch. Div. 750.)

And no order showing the reason is necessary: (*Clarke v. Cookson*, *sup.*; *Hunt v. City of London Real Property Company*, L. Rep. 3 Q. B. Div. 19.)

(b) *Elsewhere.*

After notice of trial has been given of any action or issue to be tried elsewhere than in London or Middlesex, either party may at any time before the day next before the commission day enter the action or issue for trial at the next assizes: (O. XXXVI., r. 15, March, 1879.)

3. WHERE MADE.

(a) *Trials by Judge Alone.*

(1) *In London.*

Where notice for trial before a judge is given, the action must be set down with the registrar.

(2) *In District Registry.*

An action in the Chancery Division proceeding in the district registry, must be entered with the district registrar (O. XXXV., rr. 1 and 1A, June, 1876) for trial in London before the judge: (*Re Smith*; *Hutchinson v. Ward*, L. Rep. 6 Ch. Div. 692.)

(b) *Trials by Judge and Jury.*

In actions assigned to the Chancery Division, when the plaintiff . . . gives notice of trial before a judge and jury, the action is to be entered for trial with the associates, instead of with the Chancery registrar: (Ch. Reg. Not. Feb. 1877; *Warner v. Murdoch*, L. Rep. 4 Ch. Div. 750; and see *post*, XI.)

After notice of trial has been given of any action or issue to be tried elsewhere than in London or Middlesex, either party may at any time before the day next before the commission day enter the action or issue for trial at the next assizes in the district registry (if any) of the city or town where the trial is to be had, or with the associate at the assize town as heretofore: (O. XXXVI., r. 15, March, 1879.)

So long as there is no district registry in the places enumerated in the first of the following columns, entries for trial may be made in the district registries in the second of the following columns—*i.e.*, actions and issues for trial at—

Bodmin	may be entered in the district registry at				Truro.
Carnarvon	"	"	"	"	Bangor.
Chelmsford	"	"	"	"	Colchester.
Lancaster	"	"	"	"	Preston.

Lewes	may be entered in the district registry at	Brighton.
Monmouth	"	Newport, Mon.
Stafford	"	Hanley.
Taunton or Wells	"	Bridgwater.
Warwick	"	Birmingham.
Winchester	"	Southampton.
		(<i>Id.</i>)

(c) *Before Official Referee* [see REFEREES.]

4. HOW MADE.

(a) *Form of Entry.*

The following is the form of *præcipe* on entering an action for trial—

In the High Court of Justice,	Division.	18	No.
Between		Plaintiff	
	and		
		Defendant.	

Enter this action for trial.

Dated the day of 18 .

(Signed)
(Address)

(Sched. E. 26, Rules of April, 1880.)

(b) *Certificate of Master, Request, &c.*

All causes required to be heard shall be set down for hearing by the registrars, upon production to them of the certificate of the proper officer that the same are in a fit state to be set down for hearing: (C. O. 21, r. 2.)

Causes are to be set down for original hearing upon production of the [master's] certificate that the cause is in a fit state to be set down for hearing, indorsed by the solicitor of the party setting down the same with a memorandum stating, if there be any infant defendant, that a guardian *ad litem* has been appointed; or if there be not, stating that there is not, any infant defendant. The memorandum may be in the form following, that is to say:—

“A Guardian *ad litem* has been appointed to the Infant Defendant
A. B.”

or,

“There is not any Infant Defendant.”
A. B., Plaintiff's Solicitor.

1st March, 18 .

(Ch. Reg., March, 1860, r. 7.)

Demurrers, motions for a decree, original causes, special cases, causes for further consideration, and appeals . . . are to be set down by the registrar's clerk at the Order of Course Seat on the same day the order, petition, [master's] certificate, request, or other document required for that purpose, is produced to or left with him; and he is to retain any such petition, certificate, or request for filing: (Ch. Reg. March, 1860, r. 1.)

[And see FURTHER CONSIDERATION, III.]

(c) *Preliminary List where Jury Trial Entered with District Registrar.*

[Where the action is to be tried by jury at the assizes (see *sup.* 3 (b)).] the entry shall be made in a numbered list to be provided by the district registrar in such vacant number as the party entering shall select, and the list shall be open for the inspection of all parties interested therein at all times during office hours: (O. XXXVI., r. 15, March, 1879.)

(d) Delivering Copies of Pleadings.

The party entering the action for trial shall deliver to the officer two copies of the whole of the pleadings in the action, for the use of the judge at the trial. Such copies shall be in print, except as to such parts, if any, of the pleadings as are by the rules permitted to be written: (O. XXXVI., r. 17, as amended by Rules 17a, of Dec. 1875.)

[Where an action is entered with the district registrar (*sup.* (c))] at the time of entry two copies of the pleadings shall be delivered as directed by Order XXXVI., r. 17a, one of which shall be duly stamped with the amount of the fee payable on entry of the cause for trial: (O. XXXVI., r. 15, March, 1879.)

Unless such copies are delivered the action will not be entered for trial: (Ch. Reg. Not., 19th April, 1877; 21 S. J. 486.)

(e) Marking Cause for Jury Trial at Defendant's Instance.

[Where the defendant has given a cross notice for trial by judge and jury (see *sup.*, II.)] the action will be marked in the cause book "Jury trial at defendant's instance" on the request of the solicitor for either party, and on the certificate of such solicitor that . . . notice has been duly given within the time or extended time (see *sup.*, II.): (Ch. Reg. Not., Feb. 1877.)

*(f) Lists for Trial.**(1) In London or Middlesex.*

The list or lists of actions for trial at the sittings in London and Middlesex respectively shall be prepared and the actions shall be allotted for trial without reference to the division of the High Court to which such actions may be attached: (O. XXXVI., r. 16.)

(2) At the Assizes.

The registrar shall close the list [mentioned *sup.* (c), after correction as mentioned *post*] and transmit a corrected copy of the said list, together with the two copies of the pleadings, to the associate at the assize town in such time that the same may be received at his office before the opening of the commission: (O. XXXVI., r. 15, March, 1879.)

Causes or issues entered for trial by the associate shall be entered in such vacant numbers in the list so transmitted as the party entering may select, and shall be the cause list for the assizes: (O. XXXVI., r. 15, March, 1879.)

If both parties enter the action or issue for trial it shall be tried in the order of the plaintiff's entry, and the defendant's entry shall be vacated: (O. XXXVI., r. 15, March, 1879.)

(3) Adding Cases for Jury Trial at Defendant's Instance.

Actions which have been . . . marked [for jury trial at defendant's instance (see *sup.* (e))] will be added by the associates to their list of actions for trial, upon the solicitor for either party bringing to them the certificate of the Chancery Registrar . . . annexed to the statement of claim: (Ch. Reg. Not. 19th April, 1877, where the form of certificate is given.)

V. MARKING "SHORT."

[See SHORT CAUSE.]

VI. WITHDRAWAL OF AND EXPUNGING CASES.

Where a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant, upon producing to the proper officer a consent in writing signed by the parties: (O. XXXIII., r. 2, Dec. 1875; and see DISCONTINUANCE AND WITHDRAWAL.)

Where any cause becomes abated or is compromised after the same is set down to be heard, the solicitor for the plaintiff shall certify the fact as the case may be, to the registrar, who shall cause an entry thereof to be made in the cause-book opposite to the name of such cause (C. O. 21, r. 7); otherwise the defendant is entitled to the costs of the day: (*Saner v. Deavin*, 14 Beav. 646.)

Where any cause shall have been standing for one year in the cause-book, marked as "abated," or standing over generally, such cause shall, at the expiration of the year, be struck out of the cause-book: (C. O. 21, r. 8.)

Where the trial of an action or issue which has been entered for trial [at the Assizes] has been postponed or withdrawn under O. XXXIII., r. 2, or settled, the party who made the entry shall immediately thereupon give notice thereof to the [district] registrar, and such entry shall be expunged from the list: (O. XXXVI., r. 15, March, 1879.)

VII. MANNER OF TRIAL.

1. OF ACTIONS.

Actions shall be tried and heard either before a judge or judges, or before a judge sitting with assessors, or before a judge and jury [or before an official or special referee, with or without assessors]: (O. XXXVI., r. 2.)

A question in a cause only can be referred; the whole action cannot be referred to an official or special referee, as such, even by consent: [see REFEREES.]

2. OF ISSUES.

Issues may be tried—

- (a) Before a judge or judges;
- (b) Before a judge sitting with assessors;
- (c) Before a judge and jury;
- (d) Before an official or special referee, with or without assessors: (O. XXXVI., r. 2; and see REFEREES.)

An issue under the Interpleader Act (1 & 2 Will. 4, c. 58) cannot be tried before a judge alone, even where notice of trial before such judge has been given, and the defendant has given no counter-notice: (*Hamlyn v. Betteley*, L. Rep. 6 Q. B. Div. 63.)

3. OF QUESTIONS OF FACT IN DIFFERENT WAYS, OR ONE BEFORE ANOTHER.

Subject to the provisions of the preceding rules [of O. XXXVI.] the court or a judge may, in any action at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the place or places for such trial or trials, and in all cases may order that one or more issues of fact be tried before any other or others: (O. XXXVI., r. 6.)

In an action for injuries to a vessel, it was ordered that the question of liability should be tried before a jury, and the question of damages before an official referee: (*Liverpool, &c., Company v. London, &c., Docks Company*, W. N. 1875, p. 203.)

In an action against several defendants involving various issues, the plaintiff having applied for an order for two simple issues to be tried as between themselves and two of the defendants before the rest of the action, the court made the order on the plaintiffs' undertaking not to seek relief against the said two defendants in respect of any cause of action other than that covered by the issues so to be tried, and also

discontinuing such portion of the action as the court should direct: (*Emma Silver Mining Company v. Grant*, L. Rep. 11 Ch. Div. 918; 40 L. T. Rep. N. S. 804.)

An application to have one issue in an action tried before another can only be granted on very special grounds. Where a defendant in a partnership action set up by counter-claim an agreement by the plaintiff for sale to the defendant of his (the plaintiff's) interest in the partnership at a stated price, it was held that the defendant was not entitled to have the issue raised by his counter-claim tried before the plaintiff's issues in the action: (*Piercy v. Young*, L. Rep. 15 Ch. Div. 475; 42 L. T. Rep. N. S. 292.)

Application may be made before delivery of the reply (*Id.*); but will not be allowed if made by a party who has exercised his option for trial in another way: (*Dent v. Sovereign Life Assurance Company*, W. N. 1879, p. 33.)

The Court of Appeal will not interfere with the discretion of a divisional court, but a divisional court will interfere with the discretion of a judge at chambers: (*Tasmanian Railway Company v. Clark*, W. N. 1879, pp. 88, 106.)

4. OF SEVERAL CAUSES OF ACTION.

Where the plaintiff unites in the same action and in the same statement of claim several causes of action, . . . if it appear to the court or a judge that any such causes of action cannot be conveniently tried or disposed of together, the court or judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof: (O. XVII., r. 1.)

VIII. PLACE OF TRIAL.

1. HOW FIXED.

There shall be no local venue for the trial of any action, but when the plaintiff proposes to have the action tried elsewhere than in Middlesex, he shall in his statement of claim name the county or place in which he proposes that the action shall be tried, and the action shall, unless a judge otherwise orders, be tried in the county or place so named. Where no place of trial is named in the statement of claim, the place of trial shall, unless a judge otherwise orders, be the county of Middlesex: (O. XXXVI., r. 1.)

The plaintiff has the power to fix any place for the trial in cases in the Chancery Division: (*Redmayne v. Vaughan*, 24 W. R. 983.)

2. CHANGING.

An order to change the place of trial will only be made where there is a clear preponderance of convenience in favour of the change: (*Plum v. Normanton Iron Company*, W. N. 1876, p. 105; *Powell v. Williams*, L. Rep. 12 Ch. Div. 234; 40 L. T. Rep. N. S. 679; 27 W. R. 796.)

As to the order specifying the reason for the change, see O. XXXVI., r. 29a, *post*, XI., 3 (b.)

IX. TRIAL BY JUDGE ALONE.

1. HOW PROCURED.

(a) *By Notice of Trial.*

A party desiring to have his action tried by a judge without a jury must give notice of trial in such a manner: (see *sup.*, I., 2.)

(b) *By order.*

The court or a judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly

of law, arising in any cause or matter which previously to the passing of the Act could, without any consent of parties, be tried without a jury : (O. XXXVI., r. 26.)

The whole action may be ordered to be tried without a jury : (*Clarke v. Cookson*, L. Rep. 2 Ch. Div. 746; 34 L. T. Rep. N. S. 646; *Back v. Hay*, L. Rep. 5 Ch. Div. 235; 36 L. T. Rep. N. S. 295; *Swindell v. Birmingham Syndicate*, L. Rep. 3 Ch. Div. 127; 35 L. T. Rep. N. S. 111.)

In actions which could formerly only have been brought as suits in the Court of Chancery, the High Court has now the same discretion as the Court of Chancery formerly, whether there shall be a trial by jury; and the parties have, in such cases, no absolute right to a trial by jury: (per James and Mellish, L.J.J., *Swindell v. Birmingham Syndicate*, *sup.*; *West v. White*, L. Rep. 4 Ch. Div. 631; 46 L. J. 627, Ch.; *Ruston v. Tobin*, L. Rep. 10 Ch. Div. 558; 40 L. T. Rep. N. S. 111; and see *Bovill v. Hitchcock*, L. Rep. 3 Ch. App. 417.)

The Court of Appeal will not interfere with the discretion of the court below, unless in a very strong case—as, for instance, where the judge below said he made or refused the order because he held a certain opinion as a matter of law, which the Court of Appeal considers wrong: (*Swindell v. Birmingham Syndicate*, *sup.*; *Ruston v. Tobin*, *sup.*)

Where there are several defendants, and one of them only gives notice to the plaintiff that he desires to have the issues tried by jury, notice of a plaintiff's motion that, notwithstanding the notice, the action may be tried without a jury, need not be served on the other defendants (*Back v. Hay*, L. Rep. 5 Ch. Div. 239); but the refusal of one defendant does not prevent an action being tried by jury: (*Mirehouse v. Barnett*, 47 L. J. 689, Ch.)

The application may be made by motion or summons.

The order may be made notwithstanding a cross-notice for a jury under Order XXXVI., r. 3: (see *sup.*, II.)

Rule 6 was framed to meet cases which would, under the old system, have been tried in the Court of Chancery, and which might be considered, by reason of involving a mixture of law and fact, or from great complexity, or otherwise, not capable of being conveniently tried before a jury. Where the case is of a nature fit to be tried by jury, the right of a party should not ordinarily be interfered with: (per Hall, V.C., *Clarke v. Cookson*, *sup.*; per Jessel, M.R., *Bordier v. Burrell*, L. Rep. 5 Ch. Div. 512; and *Wedderburn v. Pickering*, L. Rep. 13 Ch. Div. 769; 41 L. T. Rep. N. S. 523; 28 W. R. 239; per Bacon, V.C., *Singer Manufacturing Company v. Loog*, L. Rep. 11 Ch. Div. 656; 40 L. T. Rep. N. S. 647; and *West v. White*, *sup.*; per Fry, J., *Powell v. Williams*, L. Rep. 12 Ch. Div. 234; 40 L. T. Rep. N. S. 679; 27 W. R. 796.)

Thus, there is no absolute right to a trial by jury in actions—

For specific performance (*Sykes v. Firth*, 46 L. J. 627, Ch.; *Swindell v. Birmingham Syndicate*, *sup.*), although the writ by amendment claims, in the alternative, damages for misrepresentation (*Pilley v. Baylis*, L. Rep. 5 Ch. Div. 241);

For cancellation or setting aside an agreement on the ground of fraud (*Back v. Hay*, *sup.*; *Ruston v. Tobin*, L. Rep. 10 Ch. Div. 558; 40 L. T. Rep. N. S. 111; 27 W. R. 588);

For infringement of a trade mark (*Spratt's Patent v. Ward*, L. Rep. 11 Ch. Div. 240; 40 L. T. Rep. N. S. 250; 27 W. R. 470);

To restrain the use of a trade name (*Singer Manufacturing Company v. Loog*, L. Rep. 11 Ch. Div. 656);

Where the correspondence was voluminous; and where the main question was one of title, depending on conveyances, plans, and photographs, the action was ordered to be tried before a judge alone: (*Garling v. Royds*, W. N. 1876, p. 291; *Wedderburn v. Pickering*, L. Rep. 13 Ch. Div. 769; 41 L. T. Rep. N. S. 523; 28 W. R. 239; and see *Wood v. Kay*, W. N. 1879, p. 206.)

An action for a mandatory injunction to restrain a defendant from permitting a building to remain so as to obstruct the plaintiff's light, must be sent for trial by jury if either party requires it: (*Bordier v. Burrell*, *sup.*)

In the absence of special cause, a defendant in a nuisance case will not be deprived of his right to have the issues tried by a jury: (*West v. White*, L. Rep. 4 Ch. Div. 631; 36 L. T. Rep. N. S. 95; 46 L. J. 627, Ch.; *Powell v. Williams*, L. Rep. 12 Ch. Div. 234; 40 L. T. Rep. N. S. 679; 27 W. R. 796.)

Where the principal questions in an administration action were as to the making of a bill of exchange, whether it was given for a gambling debt, and whether the plaintiff was the *bonâ fide* owner for value, a trial by jury was ordered: (*Clarke v. Cookson*, *sup.*).

(c) *By Setting Down in Chancery.*

A party who has set down his action for trial by a judge of the Chancery Division has exercised his option as to the mode of trial, and is not afterwards entitled to apply for trial of an issue before a jury: (*Dent v. Sovereign Life Assurance Company*, 27 W. R. 379.)

(d) *By Agreement to take Evidence by Affidavit.*

Where the parties agree that the evidence shall be taken by affidavit, it is equivalent to an agreement that the action shall be tried by a judge without a jury, even where the party would otherwise be entitled as of right to a trial by jury: (*Brooke v. Wigg*, L. Rep. 8 Ch. Div. 510; 38 L. T. Rep. N. S. 549, 732; 47 L. J. 749, Ch.; 26 W. R. 729.)

2. HOW TRIAL TAKES PLACE.

(a) *Before one Judge only.*

Every action and proceeding in the High Court of Justice, and all business arising out of the same [except as thereafter provided], shall, so far as practicable and convenient, be heard, determined, and disposed of before a single judge: (A.J.A., 1876, s. 17.)

The exception applies to Divisional Courts.

(b) *Publicity of Proceedings.*

Any trial in the High Court must be public. The only exceptions are in cases affecting lunatics, or wards of court, or where the practice of the old ecclesiastical courts is continued, or where a public trial would defeat the object of the action: (*Nagle-Gillman v. Christopher*, L. Rep. 4 Ch. Div. 173.)

(c) *Default of Appearance of Parties.*

[See JUDGMENT, I., 5.]

(d) *Addresses of Counsel and Order of Proceedings.*

The general rules are as follows:

1. On a question of fact only one counsel will be heard on each side: (*Connington v. Gilliat*, L. Rep. 1 Ch. Div. 691; 45 L. J. 273, Ch.)

2. Where there is a question of law two counsel will be heard on each side: (*Id.*)

3. Where the evidence is not *vivâ voce*, the plaintiff's leading counsel opens and argues his case; the plaintiff's evidence is read; the plaintiff's

junior counsel is heard; the defendant's leading counsel opens and argues his case; the defendant's evidence is read; the defendant's junior counsel is heard; the plaintiff's leading counsel replies.

4. Where the evidence is *vivâ voce*, the plaintiff's counsel are heard; the plaintiff's witnesses are examined, cross-examined, and re-examined; the defendant's counsel are heard; the defendant's witnesses are examined, cross-examined, and re-examined: (Dan. 844-5.)

In Mr. Justice Fry's Court, the plaintiff's leading counsel opens the case; the plaintiff's witnesses are examined, cross-examined, and re-examined; the plaintiff's junior counsel sums up the evidence; the defendant's leading counsel opens his case; the defendant's witnesses are examined, cross-examined, and re-examined; the defendant's junior counsel sums up his evidence; the plaintiff's leading counsel replies: (*Kino v. Rudkin*, L. Rep. 6 Ch. Div. 160.) In *Bonnewell v. Jenkins*, W. N. 1877, p. 202, a short address by the plaintiff's junior counsel was allowed.

In V.C. Malins' Court, either the leader or junior may sum up, so that, however, in case of either plaintiff or defendant, one counsel only shall be heard after the evidence has been put in: (*Metzler v. Wood*, W. N. 1877, p. 260; 37 L. T. Rep. N. S. 523; 47 L. J. 139, Ch.; 26 W. R. 125.)

5. Where witnesses are cross-examined on their affidavits at the hearing, the cross-examination of each witness follows the reading of his affidavit: (Dan. 844.)

6. Subject to rules 7 and 8, if there are several sets of defendants, their counsel are heard, and their evidence is read, in the order in which the defendants' names appear on the record.

7. Counsel for the defendants having the same interest as the plaintiff are heard immediately after the plaintiff's counsel.

8. Where the plaintiff claims alternative relief against two defendants, he is not at the hearing bound to elect against which of them to proceed, but he may go into the whole case. The counsel for one of the defendants may address the court in support of the plaintiff's case, and cross-examine the plaintiff's witnesses: (*Child v. Stenning*, L. Rep. 7 Ch. Div. 413; 38 L. T. Rep. N. S. 232; 47 L. J. 211, Ch.; 26 W. R. 265.)

Where there are questions of fact and questions of law to be raised at the trial, the judge may, if he choose, decide the question of law first: (*Pooley v. Driver*, L. Rep. 5 Ch. Div. 468.)

(e) *Ordering Witnesses out of Court.*

The court may order witnesses out of court during the examination of other witnesses, whether they are parties to the action or not: (*Outram v. Outram*, W. N. 1877, p. 75.)

(f) *Adjournment and Postponement.*

The judge may, if he think it expedient for the interests of justice, postpone or adjourn the trial for such time, and upon such terms, if any, as he shall think fit: (O. XXXVI., r. 21; and see *post*.)

Where the case was adjourned to amend by adding a party, the party desiring the adjournment was made to pay all the costs occasioned by the case having been in the paper, and not merely a fixed sum for costs, as under the old Chancery practice: (*Lydall v. Martinson*, L. Rep. 5 Ch. Div. 780; 37 L. T. Rep. N. S. 69; 25 W. R. 866; *Dowdeswell v. Dowdeswell*, W. N. 1877, p. 228.)

Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, and some only of such issues or questions of fact have been tried or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others of them unnecessary, or renders it desirable that

the trial or determination thereof should be postponed, may apply to the court or a judge for leave to set down the action on motion for judgment, without waiting for such trial or determination. And the court or judge may, if satisfied of the expediency thereof, give such leave, upon such terms, if any, as shall appear just, and may give any directions which may appear desirable as to postponing the trial of the other questions of fact: (O. XL., r. 8.)

Upon production to the registrar of a request or consent signed by the solicitors of all parties, at the latest in the forenoon of the day before the day the cause is to be in the paper, it will be marked as standing over to a day to be named. If all parties do not consent, application should be made to the court for that purpose at the latest in the forenoon of the day before the day the cause is to be in the paper; otherwise, if the cause be placed in the paper and called on, it may be struck out, and in that case it must be again set down at the bottom of the list: (Ch. Reg. March, 1860, r. 13.)

It shall be lawful for the [judge] when sitting in open court to adjourn for consideration in chambers any matter which, in the opinion of such judge, may be more conveniently disposed of in chambers: (15 & 16 Vict. c. 80, s. 27.)

(g) *Judgment, Further Consideration, and Motion for Judgment.*

Upon the trial of an action the judge may, at or after the trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration, or leave any party to move for judgment: (O. XXXVI., r. 22a., Dec. 1876, repealing O. XXXVI., r. 22; and see JUDGMENT.)

X. TRIAL BEFORE JUDGE AND ASSESSORS.

Subject to any rules of court and to such right as may now exist to have particular cases submitted to the verdict of a jury . . . in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice or before the Court of Appeal . . . the High Court or the Court of Appeal may [if] it . . . think it expedient so to do, call in the aid of one or more assessors specially qualified, and try and hear such cause or matter wholly or partially with the assistance of such assessors. The remuneration, if any, to be paid to such assessors shall be determined by the court: (J. A., 1873, s. 56.)

Trials with assessors shall take place in such manner and upon such terms as the court or a judge shall direct: (O. XXXVI., r. 28.)

Notice of trial with assessors will not prevent a party giving notice for trial of issues of fact by a jury: (*Sugg v. Silber*, L. Rep. 1 Q. B. Div. 362.)

XI. TRIAL BY JURY.

1. HOW PROCURED.

A party desiring to have his action tried by jury must give notice of trial in such a manner, or give cross-notice of his demand for such trial: (see *sup.* I., 2; II.)

Where, no place of trial being named in the statement of claim, the action is set down in Middlesex, no special order is necessary: (*Hunt v. City of London Real Property Company*, L. Rep. 3 Q. B. Div. 19; 37 L. T. Rep. N. S. 344.)

2. WHEN HAD AS OF RIGHT.

[See *sup.* II.; IX., 1 (b).]

A party who has set down his action for trial by a judge of the Chancery Division has thereby exercised his option as to trial, and is not

entitled to a trial by a jury: (*Dent v. Sovereign Life Assurance Company*, 27 W. R. 379.)

3. WHERE ORDERED.

(a) General Power.

The court or a judge may, if it shall appear either before or at the trial that any issue of fact can be more conveniently tried before a jury, direct that such issue shall be tried by a judge with a jury: (O. XXXVI., r. 27.)

The trial may be directed either in London or Middlesex, or at the assizes: (*Clarke v. Cookson*, L. Rep. 4 Ch. Div. 746; 34 L. T. Rep. N. S. 646.)

In any cause the court or a judge of the division to which the cause is assigned may, at any time or from time to time, order the trial and determination of any question or issue of fact, or partly of fact and partly of law, by any commissioner or commissioners appointed in pursuance of the 29th section of the Judicature Act, 1873, or at the sittings to be held in Middlesex or London; and such question or issue shall be tried and determined accordingly: (O. XXXVI., r. 29.)

Her Majesty, by commission of assize or by any other commission, either general or special, may assign to any judge or judges of the High Court of Justice or other persons usually named in commissions of assize, the duty of trying and determining within any place or district specially fixed for that purpose by such commission, any causes or matters, or any questions or issues of fact or of law, or partly of fact and partly of law, in any cause or matter depending in the said High Court, or the exercise of any civil or criminal jurisdiction capable of being exercised by the said High Court; and any commission so granted by Her Majesty shall be of the same validity as if it were enacted in the body of this Act; and any Commissioner or Commissioners appointed in pursuance of this section shall, when engaged in the exercise of any jurisdiction assigned to him or them in pursuance of this Act, be deemed to constitute a court of the said High Court of Justice; and, subject to any restrictions or conditions imposed by rules of court and to the power of transfer, any party to any cause or matter involving the trial of a question or issue of fact, or partly of fact and partly of law, may, with the leave of the judge or judges to whom or to whose division the cause or matter is assigned, require the question or issue to be tried and determined by a Commissioner or Commissioners as aforesaid, or at sittings to be held in Middlesex or London as hereinafter in this Act mentioned, and such question or issue shall be tried and determined accordingly: (J. A. 1873, s. 29.)

A cause or matter not involving any question or issue of fact may be tried and determined in like manner with the consent of all the parties thereto: (J. A. 1873, s. 29.)

Mr. Justice Fry may make an order directing the trial of issues before a jury: (*Lloyd v. Jones*, *inf.*)

The whole of an action assigned to the Chancery Division, or only issues therein, may be ordered to be tried at the London or Middlesex sittings or at the assizes: (*Wood v. Hamblet*, L. Rep. 6 Ch. Div. 113; 47 L. J. 114, Ch.)

The power to make an order directing the trial of issues before a jury is discretionary: (*Lloyd v. Jones*, L. Rep. 7 Ch. Div. 390; 47 L. J. 470, Ch.; 26 W. R. 262.) The court has the same discretion as it has in directing trials without a jury: (see *sup.*, II.; IX., 1 (b).)

The power will not be exercised on the application of a party who has been guilty of delay in giving notice of trial or taking other steps in the action: (*Lloyd v. Jones*, *sup.*)

(b) *Order to specify reason therefor.*

Where in any action in the Chancery Division the action, or any question at issue in the action, is ordered to be tried before any commissioner or commissioners of assize, or at the London or Middlesex sittings of any division other than the Chancery Division, the order directing such trial shall state on its face the reason for which it is expedient that the action, question, or issue should be so tried, and should not be tried in the Chancery Division: (O. XXXVI., r. 29A, Dec. 1876.)

Per Bacon, V.C.: It is a sufficient reason that the defendant desires a trial by jury, and that the court sees no reason to the contrary: (*West v. White*, L. Rep. 4 Ch. Div. 631; 36 L. T. Rep. N. S. 95.)

Per Jessel, M.R.: Such mere desire is not a sufficient reason. The reasons directed by him to be inserted in an order for trial at the Staffordshire Assizes were "because both parties desire it, because the action is one for damages only, because it relates to land in Staffordshire, and because there are a great many witnesses residing in the neighbourhood": (*Wood v. Hamblet*, L. Rep. 6 Ch. Div. 113.)

The reasons given in an order of Fry, J. were "that the *locus in quo* is more accessible from Hereford than from London, that a large number of witnesses reside in places from which Hereford is more accessible than from London, and that it has not been made to appear to the court desirable to direct a trial without a jury of the issues of fact": (*Powell v. Williams*, L. Rep. 12 Ch. Div. 239.)

4. WHERE TRIAL TAKES PLACE.

A case cannot be tried with a jury before a judge of the Chancery Division, but such action, or the issues therein, will be tried at the sittings in London or Middlesex or at the assizes, as the notice of trial, cross notice, or order of the judge may specify: (*Warner v. Murdock*, L. Rep. 4 Ch. Div. 750; *Clarke v. Cookson*, L. Rep. 2 Ch. Div. 746; 34 L. T. Rep. N. S. 646; 45 L. J. 753, Ch.; *Wood v. Hamblet*, *sup.*)

5. WHAT JURY TRIED BEFORE.

In any county, except London and Middlesex, the plaintiff . . . shall be entitled to have the cause tried by a special jury, upon giving notice in writing to the defendant, at such time as would be necessary for a notice of trial, of his intention that the cause shall be so tried; and the defendant . . . shall be so entitled, on giving the like notice within the time . . . limited for obtaining a rule for a special jury [more than six days before commission day, but not till after issue joined]: Provided that the court or a judge may at any time order that a cause shall be tried by a special jury, upon such terms as they or he shall think fit: (C. L. P. Act, 1852, s. 109.)

In London and Middlesex . . . any party to any action triable at any of the aforesaid sittings . . . shall be entitled to have the cause tried by a special jury upon the same conditions as would entitle him to have it so tried in any county other than London and Middlesex: (Jury Act, 1870, s. 18.)

In London and Middlesex every court or judge shall have the same power of ordering that a cause be tried by a special jury as the like court or judge would have if the cause were tried in any county other than London and Middlesex: (*Id.*; and see C. O. 41, r. 27.)

Where notice has been given to try by special jury, either party may, six days before the first day of the sittings in London or Middlesex, or adjournment day in London, or commission day of the assizes, give notice to the sheriff that such cause is to be tried by a special jury; and in case

no such notice be given no special jury need be summoned or attend, and the cause may be tried by a common jury, unless otherwise ordered by the court or a judge: (C. L. P. A., 1852, s. 112.)

In all cases where notice is not given to the sheriff that the cause is to be tried by a special jury, and by reason thereof a special jury is not summoned or does not attend, the cause may be tried by a common jury, to be taken from the panel of common jurors, in like manner, as if no proceedings had been had to try the cause by a special jury: (C. L. P. A., 1852, s. 113.)

6. VIEW BY JURY.

Either party shall be at liberty to apply by summons to a judge at chambers for a view by the jury summoned for any trial; and on the hearing of such summons each party shall name a shower for such view: (C. O. 41, r. 37.)

The summons for a view, and the order to be made thereon, shall state the place at which the view is to be made, and the distance thereof from the office of the under-sheriff. And the sum to be deposited in the hands of the under-sheriff shall be 10*l.* in case of a common jury, and 16*l.* in case of a special jury, if such distance shall not exceed five miles, and 15*l.* in case of a common jury, and 21*l.* in case of a special jury, if it shall be above five miles; and if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the solicitor or party who obtained the view; and if such sum shall not be sufficient to pay such expenses, the deficiency shall forthwith be paid by such solicitor or party to the under-sheriff: (C. O. 41, r. 38.)

The mode and practice [as to] a special jury, and the proceedings after any order for a view shall have been made as aforesaid, shall be the same in all respects as . . . for the time being shall be in force in the [Common Law Divisions] when a special jury is ordered to be struck or a view is to be had, or as near thereto as the practice of [the] court will admit: (C. O. 41, r. 39.)

7. POSITION OF JUDGE.

(a) *Before What Judge Tried.*

Every trial of any question or issue of fact by a jury shall be held before a single judge, unless such trial be specially ordered to be held before two or more judges: (O. XXXVI., r. 7.)

(b) *Leaving Issues to, and Directing Jury.*

Nothing in the Act [of 1873], nor in any rule or order made under the powers thereof, or of this Act, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the judge to the jury before whom the same shall come for trial, with a proper and complete direction to the jury upon the law, and as to the evidence applicable to such issues:

Provided also, that the said right may be enforced either by motion in the High Court of Justice, or by motion in the Court of Appeal founded upon an exception entered upon or annexed to the record: (J. A. 1875, r. 22; *Cheese v. Lovejoy*, L. Rep. 2 P. Div. 161.)

(c) *Adjournment and Postponement.*

[See *sup.* IX., 2 (f).]

(d) *Judgment, Further Consideration, Motion for Judgment, &c.*

Upon the trial of an action, the judge may, at or after the trial,
Direct that judgment be entered for any or either party; or,
Adjourn the case for further consideration; or,
Leave any party to move for judgment: (O. XXXVI., r. 22a, Dec., 1876, repealing O. XXXVI., r. 22; and see JUDGMENT.)

A judge cannot disregard the verdict of a jury which is relevant to the matter in dispute, and enter judgment in opposition to it: (*Perkins v. Dangerfield*, W. N., 1879, p. 172.)

[Subject to s. 22, given above, and] subject to any rules of court, any judge of the said High Court, sitting in the exercise of its jurisdiction elsewhere than in a divisional court, may reserve any case, or any point in a case, or may direct any case, or point in a case, to be argued: (J. A., 1873, s. 46.)

Every action and proceeding in the High Court of Justice, and all business arising out of the same [except where rules provide that it shall be dealt with by a divisional court], shall, so far as is practicable and convenient, be heard, determined, and disposed of, before a single judge: (A. J. A., 1876, s. 17.)

As to setting aside judgment and moving to enter another judgment, see JUDGMENT.

Where, by section 17 of the Appellate Jurisdiction Act, 1876, or by these rules, any application ought to be made to, or any jurisdiction exercised by, the judge before whom an action has been tried, if such judge shall die or cease to be a judge of the High Court, or if such judge shall be a judge of the Court of Appeal, or if, for any other reason, it shall be impossible or inconvenient that such judge should act in the matter, the president of the division to which the action belongs may, either by a special order in any action or matter, or by a general order applicable to any class of actions or matters, nominate some other judge to whom such application may be made, and by whom such jurisdiction may be exercised: (O. LVIIA., r. 2; Dec. 1876.)

XI. TRIAL BY OFFICIAL OR SPECIAL REFEREE.

[See REFEREE.]

XII. PROCEEDINGS AFTER TRIAL.

All proceedings in an action subject to the hearing or trial, and down to and including the final judgment or order [except when rules provide that it shall be dealt with by a Divisional Court], and always excepting any proceedings on appeal in the Court of Appeal, shall, so far as is practicable and convenient, be had and taken before the judge before whom the trial or hearing of the cause took place: (A. J. A., 1876, s. 17.)

As to the power of the judge who tried the cause to issue an injunction in a case of libel, see *Saaby v. Easterbrook* (L. Rep. 3 C. P. Div. 339).

Each of the several causes which have been or shall be transferred to Mr. Justice Fry shall, until further order, be deemed to have been transferred to him for the purpose only of trial or of hearing: (L. C. Reg. 19th June, 1877: and see JURISDICTION, V.; TRANSFER.)

XIII. NEW TRIAL.

[See NEW TRIAL.]

TRUSTEES.

I. EXECUTION OF TRUSTS.

1. JURISDICTION.
2. WRIT OF SUMMONS.
3. PARTIES.
4. EFFECT OF ACTION ON POWERS.
5. TAKING TRUST ACCOUNTS.
6. PLEADING.
7. COMPULSORY PAYMENT INTO COURT.
8. INJUNCTION.
9. RECEIVER.
10. CHARGING TRUSTEE WITH INTEREST.
11. DISCHARGING TRUSTEE.
12. ARREST OF TRUSTEE [see EXECUTION, XX.].
13. COSTS.
 - (a) *General Rule.*
 - (b) *Out of what Fund Trustee's Costs Payable.*
 - (c) *Charges and Expenses.*
 - (d) *Where Trustee Deprived of or Made to Pay Costs.*
 - (e) *Of Disclaiming Trustee.*
 - (f) *Of Plaintiff Cestui que Trust.*

II. PROCEEDINGS FOR COURT'S OPINION AND ADVICE.

1. POWER TO APPLY WITHOUT SUIT.
2. WHERE ADVICE GIVEN.
3. APPLICATION.
 - (a) *By whom Made.*
 - (b) *How Made.*
 - (c) *Form of Petition and Concise Statement.*
 - (1) *Title.*
 - (2) *Marking.*
 - (3) *Paragraphs.*
 - (d) *Form of Summons.*
 - (e) *Filing Concise Statement.*
 - (f) *Service.*
 - (1) *On Whom.*
 - (2) *When Effected.*
4. EVIDENCE.
5. REQUIRING ATTENDANCE OF COUNSEL.
6. OPINION OR DIRECTIONS.
 - (a) *Passing, &c.*
 - (b) *Effect.*
7. COSTS.

III. TRUSTEE ACTS, 1850 AND 1852.

1. INTERPRETATION.
 - (a) *Generally.*
 - (b) *Assign—Assignment.*
 - (c) *Contingent Right.*
 - (d) *Convey—Conveyance.*
 - (e) *Devisee.*
 - (f) *Lands.*
 - (g) *Lunatic.*
 - (h) *Mortgage.*
 - (i) *Person.*
 - (k) *Personal Estate.*
 - (l) *Person of Unsound Mind [see sup. (g)].*
 - (m) *Possessed.*
 - (n) *Seised.*

- (o) *Stock.*
- (p) *Transfer.*
- (q) *Trust—Trustee.*

2. JURISDICTION.

- (a) *Over what Property.*
- (b) *To make Vesting Orders of Land.*
 - (1) Infant Trustee or Mortgagee.
 - (2) Trustee Out of Jurisdiction.
 - (3) Uncertainty which Trustee Survived.
 - (4) Uncertainty as to Existence of Trustee.
 - (5) Trustee Dying Intestate without known Heir.
 - (6) Unborn Persons becoming Entitled as Trustees.
 - (7) Trustee Refusing to Convey.
 - (8) After Order for Sale.
 - (9) Where Legal Estate derived from Mortgages.
 - (10) On Appointing New Trustee.
 - (11) Copyhold and Customary Lands.
- (c) *To make Vesting Orders of Stock and Choses in Action.*
 - (1) Infant Trustee.
 - (2) Trustee Out of Jurisdiction, Not to be Found, or Not known to be Alive or Dead.
 - (3) Trustee or Executor Refusing to Transfer after Request.
 - (4) Person Refusing to Transfer after Order.
 - (5) On Appointing New Trustee.
 - (6) In Persons not New Trustees.
- (d) *To make Vesting Orders of Charity Property.*
- (e) *To Appoint Person to Convey, &c.*
- (f) *To Appoint New Trustees.*
 - (1) General Rules.
 - (2) Lunacy of Donee of Power.
 - (3) Absence of Donee of Power.
 - (4) Doubtful Power.
 - (5) Saving Expense.
 - (6) Imperfect Power.
 - (7) Infancy.
 - (8) Residence Abroad.
 - (9) Bankruptcy, Composition, &c.
 - (10) Lunacy of Trustee.
 - (11) Doubt as to Person who holds Property.
 - (12) Where no Trustees.
 - (13) Disclaimer.
 - (14) Invalid Trust Deed.
 - (15) Felony of Trustee.
 - (16) Re-Appointing Trustees.
 - (17) Vesting Order of Leasehold.
 - (18) Removal of Trustee or Donee of Power.
 - (19) Who Appointed
 - (20) Number Appointed.

3. APPLICATION.

- (a) *Where Made.*
- (b) *By whom Made.*
- (c) *How Made.*
- (d) *Service.*

4. EVIDENCE.

5. HEARING.

6. ORDER.

7. APPOINTMENT IN CHAMBERS.

8. COSTS.

9. MISCELLANEOUS PROVISIONS.

- (a) *Sale for Payment of Debts.*
- (b) *Specific Performance, Petition, or Exchange.*
- (c) *Payment into Court.*

IV. TRUSTEE RELIEF ACTS, 1847 AND 1849.

1. WHO MAY PAY OR TRANSFER INTO COURT.
 - (a) *Without Order.*
 - (b) *Under Order.*
2. AMOUNT PAID IN.
3. AFFIDAVIT.
 - (a) *Filing and Contents.*
 - (b) *Printing.*
4. DIRECTION FOR PLACING TO TRUST ACCOUNT.
5. TITLE OF ACCOUNT.
6. RECEIPT OR CERTIFICATE FOR MONEY, STOCKS, OR SECURITIES.
7. EFFECT OF PAYMENT IN.
8. NOTICE OF PAYMENT IN.
9. INVESTMENT AND PAYMENT OF DIVIDENDS.
10. ADMINISTRATION AND PAYMENT OUT.
 - (a) *Application.*
 - (1) *How Made.*
 - (2) *Address for Service.*
 - (3) *By whom Made.*
 - (4) *Service and Notice.*
 - (b) *Order.*
11. COSTS.

V. OF CHARITIES [see CHARITIES].

VI. LEAVE TO SELL MINES OR LAND SEPARATELY [see CONFIRMATION OF SALES].

VII. PURCHASE OF REVERSION OF ECCLESIASTICAL ESTATE [see ECCLESIASTICAL ESTATES].

VIII. AS PARTIES [see PARTIES].

I. EXECUTION OF TRUSTS.

1. JURISDICTION.

All causes and matters for . . . the execution of trusts, charitable or private [are assigned to the Chancery Division]: (J. A., 1873, s. 34.)

A claim for the creation of a trust is not within the matters expressly assigned: (Anon., W. N., 1876, p. 106.)

Although, where a trust has been created for an illegal purpose, the court will not generally interfere, it will do so where the illegal purpose fails to take effect: (*Symes v. Hughes*, L. Rep. 9 Eq. 475; 22 L. T. Rep. N. S. 462; 39 L. J. 304, Ch.)

If the equities be not perfectly clear, a trustee should decline to act without the sanction of the court, and he will be allowed all costs and expenses incurred by him in an application for that purpose: (Lewin, 320.)

The action may be instituted either by the trustees or by the *cestui que trust*, but in most cases an action is sustained rather than originated by the trustee: (Lewin, 321.)

If the rights be perfectly clear, and the trustee comes to the court without reason he will be answerable in costs, though he act neither fraudulently nor maliciously: (Lewin, 320.)

If there be no dispute as to the amount of the fund, but only as to who is entitled to it, and the trustee, instead of paying the fund into court under the Trustee Relief Act, needlessly commences an action, he will be allowed only the costs that would have been incurred had he taken advantage of that Act: (Lewin, 321.)

Trustees are not justified in applying to the court for execution of the trusts simply because there may hereafter be difficulties, and their premature action will be dismissed with costs: (*Beckett v. Attwood*, W. N., 1880, p. 121.)

Where two trustees have advanced money on insufficient security, the court will not, on action brought by one against the other, the *cestuis que trustent* not being parties, order the securities to be realised; the *cestuis que trustent* ought to have the chance of electing to take the securities: (*Butler v. Butler*, L. Rep. 5 Ch. Div. 116; affirmed L. Rep. 7 Ch. Div. 116.)

A trustee is indemnified by the judgment of the High Court, and an appeal by him to the Court of Appeal is at his own risk: (Lewin, 320.)

The *cestui que trust* is entitled to bring an action against the trustee, and compel him to the execution of any particular act of duty, as to lend his name for asserting a legal right: (Lewin, 724-5.)

And generally a *cestui que trust*, who can allege an existing interest, however minute or remote, may upon reasonable cause shown, apply to the court to have his interest properly secured: (Lewin, 725.)

2. WRIT OF SUMMONS.

In all cases of ordinary account, as, for instance, in the case of an . . . ordinary trust account, where the plaintiff, in the first instance, desires to have an account taken, the writ of summons shall be indorsed with a claim that such account be taken: (O. III., r. 8.)

Under a common decree for an account an executor could only be charged with his own acts and actual or constructive receipts: (Seton, 461, citing *Terrell v. Matthews*, 1 Mac. & G. 433, n.; and see *post*, 5.)

3. PARTIES.

As to joining parties generally where trustees sue or are sued, see PARTIES, I., 4; II., 4.

Where the solicitor of trustees has been guilty of negligence or fraud, he may be sued jointly with them, but not alone: (Seton, 463.)

Trustees may sue alone to recover trust funds without making their *cestuis que trustent* parties; and one may sue the other although the plaintiff joined in the breach of trust: (Seton, 466.)

As the necessity of joining *cestuis que trustent* where one trustee sues another for the realisation of insufficient securities, see *Butler v. Butler*, cited *sup.* 1.

One trustee may sue alone, to recover the trust funds, making the other a party: (Seton, 466.)

Where the suit is not confined to a particular breach, but asks a general account with wilful default, all the trustees, living or dead, must be represented: (Seton, 466.)

4. EFFECT OF ACTION ON POWERS.

If a suit has been instituted for the execution of the trust and a decree made, the powers of the trustees are thenceforth so far paralysed that the authority of the court must sanction every subsequent proceeding: (Lewin, 516, and where instances are given, citing *Minors v. Battison*, L. Rep. 1 App. Cas. 428, &c.)

Even if no decree has been made the trustees ought, after action brought, to consult the court before doing anything which is not a merely formal act: (Lewin, 516-7, 533-4.)

5. TAKING TRUST ACCOUNTS.

In default of appearance to a summons indorsed under Order III., rule 8 [see *sup.* 2], and after appearance, unless the defendant by affidavit or otherwise satisfy the court or a judge that there is some preliminary

question to be tried, an order for the account claimed, with all directions [formerly] used in the Court of Chancery in similar cases, shall be forthwith made: (O. XV., r. 1.)

As to the manner of proceedings under the above rule; as to ordering and taking accounts and inquiries generally, see ACCOUNT; INQUIRIES; CHAMBERS; and see *post*, 6, 10.

6. PLEADING.

If an action be brought for an account, and the plaintiff seeks relief against wilful default, he must, in his pleadings, allege some specific act of wilful default, and pray consequential relief, and at the hearing must prove some act of wilful default, or at least establish a case for inquiry: (Lewin, 772.)

Where, at the original hearing, the common accounts only have been directed, it is too late to ask relief on further directions against any wilful act that may have transpired accidentally in the course of other inquiries: (Lewin, 772.)

A trustee cannot be declared liable for wilful default upon a common order made at chambers for the administration of the testator's estates: (*Id.*); and see, further, as to wilful default, Seton, 476-7.

The right of contribution between co-trustees for breaches of trust may now be enforced in the same suit: (*Butler v. Butler*, L. Rep. 14 Ch. Div. 329; 42 L. T. Rep. N. S. 728; 28 W. R. 825.)

As to changing and failing to prove breaches of trust, see *post*, 13 (f).

A person who has accepted property as a trustee, and held it as such, is not at liberty to dispute the title of his *cestui que trust*, though it may be doubtful: (*Neligan v. Rache*, 7 Ir. R. Eq. 332.)

7. COMPULSORY PAYMENT INTO COURT.

To call for payment of money into court, the plaintiff must either be solely entitled to the fund or have acquired in the whole of the fund such an interest, together with others, as entitles him, on his own behalf, and the behalf of those others, to have the fund secured in court: (*Freeman v. Fairlie*, 3 Mer. 29; Lewin, 836.)

It is not indispensable that the plaintiff should be the person exclusively interested. If he have a partial or contingent interest, it is enough if all the other parties interested in the fund are before the court; and sometimes orders will be made where some of the persons interested are not before the court, or the defendant does not admit that all are before it: (Lewin, 837.)

Where the other persons interested are not necessary parties, payment into court, if consistent with the claim in the action, may be obtained without serving them with the notice of motion: (Lewin, 837.)

To enable the court to order payment in on motion, before judgment in the action, the defendant must admit that the money is in his hands for the purpose of the application (*Freeman v. Cox*, L. Rep. 8 Ch. Div. 148); but any admission, whether direct or implied, is sufficient, as where the defendant does not appear: (*Id.*; *London Syndicate v. Lord*, L. Rep. 8 Ch. Div. 148.)

8. INJUNCTION.

If the *cestui que trust* can satisfy the court that the trustee is about to proceed to an act not authorised by the true scope of the trust, he may apply for an injunction: (Lewin, 726.)

As to the remedy for a breach of trust, see Lewin, c. 29.

9. RECEIVER.

A receiver will not be appointed on slight grounds: (see Lewin, 842-4.)

The poundage and the expenses of passing his account fall on the

income of the tenant for life: (Lewin, 844, citing *Shore v. Shore*, 4 Drew, 510.)

10. CHARGING TRUSTEES WITH INTEREST.

As a general rule, a trustee guilty of any unreasonable delay in investing the fund, or transferring it to the proper hand, will be answerable to the *cestui que trust* for interest during the period of his laches: (Lewin, 310.)

A trustee has been declared to pay interest when it was not prayed: (*Id.*)

Where money is lost that has never come to hand, interest is not charged: (Lewin, 315.)

The rate of interest charged is usually 4l. per cent., but this is only where it does not appear that greater interest has been made: (Lewin, 313.)

A higher rate of interest will not be exacted as a penalty: (Seton, 478.)

For charging 5l. per cent. a special case must be made: (*Id.*)

As to the cases in which 5l. per cent. or compound interest will be charged, see Lewin, 313-5; Seton, 478-9.

Where a deceased trustee had invested money on mortgage at 5l. per cent. on an insufficient security, and for some years, both before and after his decease, interest was paid at that rate to the *cestui que trust*; but some years after his decease the payments of interest ceased, his estate was held chargeable with interest at the rate of 5l. per cent. from the time of the last payment: (*Price v. Price*, 42 L. T. Rep. N. S. 626.)

11. DISCHARGING TRUSTEE.

A trustee may, in every proper case, get himself discharged from the office on application to the court: (Lewin, 572.)

He is not bound to show, if entitled to be discharged, that another person is ready to accept the office, for the court will appoint a new trustee; but if no one can be found to accept the trust, the court may keep the old trustee before the court, but will take care to protect him in the meantime: (*Courtenay v. Courtenay*, 3 J. & L. 533; Lewin, 572-3.)

A representative of a deceased trustee may decline to act, and will be entitled to his costs of proceedings to appoint new trustees: (Lewin, 574.)

Where the complication arose from the acts of a tenant for life, who could find no new trustee, the costs of an action by the trustees for discharge were thrown exclusively on the fund of the tenant for life: (*Id.*)

If a trustee wishes to retire from mere caprice, it is not clear that the court can or will discharge him, unless another trustee can be found in substitution: (Lewin, 573.)

But every trustee may relieve himself from the liabilities of the office by submitting the administration of the trusts to the jurisdiction of the court: (*Id.* citing *Forshaw v. Higginson*, 20 Beav. 485; *Gardiner v. Downes*, 22 Beav. 397.)

Where the trustee retires from caprice or without sufficient reason, he must bear the costs; but where he retires from necessity, or on good and sufficient cause, they will be thrown upon the trust estate: (Lewin, 574.)

Where a trust originally simple has become embarrassing from its complications the trustee is entitled to the costs of his action to be relieved: (*Id.* citing *Barker v. Peile*, 2 Dr. & Sm. 340.)

Except in cases of special difficulty the court usually appoints a trustee without a reference to chambers, and without a suit, under the Trustee Acts: (Lewin, 573, and see *post*, III., 2 (f).)

12. ARREST OF TRUSTEE.

[See EXECUTION, XX.]

13. COSTS.

(a) *General Rule.*

Subject to the provisions of the [Judicature Act, 1873] the costs of and incident to all proceedings in the High Court shall be in the discretion of the court; but nothing herein contained shall deprive a trustee . . . of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in courts of equity: (O. LV., r. 1.)

(b) *Out of what Fund Trustees' Costs Payable.*

As between the trustee and *cestui que trust*, the trustee generally has his costs of suit awarded to him at the hearing either out of the estate or to be paid by the *cestui que trust*: (Lewin, 846.)

If there be a fund under the control of the court, he will have his costs as between solicitor and client: (*Id.*)

If there be no fund, if the *cestuis que trustent* bring the trustee before the court for obtaining its directions as to the rights of the parties or the mode of administration, and the trustees are free from blame, the trustees are entitled to their costs as against the *cestuis que trustent* personally: (*Id.*)

Where, by the exercise of the usual power of appointment in a marriage settlement, the shares of children were appointed unequally, but were equalised, or nearly so, by a division of the unappointed property under a hotchpot clause, the costs of an action to administer the trusts of the settlement were ordered to be paid rateably out of the appointed and unappointed shares: (*Moore v. Dixon*, L. Rep. 15 Ch. Div. 566.)

(c) *Charges and Expenses.*

If it appear by the pleadings, or the court be otherwise satisfied, that the trustee has sustained charges and expenses beyond the costs of suit, the court will order him his costs, charges, and expenses properly incurred; but an order made in a suit in this form will not comprise costs, charges, and expenses incurred in defending other suits, unless they be specially mentioned: (Lewin, 846.)

(d) *Where Trustee deprived of or made to Pay Costs.*

If any particular instance of misconduct or general dereliction of duty in the trustee, or his caprice or obstinacy, be the immediate cause of the suit being instituted, the trustee will be made to pay personally the costs occasioned by his improper behaviour: (Lewin, 848-9.)

Trustees who have been guilty of impropriety of conduct may be merely deprived of costs in the discretion of the court: (*Re Hoskins*, L. Rep. 6 Ch. Div. 281; 46 L. J. 814, Ch.)

A trustee cannot appeal in respect of costs only which he has been ordered to pay: (*Id.*; *Taylor v. Dowlen*, L. Rep. 4 Ch. App. 697.)

And if the suit was occasioned by an innocent mistake of the trustee, the court will, not give him costs; make him pay part of the costs; allow him his costs: (Lewin, 849.)

If a breach of trust is trivial, the court may give the trustee his whole costs: (Lewin, 850.)

When part of the plaintiff's case for breach of trust fails in an action against the trustee, the latter will be made to pay the costs of that part of the action which has succeeded: (*Pocock v. Reddington*, 5 Ves. 800, cited Lewin, 849.)

Though a trustee must generally pay the costs of a suit to repair his breach of trust, he is entitled to his subsequent costs relating to ordinary taking of accounts: (Lewin, 849; and see *Bath v. Bell*, 39 L. T. Rep. N. S. 422.)

A trustee will be deprived of, or made to pay costs, if he refuses to account, wilfully mis-states accounts, by chicanery in his pleadings keeps the *cestui que trust* from a true knowledge of the account, or keeps accounts in a confused manner: (Lewin, 851.)

As to the trustee being liable for the costs of appeal, and other unnecessary proceedings, see *sup.* 1.

As to the costs of severing in any proceedings, see COSTS, III., 2 (*Severance*); Seton, 483.

If the suit did not originate from any necessity of inquiring into the conduct of the trustee, but, in the course of the proceedings instituted on other grounds, it appears the trustee has in some particular instance been guilty of a breach of trust, the trustee will not have to pay the costs of the whole suit, but only such as are connected with the breach of trust, and will be allowed his costs of the rest of the suit: (Lewin, 950.)

Where a bill was filed to set aside a decree for a compromise, on the ground of personal fraud in one of the trustees in obtaining the decree, but the charge was disproved, and the bill was dismissed, with costs, to be paid by the plaintiff's next friend, on his being unable to pay them, the trustee was allowed the costs out of the trust estate: (*Walters v. Woodbridge*, L. Rep. 7 Ch. Div. 504.)

Where two co-executors of a trustee, one of them a solicitor, were jointly liable in respect of a breach of trust committed by their testator, the solicitor having had the sole management of the trust estate, and having resorted to vexatious means to evade legal proceedings, an order was made, as between him and his co-trustee, that the latter was entitled to recover from him the whole costs of the action: (*Price v. Price*, 42 L. T. Rep. N. S. 626.)

(e) Of Disclaiming Trustee.

If a person named as a trustee be made defendant in an action, and by his defence disclaim the trust, the action will be dismissed as against him, with costs—not with costs as between solicitor and client: (Lewin, 847-8.)

(f) Of Plaintiff Cestui que Trust.

Although a *cestui que trust* is ordinarily entitled to his costs, out of the trust fund, of an action for execution of the trusts, if the action is really brought for the removal of a trustee, and this part of the claim fails, or is abandoned, the plaintiff will be made to pay the whole costs of the action: (*Fane v. Fane*, L. Rep. 13 Ch. Div. 228; 41 L. T. Rep. N. S. 551; 49 L. J. 200, Ch.; 28 W. R. 348.)

Where an action is commenced by a *cestui que trust*, and it is found at the hearing that, upon the true construction of the instrument, he has no interest in the fund, if the point was so doubtful that the fund could not have been distributed without the opinion of the court, and, either the fund is administered by the court in the plaintiff's action, or the court declares the rights of the parties in the action, the plaintiff generally has his costs: (Lewin, 321.)

It is otherwise when the plaintiff's contingent interest ceases *pendente lite*, and the parties interested repudiate the proceedings: (*Id.*)

II. PROCEEDINGS FOR COURT'S OPINION AND ADVICE.

1. POWER TO APPLY WITHOUT SUIT.

Any trustee, executor, or administrator shall be at liberty, without the institution of a suit, to apply by petition to any judge of the [Chancery Division] or by summons upon a written statement to any such judge at chambers, for the opinion, advice, or direction of such judge on any question respecting the management or administration of the trust

property or the assets of any testator or intestate: (22 & 23 Vict. c. 35, s. 30.)

2. WHERE ADVICE GIVEN.

As the Act does not give any right of appeal, it was not intended to authorise adjudications upon nice points of law. The object of the Act was to procure for trustees at a small expense the assistance of the court upon points of minor importance arising in the management of the trust: (Lewin, 535.)

Advice has been given as to:—

Investing and re-investing trust money: (*Re Simson*, 1 J. & H. 89; *Re Peyton*, L. Rep. 7 Eq. 463; *Re Knowles*, W. N. 1868, p. 233; 18 L. T. Rep. N. S. 809; *Re French*, L. Rep. 15 Eq. 68; *Re Clergy Orphan Corporation*, L. Rep. 18 Eq. 280; *Re Tuck*, W. N. 1869, p. 15; *Re Wedderburn*, L. Rep. 9 Ch. Div. 112.)

Payment and compromise of debts and other claims: (*Re Box*, 1 H. & M. 552; *Re Cope*, W. N. 1877, p. 87; *Re Murray*, W. N. 1868, p. 195; *Re Mackintosh*, 42 L. J. 208, Ch.)

Consenting to or making sales: (*Earl Poulett v. Hood*, L. Rep. 5 Eq. 116; *Re Stone*, W. N. 1874, p. 4.)

Mortgaging: (*Re Chawner*, L. Rep. 8 Eq. 569.)

Leasing: (*Re Shaw*, L. Rep. 12 Eq. 124; 19 W. R. 125; *Re Lees*, W. N. 1875, p. 61.)

Repairs: (*Re Lord Hotham*, L. Rep. 12 Eq. 124; *Re Leslie*, L. Rep. 2 Ch. Div. 185.)

Infant's advances and maintenance: (*Re Kershaw*, L. Rep. 6 Eq. 322; *Re Breed*, L. Rep. 1 Ch. Div. 226.)

Maintenance of lunatic not so found: (*Re T—*, L. Rep. 15 Ch. Div. 78.)

Execution of trust or power: (*Symes v. Pugh*, W. N. 1875, p. 173; *Re Cardross*, L. Rep. 7 Ch. Div. 728.)

Payment to woman past age of child-bearing: (*Re Taylor*, 70 L. T. 241.)

Payment of costs incurred by tenant for life in actions for the benefit of the inheritance: (*Re Earl De la Warr*, 70 L. T. 241.)

The court will give no opinion on:—

Hypothetical cases: (*Re Box*, 11 W. R. 304.)

Difficult questions: (*Re Mockett*, 1 Johns. 628.)

Questions of construction of a limitation of property: (*Re Hooper*, 29 Beav. 656; but see *Re Thompson*, W. N. 1871, p. 190.)

The court will make no order affecting rights to property: (*Re Lorenz*, 1 Dr. & Sm. 401.)

3. APPLICATION.

(a) By whom Made.

The application may be made by all the trustees, executors, or administrators (*sup.* 1); by one of them (*Re Muggeridge*, Johns. 625); by beneficiaries: (*Re Ward*, 13 L. T. Rep. N. S. 495.)

(b) How Made.

The application may be made by petition or summons (*sup.* 1), the former being the proper course: (*Re Dennis*, 5 Jur. N. S. 1388.)

(c) Form of Petition and Concise Statement.

(1) Title.

All petitions, summonses, statements, affidavits, and other written proceedings under the 30th section of the . . . Act shall be intituled, "In the matter of the said Act, and in the matter of the particular trust, will, or administration": (Ch. O., 20th March, 1860, r. 1.)

(2) Marking.

Every such petition and statement shall be marked in manner directed by the 6th of the Consolidated General Orders, r. 6: (*Id.*)

(3) Paragraphs.

Every such petition or statement shall state the facts concisely, and shall be divided into paragraphs, numbered consecutively: (*Id.*)

(d) Form of Summons.

Every such summons shall, except as to its title, be in the form of the general summons in Schedule (K.) No. 1, subjoined to the Consolidated General Orders: (*Id.*)

(e) Filing Concise Statement.

At the time when any such summons is sealed, the statement upon which the same is grounded shall be left at the chambers of the judge, and shall, on the conclusion of the proceeding, be transmitted to the registrar by the chief clerk, with the minutes of the opinion, advice, or direction given by the judge; and the registrar shall cause such statement to be transmitted to the Report Office, to be there filed: (Ch. O., 20th March, 1860, r. 2.)

(f) Service.

(1) On Whom.

Such application [is] to be served upon or the hearing thereof to be attended by all persons interested in such application, or such of them as the said judge shall think expedient: (22 & 23 Vict. c. 35, s. 30.)

It is generally unnecessary to serve anyone: (*Re Tuck*, W. N. 1869, p. 15; *Re Larken*, W. N. 1872, p. 85.)

(2) When Effected.

Every such petition or summons shall be served seven clear days before the hearing thereof, unless the person served shall consent to a shorter time: (Ch. O., 20th March, 1860, r. 3.)

The practice of obtaining, in the first instance, directions as to service, has been disapproved of: (Morg. & Ch. 254; Lewin, 535.)

4. EVIDENCE.

No evidence is admitted: (*Re Muggeridge, sup.*); but see *sup.* 3 (c) (1), which contemplates affidavits being filed.

5. REQUIRING ATTENDANCE OF COUNSEL.

The judge by whom [the petition] is to be answered may require the petitioner or applicant to attend him by counsel either in chambers or in court, where he deems it necessary to have the assistance of counsel: (23 & 24 Vict. c. 38, s. 9.)

6. JUDICIAL OPINION, OR DIRECTIONS.

(a) Passing, &c.

The opinion, advice, or direction of the judge shall be passed and entered, and remain as of record, in the same manner as any order made by the court or judge; and the same shall be termed "a judicial opinion," or "judicial advice," or "judicial direction," as the case may be: (Ch. O., 20th March, 1860, r. 4.)

(b) Effect.

The trustee, executor, or administrator, acting upon the opinion, advice, or direction given by the said judge shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator, in the subject-matter of the said application; provided, nevertheless, that this Act shall not extend to indemnify any trustee, executor, or administrator, in respect of any act done in accord-

ance with such opinion, advice, or direction as aforesaid, if such trustee, executor, or administrator, shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction: (22 & 23 Vict. c. 35, s. 30.)

Indemnity only extends as far as the facts are correctly stated in the petition: (*Re Mockett, sup.*)

The opinion does not prejudice an action: (Morg. & Ch. 255.)

There is no appeal: (*Re Bunnett*, 10 Jur. N. S. 1098.)

7. COSTS.

The costs of such application as aforesaid shall be in the discretion of the judge to whom the said application shall be made: (22 & 23 Vict. c. 35, s. 30; and see COSTS.)

The costs are directed to be paid out of the estate (*Re Lees, sup.*; *Re Leslie, sup.*), or out of income where the petition relates only to income: (*Re Spiller*, 6 Jur. N. S. 386.)

III. TRUSTEE ACTS, 1850 AND 1852.

1. INTERPRETATION.

(a) Generally.

Generally, unless the contrary shall appear from the context, every word importing the singular number only shall extend to several persons or things, and every word importing the plural number shall apply to one person or thing, and every word importing the masculine gender only shall extend to a female: (Tr. A. 1850, s. 2; *Re Hartnall*, 5 De G. & Sm. 111.)

[The Trustee Extension Act, 1852,] shall be read and construed according to the definitions and interpretations contained in the second section of the Trustee Act, 1850, and the provisions of the said last-mentioned Act (except so far as the same are altered by or inconsistent with [the Act of 1852] shall extend and apply to the cases provided for by [the Act of 1852] in the same way as if [the latter] Act had been incorporated with and had formed part of the said Trustee Act, 1850: (Tr. Ex. A., 1852, s. 12.)

(b) Assign—Assignment.

“Assign” and “assignment” shall mean the execution and performance by a person of every necessary or suitable deed or act for assigning, surrendering, or otherwise transferring lands of which such person is possessed, either for the whole estate of the person so possessed, or for any less estate: (Tr. A., 1850, s. 2.)

(c) Contingent Right.

“Contingent right,” as applied to lands, shall mean a contingent and executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent: (Tr. A., 1850, s. 2.)

See, as to right of entry, *Hunt v. Remnant*, 9 Ex. 640; *Hunt v. Bishop*, 8 Ex. 680; *Shelf*. 639.

(d) Convey—Conveyance.

“Convey” and “conveyance,” applied to any person, mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another lands whereof such person is seised or entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants in tail

in accordance with the [Fines and Recoveries Act], and including also surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to, or in aid of, a complete assurance of such customary or copyhold lands : (Tr. A., 1850, s. 2.)

A vesting order, with the protector's consent, bars estates in remainder : (*Powell v. Matthews*, 1 Jur. N. S. 973.)

As to copyholds, see *Rowley v Adams*, 14 Beav. 130.)

(e) *Devisee.*

"Devisee," in addition to its ordinary signification, means the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the lands of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent : (Tr. A., 1850, s. 2.)

(f) *Lands.*

"Lands" extends to and includes manors, messuages, tenements, and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein : (Tr. A., 1850, s. 2.)

Where the word "lands" only had been used in an order, and the trust property consisted of rent-charges, the order was amended by inserting "hereditaments" : (*Re Harrison*, Seton, 516.)

The powers and authorities given by [the] Act to the Court . . . in England . . . extend to all lands . . . within the dominions, plantations, and colonies belonging to Her Majesty (except Scotland) : (Tr. A., 1850, s. 54.)

(g) *Lunatic.*

"Lunatic" means any person who shall have been found to be a lunatic upon a commission of inquiry in the nature of a writ *de lunatico inquirendo* : (Tr. A., 1850, s. 2.)

"Person of unsound mind" means any person, not an infant, who, not having been found to be a lunatic, is incapable from infirmity of mind to manage his own affairs : (Tr. A., 1850, s. 2.)

(h) *Mortgage.*

"Mortgage" is applicable to every estate, interest, or property in lands or personal estate, which would in a court of equity be deemed merely a security for money : (Tr. A., 1850, s. 2.)

See *Re Underwood*, 3 K. & J. 745, cited under *Trust* : (*Lawrence v. Galsworthy*, 3 Jur. N. S. 1049.)

(i) *Person.*

"Person" used and referred to in the masculine gender includes a female as well as a male, and a body corporate : (Tr. A., 1850, s. 2.)

(k) *Personal Estate.*

The powers and authorities given by [the] to the court . . . in England . . . extends to all . . . personal estate within the dominions, plantations, and colonies belonging to Her Majesty (except Scotland) : (Tr. A., 1850, s. 54.)

(l) *Person of Unsound Mind* [see *sup.* (g)].

(m) *Possessed.*

"Possessed" is applicable to any vested estate less than a life estate, at law or in equity, in possession or in expectancy, in any lands : (Tr. A., 1850, s. 2.)

(n) *Seised.*

"Seised" is applicable to any vested estate for life or of a greater description, and extends to estates at law and in equity, in possession or in futurity, in any lands : (Tr. A., 1850, s. 2.)

The word does not apply to leaseholds, see *Re Mundel*, 8 W. R. 683.

As to equitable estates, see *Re Williams*, 5 De G. & S. 515.

As to a co-parcener being seised, see *McMurray v. Spicer*, L. Rep. 5 Eq. 527.)

(o) *Stock*.

"Stock" means any fund, annuity, or security transferable in books kept by any company or society, or transferable by deed alone, or by deed accompanied by other formalities, and any share or interest therein: (Tr. A., 1850, s. 2.)

The word includes shares in a joint-stock banking company (*Re Angelo*, 5 De G. & S. 278); and shares in ships: (18 & 19 Vict. c. 91, s. 10.)

(p) *Transfer*.

"Transfer" shall mean the execution and performance of every deed and act by which a person entitled to stock can transfer such stock from himself to another: (Tr. A., 1850, s. 2.)

(q) *Trust—Trustee*.

"Trust" shall not mean the duties incident to an estate conveyed by way of mortgage; but, with this exception, the words "trust" and "trustee" shall extend to and include, implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of personal representative of a deceased person: (Tr. A., 1850, s. 2.)

The court cannot convey the estate of a paid-off mortgagee at the instance of the mortgagor: (*Re Osborn*, L. Rep. 12 Eq. 392; but see *Re Walker*, L. Rep. 3 Ch. Div. 209.)

But it is otherwise where the land is conveyed, not strictly by way of mortgage, but by way of trust for sale in default of payment of money borrowed, or where the mortgagee has become a trustee: (Morg. & Ch. 79; Seton, 516.)

On a mortgagee's death his heir was held a trustee for the executors: *Re Skitter*, 4 W. R. 791; and see 37 & 38 Vict. c. 78, s. 4.)

A vendor, after a contract, has been held a trustee of shares in a joint-stock bank for the purchaser: (*Re Angelo*, 5 De G. & S. 278.)

Voluntary vendors of land are trustees only where there is no dispute as to title or contract, or the contract has been executed or been the subject of an award: (Seton, 517; *Re Lowry's Will*, L. Rep. 15 Eq. 78; *Re Cuming*, L. Rep. 5 Ch. App. 72.)

If the right is not clear, or where the alleged trustee can possibly dispute the trust, the vendor must be declared a trustee in an action: (*Re Carpenter Kay*, 418; *Re Weeding*, 4 Jur. N. S. 707; Seton, 517; Lewin, 867.)

The infant heir of a vendor who has died intestate after having contracted to sell real estate is not a constructive trustee of the purchaser unless so declared by judgment: (Lewin, 867; and see *Re Lowry, sup.*)

As to a bare trustee's freeholds vesting in his legal personal representatives, see 38 & 39 Vict. c. 87, s. 48.

An owner of copyholds who has covenanted to surrender, and declared that he will stand seised on trust for the covenantee, is within the Act: (*Re Collingwood*, 6 W. R. 536.)

Although there is no such declaration, if the contract has been executed, the covenantor is a trustee: (*Re Cuming, sup.*)

If the *cestui que trust* has sold his equitable interest and the sale has been completed, the purchaser is *cestui que trust*, and may apply for

transfer of the legal estate: (*Re Wilkinson*, 10 Jur. N. S. 716; *Re Groom*, 11 L. T. Rep. N. S. 336; *Lewin*, 867.)

Where a railway company has taken possession under a compulsory sale, the vendor's heir is a trustee: (*Re Russell*, 12 Jur. N. S. 224; *Re Badcock*, 2 W. R. 386.)

An heir who has elected to take under the will is a trustee: (*Dewar v. Maitland*, L. Rep. 2 Eq. 834.)

The husband of a married woman entitled to stock was held a trustee: (*Re Wood*, 7 Jur. N. S. 323.)

An executor holding a legacy bequeathed to persons in succession is a constructive trustee: (*Re Davis*, L. Rep. 12 Eq. 214.)

Infants have been treated as trustees of stock to which they were beneficially entitled when certain trusts for maintenance had been vested in executors who were dead: (*Gardner v. Cowles*, L. Rep. 3 Ch. Div. 304.)

See, as to the executrix of a surviving trustee, *Re Ellis*, 24 Beav. 426; assignees in bankruptcy, *Re Joyce*, L. Rep. 2 Eq. 576; heir taking through disclaimer, *Wilks v. Groom*, 6 D. M. & G. 205; *Hooper v. Strutton*, 12 W. R. 367, cited *Morg. & Ch.* 79.

2. JURISDICTION.

(a) *Over what Property.*

The powers and authorities given by [the] Act to the court . . . in England shall extend to all lands and personal estate within the dominions, plantations, and colonies belonging to Her Majesty (except Scotland): (Tr. A., 1850, s. 54.)

The Lord Chancellor of Great Britain sitting in lunacy has not a concurrent jurisdiction over lands in Ireland: (*Re Davies*, 3 Mac. & G. 278.) But vesting orders have been made by the Court of Chancery in England of land in Ireland (*Re Hewitt*, 6 W. R. 537; *Re Taitt*, W. N. 1870, p. 25), and in Canada (*Re Schofield*, 24 L. T. Rep. O. S. 322; *Re Groom*, 11 L. T. Rep. N. S. 336.)

A vesting order as to lands in Ireland may be made and an appointment of trustees thereof ordered, on a petition in England intitled in the Chancery Division and in lunacy: (*Re Lamotte*, L. Rep. 4 Ch. Div. 325; *Re Hodgson*, L. Rep. 11 Ch. Div. 888.)

The Acts extend to the private property of the sovereign in England and Ireland: (25 & 26 Vict. c. 37, s. 10.)

(b) *To make Vesting Orders of Land.*

(1) *Infant Trustee or Mortgagee.*

Where any infant [is] seised or possessed of any lands upon any trust or by way of mortgage . . . the court may make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order [has] the same effect as if the infant trustee or mortgagee had been twenty-one years of age, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate: (Tr. A. 1850, s. 7.)

Where any infant [is] entitled to any contingent right in any lands upon any trust or by way of mortgage . . . the court [may] make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said court shall direct; and the order [has] the same effect as if the infant had been twenty-one years of age, and had duly executed a deed so releasing or disposing of the contingent right: (Tr. A. 1850, s. 8.)

The fact of the infant being of unsound mind does not oust the jurisdiction of the Chancery Division: (*Re Arrowsmith*, 4 Jur. N. S. 1123.)

Where an infant is tenant in tail in remainder, a vesting order, made with the consent of the tenant for life, bars the entail and remainders: (*Powell v. Matthews*, 1 Jur. N. S. 973.)

Where the vesting order is in favour of a *feme covert*, it may be made to such person or persons as she shall appoint: (*Re Powell*, 4 K. & J. 338.)

The legal estate may be ordered to vest to uses to bar dower in favour of a purchaser: (*Davey v. Millar*, 17 Jur. 908; and see *Re Lush's Estate*, 5 De G. & Sm. 436.)

Where the property is required to be severed, two vesting orders instead of one will be made: (*Brader v. Kerby*, W. N. 1872, p. 174.)

The outstanding legal estate of mortgaged property has been vested in devisees of the equity of redemption, subject to a legacy charged on the latter by the mortgagor's will: (*Re Ellerthorpe*, 18 Jur. 669.)

The infant heir of a deceased vendor is not a constructive trustee of the legal estate unless he has been expressly declared such by judgment (*Re Carpenter*, Kay, 420); but he is in case of a compulsory sale to a public company: (*Re Russell*, W. N. 1866, p. 125.)

An infant devisee of a vendor in a compulsory sale to a public company is a trustee: (*Re Lowry*, L. Rep. 15 Eq. 78.)

As to vesting order, with protector's consent, passing remainders after a tenancy in tail, see *sup.*, 1 (d), see also 37 & 38 Vict. c. 78, s. 4, as to a mortgagee's representatives; and 38 & 39 Vict. c. 87, s. 48, as to a bare trustee.)

(2) Trustee out of Jurisdiction.

When any person solely seised or possessed of any lands upon any trust [is] out of the jurisdiction of the court . . . or cannot be found . . . the . . . court [may] make an order vesting such lands in such person or persons in such manner and for such estate as the . . . court . . . directs; and the order has the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner and for the same estate: (Tr. A., 1850, s. 9.)

The fact that the trustee is also of unsound mind does not oust the jurisdiction of the Chancery Division: (*Re Gardner*, L. Rep. 10 Ch. Div. 29; 40 L. T. Rep. N. S. 52.)

Mere temporary absence abroad is insufficient: (*Hutchinson v. Stephens*, 5 Sim. 499.)

When a testator devised copyholds to A., a daughter, and after his death his two daughters and co-heiresses were admitted as tenants in common; and subsequently, on an enfranchisement, the conveyance was made to the two daughters in fee, and one of them was out of the jurisdiction, it was held that an order, vesting in trustees for A. the legal estate which was in the other daughter was properly made under sect. 9: (*McMurray v. Spicer*, L. Rep. 5 Eq. 527.)

Where leases were granted to A. B., and he subdemised to C. D., for the terms less ten days, and C. D. mortgaged to E. F. and Co. for securing money, and subdemised for the last-mentioned terms less one day, with a power of sale, and covenanted to assign the last day of each term to a purchaser; and E. F. and Co. sold to G. H. and assigned the mortgage terms, and G. H. then bought of A. B. the improved ground rents, and took an assignment of the leases granted to him, and C. D., the mortgagor, being abroad, G. H. petitioned the court to declare the last day of each of the terms created by the underlease to him vested in the petitioner, the court dismissed the petition: (*Re Probert's Purchase*, 22 L. J. 948, Ch.)

Where a testator devised lands in trust for sale for payment of debts, the trustees disclaimed, the heir at law could not be found, and the lands were sold under a decree in an administration suit, an order was made, under sects. 9 and 20, appointing a person to convey to the purchasers: (*Wilks v. Groom*, 6 De G., M., & G. 205; 2 Jur. N. S. 1077.)

Where a testator directed his real estate to be sold without naming anyone to sell, and there was no devise of the real estate, and the heir was out of the jurisdiction, the court in an administration suit declared the heir a trustee, and vested his interest in the executor: (*Hooper v. Strutton*, 12 W. R. 367; see *Re Badcock*, 2 W. R. 386.)

The heir of a mortgagee in possession has been declared a trustee for the executors: (*Re Skitter*, 4 W. R. 791.)

An absconding mortgagor, defendant in a foreclosure suit, was declared a trustee, and the estate was vested in the mortgagee (*Lechmere v. Clamp*, 30 Beav. 218; 31 Beav. 578); but a separate application must be made: (*Smith v. Boucher*, 1 Sm. & G. 72.)

When any person or persons [are] seised or possessed of any lands jointly with a person out of the jurisdiction of the court . . . or who cannot be found, the court [may] make an order vesting the lands in the person or persons so jointly seised or possessed, or in such last-mentioned person or persons together with any other person or persons, in such manner and for such estate as the court directs; and the order [has] the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance or assignment of the lands in the same manner for the same estate: (Tr. A., 1850, s. 10.)

The section is to be read "when any person or persons shall be seised or possessed of any lands upon any trust jointly": (*McMurray v. Spicer*, *sup.*)

Where realty was mortgaged to two persons, of whom one went abroad, and on sale of the property by the mortgagor so much of the purchase-money as was payable to the mortgagees was invested in their joint names, it was held that the court had no jurisdiction on a petition to vest in the purchaser the estate of the mortgagee abroad: (*Re Osborn*, L. Rep. 12 Eq. 392.)

Where one of three mortgagees who were trustees went abroad, and in his absence the mortgage was paid off, and a new trustee was appointed in his place, the outstanding estate was vested in the transferee: (*Re Walker*, L. Rep. 3 Ch. Div. 209.)

Where one of a bankrupt's assignees had gone abroad, the court declared him a trustee, and vested the estate in the others: (*Re Joyce*, L. Rep. 2 Eq. 576.)

Where the estate of a mortgagee who died intestate descended upon two co-parceners, one of whom was out of the jurisdiction, the court vested the estate in the other: (*Re Templer*, 4 N. R. 494.)

The court will vest lands in a new trustee jointly with continuing trustees: (*Re Bute*, Johns. 15; *Smith v. Smith*, 3 Drew. 72.)

When any person solely entitled to a contingent right in any lands upon any trust shall be out of the jurisdiction of the court . . . or cannot be found, it shall be lawful for the said court to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right: (Tr. A., 1850, s. 11.)

Where realty was devised on trust for sale, but the sole trustee had

died in the testator's life time, and it was not known who was the testator's heir, the court appointed a new trustee and vested in him the descended estate: (*Gunson v. Simpson*, L. Rep. 5 Eq. 332.)

When any person jointly entitled with any other person or persons to a contingent right in any lands upon any trust shall be out of the jurisdiction of the court . . . or cannot be found, it shall be lawful for the said court to make an order disposing of the contingent right of the person out of the jurisdiction, or who cannot be found, to the person or persons so jointly entitled as aforesaid, or to such last-mentioned person or persons together with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right: (Tr. A., 1850, s. 12.)

(3) Uncertainty which Trustee Survived.

Where there shall have been two or more persons jointly seised or possessed of any lands upon any trust, and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the court . . . to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance or assignment of the lands in the same manner for the same estate: (Tr. A., 1850, s. 13.)

(4) Uncertainty as to Existence of Trustee.

Where any one or more person or persons shall have been seised or possessed of any lands upon any trust, and it shall not be known, as to the trustee last known to have been seised or possessed, whether he be living or dead, it shall be lawful for the court . . . to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate: (Tr. A., 1850, s. 14.)

(5) Trustee Dying Intestate without known Heir.

When any person seised of any lands upon any trust shall have died intestate as to such lands without an heir, or shall have died and it shall not be known who is his heir or devisee, it shall be lawful for the court . . . to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the lands in the same manner for the same estate: (Tr. A., 1850, s. 15.)

This section does not apply to leaseholds (*Re Mundel*, 8 W. R. 683; *Re Harvey*, Seton, 520); but an order may be made under sect. 34: (*Re Rathbone*, L. Rep. 2 Ch. Div. 483; *Re Dalgleish's Settlement*, L. Rep. 4 Ch. Div. 143.)

Where for money lent real estate was conveyed to the lender, his heirs and assigns, upon trust, on repayment of principal and interest by a certain day, for the borrower, his heirs or assigns, but on default upon trusts for sale, and the trusts of the purchase-money were declared to be for payment of the principal money, interest and costs, and subject thereto for the borrower, "his executors, administrators, or assigns," on default, it was held, that the trust of the surplus operated to convert the property as between the borrower's real and personal representatives, and the lender having died intestate, and it being impossible to find his heir, the court made a vesting order under this section: (*Re Underwood*, 3 Kay & J. 745.)

Where a mortgagee with power of sale and a trust to pay the residue to the mortgagor took possession, and at his death gave his estate generally to trustees, but left no heir, the court made an order under this section: (*Re Keeler*, 11 W. R. 62.)

Where a bastard sold a reversionary interest in realty, to which he was entitled under a will, and the trustees of the will subsequently conveyed the legal estate to the bastard who died without children, an order was made under this Act vesting the legal estate in the purchaser: (*Re Wilkinson's Trust*, 12 W. R. 522, cited Shelf.)

See also as to a bare trustee, 38 & 39 Vict. c. 87, s. 48; *Christie v. Owington*, L. Rep. 1 Ch. Div. 279; *Morgan v. Swansea Sanitary Authority*, L. Rep. 9 Ch. Div. 582.)

(6) Unborn Persons becoming entitled as Trustees.

When any lands are subject to a contingent right in an unborn person, or class of unborn persons, who upon coming into existence would in respect thereof become seised or possessed of such lands upon any trust, it shall be lawful for the court . . . to make an order which shall wholly release and discharge such lands from such contingent right in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn person or class of unborn persons would upon coming into existence be seised or possessed of in such lands: (Tr. A., 1850, s. 16.)

Persons born, but not ascertainable, are considered unborn: (*Basnett v. Morgan*, L. Rep. 20 Eq. 182.)

Orders have been made under this section, vesting in purchasers under a decree the rights and interests of unborn children (*Wake v. Wake*, 1 W. R. 283); and discharging in favour of purchasers the rights of unborn persons claiming under a settlement: (*Hargraves v. Wright*, 1 W. R. 408, Shelf.)

(7) Trustee Refusing to Convey.

In every case where any person is or shall be jointly or solely seised or possessed of any lands or entitled to a contingent right therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance or assignment of such lands, or a duly authorised agent of such last-mentioned person, requiring such trustee to convey or assign the same, or to release such contingent right, it shall be lawful for the court . . . , if the said court shall be satisfied that such trustee has wilfully refused or neglected to convey or assign the said lands for the space of twenty-eight days after such demand, to make an order vesting such lands in such person, in such manner and for such estate as the court shall direct, or releasing such contingent right in such manner as the court shall direct; and the said order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands, or a release of such right, in the same manner and for the same estate: (Tr. Ex. A., 1852, s. 2.)

No tender of a deed need be made, and the refusal need not be in writing: (Lewin, 894.)

A married woman is capable of refusing: (*Rowley v. Adams*, 14 Beav. 130.)

Where a mortgagor covenanted to surrender copyholds to a mortgagee, and neglected to surrender for twenty-eight days, a vesting order was made without service on the mortgagor: (*Re Crowe's Mortgage*, L. Rep. 13 Eq. 26.)

An order vesting lands, subject to an annuity, was made without service on the annuitant: (*Re Winteringham's Trust*, 3 W. R. 578.)

As to order to defeat a trustee's attempt at extortion, see *Re O'Donnell*, 19 W. R. 522.

A divorced wife may obtain an order against her husband : (*Knight v. Knight*, W. N., 1866, p. 114.)

(8) After Order for Sale.

When any decree or order shall have been made by any court of equity directing the sale of any lands for any purpose whatever, every person seised or possessed of such land, or entitled to a contingent right therein, being a party to the suit or proceeding in which such decree or order shall have been made, and bound thereby, or being otherwise bound by such decree or order, shall be deemed to be so seised or possessed or entitled (as the case may be) upon a trust within the meaning of the Trustee Act, 1850; and in every such case it shall be lawful for the court . . . if the said court shall think it expedient for the purpose of carrying such sale into effect, to make an order vesting such lands or any part thereof, for such estate as the court shall think fit, either in any purchaser or in such other person as the court shall direct; and every such order shall have the same effect as if such person so seised or possessed or entitled had been free from all disability, and had duly executed all proper conveyances and assignments of such lands for such estate : (Tr. Ex. A., 1852, s. 1.)

Where a sale has been ordered of property, in which infant and possible unborn children are interested, though the decree was made before the passing of the Act, and though the purpose of the sale is not confined to the payment of debts, the court has authority to make a vesting order : (*Wake v. Wake*, 17 Jur. 545.)

The Chancery Division has jurisdiction when the party seised or possessed is of unsound mind, if not so found : (*Herring v. Clark*, L. Rep. 4 Ch. App. 167.)

(9) Where Legal Estate derived from Mortgagee.

When any person to whom any lands have been conveyed by way of mortgage shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance of such lands, then in any of the following cases it shall be lawful for the court . . . to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct, that is to say :—

When an heir or devisee of such mortgagee shall be out of the jurisdiction of the court . . . or cannot be found :

When an heir or devisee of such mortgagee shall upon a demand by a person entitled to require a conveyance of such lands, or a duly authorised agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or a duly authorised agent of such last-mentioned person :

When it shall be uncertain which of several devisees of such mortgagee was the survivor :

When it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee whether he be living or dead :

When such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died and it shall not be known who is his heir or devisee :

The order of the . . . court made in any one of the foregoing cases shall have the same effect as if the heir or devisee or surviving devisee (as the case may be) had duly executed a conveyance or assignment of the lands in the same manner and for the same estate: (Tr. A., 1850, s. 19; and see 37 & 38 Vict. c. 78, s. 4, enabling the legal personal representative to reconvey.)

The clause is not confined to a case of simple reconveyance to the mortgagor. Where a mortgagee in fee (who has never been in possession or in receipt of the rents and profits) has died intestate as to the mortgaged hereditaments, and his heir cannot be found, the court may make an order vesting the legal estate in his executors: (*Boden's Trust*, 1 De G. M. & G. 57; *Re Lea's Trust*, 6 W. R. 482, cited Shelf.)

Where a mortgagee's personal representative assigns the mortgage, the heir being out of the jurisdiction, the assignee may obtain a vesting order of the legal estate (*Re Quinlan*, 9 Ir. Ch. R. 306); but such an order will not be made except in the cases of sale or transfer: (*Re Hewitt*, 27 L. J. 302, Ch.)

Where a testator, in 1860, after specifically devising certain lands, &c., not including in such devise any lands or hereditaments vested in him as mortgagee or trustee, gave all the residue of his real and personal estate unto all his nephews and nieces as tenants in common, it was held, on petition by the executors, that the trust and mortgage estates did not pass to the unascertained class, but to the heir-at-law as trustee, and the court ordered such estates to be vested in the executors upon the trusts of the will: (*Re Finney's Estate*, 3 Giff. 465.)

The section only applies where the mortgagee has never been in possession or receipt of rents and profits: (*Re Skitter*, 4 W. R. 791.)

In such a case where the heir of the mortgagee was out of the jurisdiction, an order was made vesting the legal estate in the executors: (*Id.*) See also sect. 15 and *Re Keeler*, *sup.*

Where a mortgagee, who was illegitimate, devised her real estate, but so as not to pass realty, and died without issue, and the money was afterwards paid off, the Crown being served but not opposing, a vesting order of the legal estate was made to a purchaser: (*Re Minchin*, 2 W. R. 179.)

Where the mortgagee's legal personal representative sold the mortgaged estate, the outstanding legal estate was vested in the purchaser without service on the mortgagee's heir, or the deceased mortgagor's personal representative: (*Re Wise*, 5 De G. & Sm. 415.)

(10) On Appointing New Trustee.

Upon making any order for appointing a new trustee or new trustees [the court may] either by the same or by any subsequent order direct that any lands subject to the trust shall vest in the person or persons who upon the appointment shall be the trustee or trustees for such estate as the court shall direct; and such order shall have the same effect as if the person or persons (who before such order were the trustee or trustees, if any) had duly executed all proper conveyance and assignments of such lands for such estates: (Tr. A., 1850, s. 34.)

The court may make an order vesting the estate in the continuing and new trustees jointly: (*Smith v. Smith*, 3 Drew, 72; *Re But*, Johns. 15; *Patching v. Barnett*, W. N. 1878, p. 27.)

Where the executors of a mortgagee had in a suit by order transferred the mortgage debt to trustees of a settlement, the court, on petition, vested the land in the trustees subject to the equity of redemption: (*Re Hughes*, 2 H. & M. 695.)

The court may, and frequently does, make a vesting order, though

there exists a person capable of executing a conveyance to the persons appointed trustees: (*Re Manning*, Kay, App. 28.)

Under this section leaseholds may be vested in new trustees: (*Re Matthews*, 2 W. R. 85; *Re Mundel*, 8 W. R. 683; *Re Rathbone*, L. Rep. 2 Ch. Div. 483; *Re Dalgleish*, L. Rep. 4 Ch. Div. 143; 35 L. T. Rep. N. S. 829.)

As to the practice where necessary evidence is not obtained till after the making of a vesting order, see *Re Havelock*, 14 W. R. 26, 174.

The court cannot direct how the trust is to be executed by the trustees: (*Re Taylor*, 2 D. F. & J. 125.)

(11) Copyhold and Customary Lands.

Whosoever, under any of the provisions of [the Trustee Act, 1850], an order shall be made by . . . the court . . . vesting any copyhold or customary lands in any person or persons, and such order shall be made with the consent of the lord or lady of the manor whereof such lands are holden, then the lands shall, without any surrender or admittance in respect thereof, vest accordingly; and whenever, under any of the provisions of the Act, an order shall be made by . . . the court . . . appointing any person or persons to convey or assign any copyhold or customary lands, it shall be lawful for such person or persons to do all acts and execute all instruments for the purpose of completing the assurance of such lands; and all such acts and instruments so done and executed shall have the same effect, and every lord and lady of a manor, and every other person, shall, subject to the customs of the manor, and the usual payments, be equally bound and compellable to make admittance to such land, and to do all other acts for the purpose of completing the assurance thereof, as if the persons in whose place an appointment shall have been made, being free from any disability, had duly done and executed such acts and instruments: (Tr. A., 1850, s. 28.)

Copyholds can be vested by order without the consent of the lord, and this does not prejudice his right to fines: (*Paterson v. Paterson*, L. Rep. 2 Eq. 31; *Re Flitcroft*, 1 Jur. N. S. 418.)

Where such an order is made to a person without the lord's consent, he is admitted as an ordinary surrenderee would have been, and for one fine: (*Bristow v. Booth*, L. Rep. 5 C. P. 92.)

Where the order is made with the lord's consent, surrender and admission are unnecessary. For the purpose of consenting, it is not necessary for the lord, to be served or to appear in court; a verified certificate of his consent is sufficient: (*Ayles v. Cox*, 17 Beav. 584.)

For form of order see *Re Crowe's Mortgage*, L. Rep. 13 Eq. 26.)

Persons were appointed to convey, in *Re Collingwood's Trusts*, 6 W. R. 536; *Re Cuming*, L. Rep. 5 Ch. App. 72; and see *Re Hey*, 9 Hare, 221.)

(c) To make Vesting Orders of Stock and Choses in Action.

(1) Infant Trustee.

When any infant shall be solely entitled to any stock upon any trust, it shall be lawful for the court . . . to make an order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof; and when any infant shall be entitled jointly with any other person or persons to any stock upon any trust, it shall be lawful for the said court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, either in the person or persons jointly entitled with the infant, or in him or them together with any other person or persons the said court may appoint: (Tr. Ex. A., 1852, s. 3.)

Where an infant is beneficially entitled, the order should not be made under this Act, but under 1 Will. 4, c. 65, s. 32: (*Re Westwood*, 6 N. R. 316; but see two next cases.)

Where a sole trustee of money for an infant and another invested it in stock in the joint names of himself and the infant, and after the deaths of the trustee and the other person, a suit was instituted, an order was made that the right to call for a transfer should vest in the executors of such other person for the purpose of transferring the fund into court: (*Sanders v. Homer*, 25 Beav. 467.)

Where a testator bequeathed a legacy to each child, and directed his executors to stand possessed of his residuary estate in trust for all his children, shares of infants to be invested in consols till payment at twenty-one or marriage, and the will contained trusts for maintenance, &c., and the executors invested in consols and died, the court declared the infants to be trustees, and directed the administratrix of the last-surviving executrix to transfer the consols into court: (*Gardner v. Cowles*, L. Rep. 3 Ch. Div. 304.)

Where money was by mistake invested in the names of infants beneficially interested in consols, the court, on bill filed, declared the infants trustees for the plaintiffs, and directed a vesting order: (*Rives v. Rives*, W. N. 1866, p. 144; see also *Devoy v. Devoy*, 3 Sm. & Giff. 403; *Stone v. Stone*, 3 Jur. N. S. 708.)

(2) Trustee out of Jurisdiction, not to be found, or not known to be Alive or Dead.

When any person or persons shall be jointly entitled with any person out of the jurisdiction of the court . . . or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or chose in action upon any trust, it shall be lawful for the said court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any person or persons the . . . said court may appoint: (Tr. A., 1850, s. 22.)

When any sole trustee of any stock or chose in action shall be out of the jurisdiction of the said court, or cannot be found, or it shall be uncertain whether he be living or dead, it shall be lawful for the said . . . court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in any person or persons the said . . . court may appoint: (Tr. A., 1850, s. 22.)

The husband of an executrix out of the jurisdiction is a trustee within the section: (*Ex parte Bradshaw*, 2 De G. M. & G. 900.)

Where an infant trustee is also out of the jurisdiction, the case is within the sections applicable to infancy: (*Re Cramer*, 5 De G. & Sm. 312.)

A trustee of stock, absent from England in command of a merchant vessel on a voyage to India, is not out of the jurisdiction: (*Hutchinson v. Stephens*, 5 Sim. 498.)

Where a debtor in India pledged shares in a joint-stock banking company in England with a creditor in England, with a written authority by letter to sell, which was communicated to and recognised by the banking company and the creditor, accordingly sold the shares, upon the petition of the purchaser it was held that the shares were "stock," held by a constructive trustee, and the court ordered a specified person

to transfer the shares to the petitioner: (*Re Angelo*, 5 De G. & S. 278.)

"Sole trustee" means a person originally a sole trustee, or who is proved to have become such by surviving, see *Randall's Will*, 1 Drew. 401.

Where bank stock was standing in the name of four trustees, one of whom was abroad and difficult to remove, the court vested the right to receive the past and future dividends in the three other trustees during their joint lives: (*Re Peyton*, 25 Beav. 317; 2 De G. & J. 290; but as to future dividends, see *Re Hartnall*, 5 De G. & Sm. 111.)

It should appear on the face of the order that the trustee is out of the jurisdiction: (*Re Mainwaring*, 26 Beav. 172.)

And as to the form of order, see *Coles v. Benbow*, W. N. 1873, p. 60.

Orders have been made vesting the right to transfer stock in a *cestui que trust* absolutely entitled: (*Ex parte Bradshaw*, 2 De G. M. & G. 900; *Re Ryan*, 9 W. R. 137; and see *Re White*, L. Rep. 5 Ch. App. 698.)

The court, when asked to transfer stock to new trustees appointed under a power, must be satisfied of the fitness of the trustees, and all interested persons must be served: (*Re Maynard*, 16 Jur. 1084; *Lewin*, 877.)

(3) Trustee or Executor Refusing to Transfer after Request.

Where any sole trustee of any stock or *chose in action* shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such *chose in action*, or any interest in respect thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person absolutely entitled thereto, it shall be lawful for the court . . . to make an order vesting the sole right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such *chose in action*, or any interest in respect thereof, in such person or persons as the said court may appoint: (Tr. A., 1850, s. 23.)

As to "sole trustee" see *sup.*, 1.

One of several trustees is not a person absolutely entitled within the meaning of sects. 23 and 24 of the Act, nor is a *cestui que trust* who has only a life interest in the dividends, where the application is to transfer the stock: (*Mackenzie v. Mackenzie*, 5 De G. & Sm. 338; 16 Jur. 723.)

Where stock was standing in the name of two trustees, both of whom refused to transfer, it was held that sects. 23 and 24 did not apply: (*Re Spawforth's Settlement*, 12 W. R. 978.)

Where the person entitled for life to dividends requested in writing two executors of a sole deceased trustee, in whose name the trust stock was standing, to receive the dividends, and they made default for twenty-eight days, the court declared the right to receive the dividends, which accrued prior to such request, to be vested in the person entitled for life, but held that it could not make any order as to any dividends accrued or to accrue subsequent to the date of the request: (*Re Hartnall*, 21 L. J. 384, Ch.)

Persons duly appointed new trustees are persons absolutely entitled to the stock within the meaning of the Act: (*Ex parte Russell*, 1 Sim. N. S. 404; *Re Baxter's Will*, 2 Sm. & G. App., v.; *Re Ellis*, cited *inf.*)

Where any one of the trustees of any stock or *chose in action* neglects or refuses to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such *chose in action* according to the

directions of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him or her by such person, the court [may] make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such *choses in action*, in the other trustee or trustees of the said stock or *choses in action* or in any person or persons whom the . . . court may appoint jointly with such other trustee or trustees: (Tr. A., 1850, s. 24.)

Where two executors of a surviving trustee refused to transfer, and the third executor was a lunatic, it was held that a vesting order could not be made under this section, and that a petition in lunacy must be presented. On a petition presented in lunacy and Chancery, an order was subsequently made vesting the right to transfer the shares in the persons beneficially entitled: (*Re White*, L. Rep. 5 Ch. App. 698.)

When any stock [is] standing in the sole name of a deceased person, and his or her personal representative [is] out of the jurisdiction of the court . . . or cannot be found, or it [is] uncertain whether such personal representative be living or dead, or such personal representative neglect or refuses to transfer such stock, or receive the dividends or income thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose . . . made to him by the person entitled as aforesaid, the court [may] make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the . . . court may appoint: (Tr. A., 1850, s. 25.)

Where the executor of a surviving trustee had not proved, and neglected to transfer on the requisition of new trustees appointed by the court, an order was made vesting the right to transfer in them: (*Re Ellis's Settlement*, 24 Beav. 426; and see *Re Dixon*, 21 W. R. 220; *Cockell v. Pugh*, 6 Beav. 293; *Re Lunn's Charity*, 15 Sim. 464.)

Where the survivor of two trustees of stock under a will died, leaving no legal personal representative, on the petition of the *cestuis que trustent*, and two new trustees, who had been appointed under a power in the will, asking that the right to transfer the stock—which was then standing in the names of the deceased trustees—might vest in the new trustees, the court made the order without: (*Re Crowe's Trust*, L. Rep. 14 Ch. Div. 304, 610; 43 L. T. Rep. N. S. 112.)

(4) Person Refusing to Transfer after Order.

Where any person neglects or refuses to transfer any stock, or to receive the dividends or income thereof, or to sue for or recover any *choses in action*, or any interest in respect thereof, for the space of twenty-eight days next after an order of the court . . . for that purpose [has] been served upon him, the . . . court [may] make an order vesting all the right of such person to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such *choses in action*, or any interest in respect thereof, in such person or persons as the . . . court may appoint: (Tr. Ext. A., 1852, s. 4.)

A petition for a preliminary order under this section need not be served upon the trustee: (*Re Mount*, 24 L. T. Rep. N. S. 290.)

The order may be made upon motion (*Re Holbrook's Will*, 8 W. R. 3); and must not deal with a larger subject-matter than the previous order which it proposes to enforce: (*Skynner v. Pelichet*, 9 W. R. 191.)

The order of the court must have been served personally, unless the case is within Tr. A., 1850, s. 23: (*Coles v. Benbow*, W. N. 1873, p. 60.)

When any stock shall be standing in the sole name of a deceased person, and his personal representative shall refuse or neglect to transfer such stock, or receive the dividends or income thereof for the space of twenty-eight days next after an order of the Court for that purpose shall have been served upon him, it shall be lawful for the Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said court may appoint: (Tr. A., 1850, s. 5.)

(5) On Appointing New Trustee.

Upon making any order for appointing a new trustee or new trustees, [the court may], either by the same or by any subsequent order, vest the right to call for a transfer of any stock subject to the trust, or to receive the dividends or income thereof, or to sue for or recover any *chose in action*, subject to the trust, or any interest in respect thereof, in the person or persons who upon the appointment shall be the trustee or trustees: (Tr. A., 1850, s. 35.)

Where the old trustee was beneficially interested in part of the stock, and the bank would not apportion the past dividend between the trust and the beneficial estate, the court (in lunacy) vested the right to receive the whole dividend in the new trustees, on their undertaking to invest the old trustee's portion for his benefit: (*Re Stewart*, 2 De G. F. & J. 1.)

An order was made under this section, vesting in a trustee appointed by the court the right to transfer stock standing in the name of a testator who had no legal personal representative: (*Re Herbert*, 8 W. R. 272; and see *Re Crowe's Trusts*, *sup.* (8).)

A vesting order operates from its date: (*Woodfall v. Arbuthnot*, L. Rep. 3 P. & M. 108.)

An order cannot be made by the Chancery Division where the former trustee was a lunatic: (*Re Smith's Trusts*, Ir. Rep. 4 Eq. 180.)

(6) In Persons not New Trustees.

Under sect. 35 the court has vested stock in the trustees of another settlement: (*Re Hilliard*, 42 L. T. Rep. N. S. 79; and see *inf.* (f) (16).)

(d) To make Vesting Orders of Charity Property.

It shall be lawful for the court to exercise the powers herein conferred for the purpose of vesting any lands, stock, or *chose in action* in the trustee or trustees of any charity or society over which charity or society the said court would have jurisdiction upon suit duly instituted, whether such trustee or trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the court or by order made upon a petition to the said court under any statute authorising the said court to make an order to that effect in a summary way upon petition: (Tr. A., 1850, s. 45.)

(e) To appoint Person to Convey, &c.

In every case where the court shall, under the Act. be enabled to make an order having the effect of a conveyance or assignment of any lands, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the Court, should it be deemed more convenient to make an order appointing a person to convey or assign such lands, or release or dispose of such contingent right: (Tr. A., 1850, s. 20.)

If a trustee of unsound mind is an infant, the Chancery Division has jurisdiction: (*Re Arrowsmith*, 4 Jur. N. S. 1123.)

The conveyance or assignment, or release or disposition of the person so appointed, shall, when in conformity with the terms of the order by

which he is appointed, have the same effect, in conveying or assigning the lands, or releasing or disposing of the contingent right, as an order of the . . . court would in the particular case have had under the provisions of [the] Act: (Tr. A., 1850, s. 20.)

In every case where . . . the court . . . shall, under the provisions of [the Trustee Act, 1850] be enabled to make an order vesting in any person or persons the right to transfer any stock transferable in the books of the Governor and Company of the Bank of England, or of any other company or society established or to be established, it shall also be lawful for . . . the court, if it be deemed more convenient, to make an order directing the secretary, deputy secretary, or accountant-general for the time being of the Governor and Company of the Bank of England, or any officer of such other company or society, at once to transfer or join in transferring the stock to the person or persons to be named in the order; and the Act [is] a full and complete indemnity and discharge to the Governor and Company of the Bank of England, and all other companies or societies and their officers and servants, for all acts done or permitted to be done pursuant thereto: (Tr. A., 1850, s. 20.)

Where there were persons under disability, and the estate was sold under a decree in lots, the court appointed the plaintiff's solicitor to convey the shares: (*Hancox v. Spittle*, 3 Sm. & Giff. 478; and see *Wilks v. Groom*, 6 De G. M. & G. 205; *Shepherd v. Churchill*, 25 Beav. 21; *Re Cuming*, L. Rep. 5 Ch. App. 72.)

As to ordering persons to join in the transfer, see *Wade v. Hopkinson*; *Hodgson v. Hodgson*, Seton, 521; *Coles v. Benbow*, W. N. 1873, p. 60.

Where stock was standing in the names of two deceased trustees, the survivor having died intestate without a legal personal representative, the court appointed the person absolutely entitled trustee of the fund, and ordered it to be transferred into his name: (*Re Dickson*, 21 W. R. 220.)

As to the conveyance, see *Ex parte Foley*, 8 Sim. 395.

(f) To Appoint New Trustees.

(1) General Rules.

Whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the court . . . it shall be lawful for the said court . . . to make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees (Tr. A., 1850, s. 32), whether there be any existing trustee or not at the time of making such order: (Tr. Ext. A., 1852, s. 9.)

The court may act where the trust is a mere office without an estate: (*Re Boyce*, 10 Jur. N. S. 138.)

Where there are distinct estates or separate shares under one trust instrument, separate trustees of each may be appointed: (*Re Dennis*, 12 W. R. 575; *Re Cotterill*, W. N. 1869, p. 183.)

The person or persons who, upon the making of such order, . . . shall be trustee or trustees, shall have all the same rights and powers as he or they would have had if appointed by decree in [an action] duly instituted: (Tr. A., 1850, s. 33.)

As to making vesting orders of lands, stock, and choses in action on appointing a new trustee, see *sup.* (b) 10 and (c) (5):

Any such appointment by the court of new trustees, and any such conveyance, assignment, or transfer . . . operates no further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have done: (Tr. A., 1850, s. 36.)

(2) Lunacy of Donee of Power.

Where the donee of the power is lunatic, notwithstanding the power of the committee under an order in lunacy, the Chancery Division has also jurisdiction to appoint: (*Re Heapley*, 18 W. R. 1070; *Re Sparrow*, L. Rep. 5 Ch. App. 662; *Re Vickers*, L. Rep. 3 Ch. Div. 112.)

The late Master of the Rolls (Romilly) required a committee to be appointed and served with the petition before making the order: (*Re Parker*, 32 Beav. 580.)

(3) Absence of Donee of Power.

Where the donee of the power was in India, a new trustee was appointed: (*Re Humphry*, 1 Jur. N. S. 921.)

(4) Doubtful Power.

Where trustee wished to retire, and it was doubtful whether the power applied, the court appointed new trustees: (*Re Woodgate's Settlement*, 5 W. R. 448; *Re Armstrong's Settlement*, 5 W. R. 448; *Cooper v. Macdonald*, 14 W. R. 755.)

Where there is difficulty in obtaining administration to, or no representative of, a last-surviving trustee, the court will appoint new trustees: (*Davis v. Chanter*, 4 Jur. N. S. 272; *Re Mathews*, 26 Beav. 463; *Re Davis*, L. Rep. 12 Eq. 214.)

(5) Saving Expense.

Where it will save expense, the court will appoint trustees, though there is no difficulty in exercising the power: (*Re Davies*, 3 M. & G. 278; *Re Manning, Kay*, App. 28.)

(6) Imperfect Power.

Where the power of appointing new trustees does not apply in the events which have happened, the court will exercise its powers: (*Williams on Petitions*, 253, citing *Re Harrison*, 22 L. J. 60, Ch.; *Cooper v. Macdonald*, 14 W. R. 755; *Travis v. Illingworth*, 2 Dr. & S. 345; *Re Dawson*, 3 N. R. 397.)

(7) Infancy.

The court will appoint a new trustee in the place of an infant trustee under a will (*Re Gartside*, 1 W. R. 196; *Re Porter*, 25 L. J. 482, Ch.); without prejudice to any application by the infant to be restored to the trusteeship when he comes of age: (*Re Shelmerdine*, 33 L. J. 474, Ch.)

(8) Residence Abroad.

The court may appoint a new trustee in place of a trustee permanently residing abroad without his consent: (*Re Bignold*, L. Rep. 7 Ch. App. 223.)

Where a trustee was resident abroad, and there was no evidence to show that he did not intend to return, the court refused to appoint a new trustee: (*Re Mais*, 19 Jur. 608; 21 L. J. 875, Ch.); but when it was known where, in Australia, the trustee was, the order was made: (*Re Harrison*, 22 L. J. 69, Ch.)

A bookseller domiciled in New York for several years was held incapable of acting: (*Mennard v. Welford*, 1 Sm. & Giff. 426.)

A temporary departure from the United Kingdom is insufficient: (*Re Moravian Society*, 4 Jur. N. S. 703; 26 Beav. 101; *Re Watts' Settlement*, 9 Hare, 106.)

The fact that the trustee is also of unsound mind does not oust the jurisdiction of the Chancery Division: (*Re Gardner*, L. Rep. 10 Ch. Div. 29; 40 L. T. Rep. N. S. 52.)

(9) Bankruptcy, Composition, &c.

Where a trustee became bankrupt, never surrendered under the bankruptcy, absconded, and had not been heard of for several years, the court appointed a new trustee: (*Re Renshaw*, L. Rep. 4 Ch. App. 783.)

Where a bankrupt is a trustee within the Trustee Act, 1850, sect. 32 of that Act shall have effect so as to authorise the court to appoint a new trustee in substitution for the bankrupt (whether voluntarily resigning or not) if it appears to the court expedient to do so, and all provisions of that Act, and of any other Act relative thereto, shall have effect accordingly: (B. A., 1869, s. 117.)

The court is the Chancery Division: (*Combès v. Brooks*, L. Rep. 12 Eq. 61.)

The section applies to a person whose estate is in liquidation: (*Re Adams*, L. Rep. 12 Ch. Div. 634; 41 L. T. Rep. N. S. 667.)

It is the duty of the court to remove a bankrupt trustee whenever the nature of the trust is such that he has to receive or deal with trust money so that he can misappropriate it: (*Re Barker*, L. Rep. 1 Ch. Div. 43.)

And where the trustee has either solely or jointly with others control over the trust property, the court will generally order his removal on the petition of the *cestuis que trustent*: (*Re Adams, sup.*)

The court has appointed new trustees where the trustee appointed by creditors to wind-up the estate and effects of a bankrupt under 24 & 25 Vict. c. 132, had died (*Re Raphael's Trust Estate*, L. Rep. 9 Eq. 233); where the trustees of a trust deed, registered under 24 & 25 Vict. c. 134, had all died, and there was no power in the deed of appointing new trustees (*Re Price's Trust Deed*, L. Rep. 6 Eq. 460); where an assignee in bankruptcy resigned his office and went abroad the court made a vesting order: (*Re Joyce*, L. Rep. 2 Eq. 576.)

See also *Re Bache*, W. N. 1868, p. 223.

As to the jurisdiction in lunacy, see *Re Donisthorpe*, L. Rep. 10 Ch. App. 55.

(10) Lunacy of Trustee.

Where the trustee is a lunatic, though not so found by inquisition, the jurisdiction in lunacy applies (*Re Burton's Trusts*, Ir. Rep. 6 Eq. 270); the petition may be presented in lunacy also: (15 & 16 Vict. c. 55, s. 10; *Re Owen*, L. Rep. 4 Ch. 782.)

(11) Doubt as to Person who holds Property.

Where the trustees of a will are dead, and it is a question in whom the legal estate is, the court will appoint new trustees and continue a receiver already appointed: (*Reeves v. Neville*, 10 W. R. 335.)

(12) Where no Trustees.

Where a testator appointed no trustees, the court held, in an administration suit, that it had inherent jurisdiction to appoint trustees (*Dodkin v. Brunt*, L. Rep. 6 Eq. 580); and so where though no trustees were originally appointed, certain persons were declared constructive trustees on a petition under the Act: (*Re Davis' Trusts*, L. Rep. 12 Eq. 214.)

Where all the trustees of a will died in the testator's lifetime, the court appointed new trustees: (*Re Smirthwaite*, L. Rep. 11 Eq. 251.)

Where stock was standing in the name of a corporation which had ceased to exist, the court appointed trustees and directed them to transfer: (*King of Hanover v. Bank of England*, L. Rep. 8 Eq. 350.)

(13) Disclaimer.

Where both the trustees of a will disclaimed, the court appointed two other persons in substitution for such trustees (*Re Tyler's Trust*, 18 L. T. Rep. N. S. 105). A trustee should disclaim by deed; a disclaimer by counsel appearing upon a petition is not sufficient (*Re Ellison*, 2 Jur. N. S. 62); except where a trustee has never acted, in which case a disclaimer by his counsel is sufficient: (*Foster v. Dawber*, 1 Drew. & Sm. 171.)

(14) Invalid Trust Deed.

On a petition for new trustees, the court will not enter into the question of the validity of the trust instrument: (*Re Matthews*, 26 Beav. 463.)

(15) Felony of Trustee.

When any person is or shall be jointly or solely seised or possessed of any lands or entitled to any stock upon any trust, and such person has been or shall be convicted of felony, it shall be lawful for the court . . . upon proof of such conviction, to appoint any person to be a trustee in the place of such convict, and to make an order for vesting such lands, or the right to transfer such stock, and to receive the dividends or income thereof, in such person to be so appointed trustee; and such order shall have the same effect as to lands as if the convict trustee had been free from any disability, and had duly executed a conveyance or assignment of his estate and interest in the same: (*Tr. Ext. A.*, 1852, s. 8.)

(16) Re-appointing Trustees.

Where new trustees have been appointed under a power, on a petition for a vesting order, the court will re-appoint the new trustees, and vest the property in them: (*Re Mundel*, 6 Jur. N. S. 880; *Re Clay*, W. N. 1873, p. 129; *Re Dalgleish*, L. Rep. 4 Ch. Div. 143; 35 L. T. Rep. N. S. 829; *Re Crowe*, L. Rep. 14 Ch. Div. 304, 610; 43 L. T. Rep. N. S. 112; 49 L. J. 442, Ch.; 28 W. R. 806.)

In such a case evidence of fitness is required: (*Re Maynard*, 16 Jur. 1084; *Re Dalgleish*, *sup.*)

(17) Vesting Order of Leasehold.

Where the property is leasehold, a vesting order may be made: (*Re Matthews*, 2 W. R. 85; *Re Dalgleish*, L. Rep. 4 Ch. Div. 143.)

(18) Removal of Trustee or Donee of Power.

Where the trust deed, gives power to appoint a new trustee, and the party is willing to exercise that power, the Act gives no jurisdiction to the court to appoint a new trustee (*Re Hodson's Settlement*, 9 Ha. 118; 15 Jur. 552). Nor can a trustee be removed by virtue of the Act if he is willing to perform the trusts: (*Re Blanchard*, 3 D. F. & J. 131; 4 L. T. Rep. N. S. 426.)

The fact that a trustee is a solicitor does not alter the cases except as to acts done by him as a solicitor, and not as a trustee: (*Id.*)

The court refused to appoint a new trustee in the place of one who had executed the trust deed and declined to act: (*Re Gartz*, 10 L. T. Rep. N. S. 331.)

Where trustees of a will declined to act, new ones were appointed: (*Re Sheppard*, 4 D. F. & J. 423; *Re Martinez*, 22 L. T. Rep. N. S. 403.)

An action is necessary to remove a trustee who is willing to act (*Re Blanchard*, *sup.*; *Re Bignold*, L. Rep. 7 Ch. App. 223), except in the case of bankruptcy.

(19) Who Appointed.

A person absolutely entitled to stock was appointed trustee for his own benefit, and the stock ordered to be transferred to him: (*Re Dickson*, W. N. 1872, p. 223.)

In selecting a new trustee, the court regards the wishes of the author of the trust as collected from the instrument creating the trust. A person will not be appointed with a view to the interest of some of the *cestui que trustent* in opposition to the interests of others. The court will have regard to the question whether the appointment will promote or impede the execution of the trust; but the mere fact of the continuing trustee

refusing to act with the proposed trustee is not sufficient to prevent the appointment: (*Re Tempest*, L. Rep. 1 Ch. App. 485.)

The court will not in general appoint a *cestui que trust* to be a trustee: (*Re Conybeare*, 1 W. R. 458; *Ex parte Clutton*, 17 Jur. 988.) But where the trusts were complicated, and a stranger could not be found, a *cestui que trust* was appointed: (*Re Clissold*, 10 L. T. Rep. N. S. 642.)

A near relative of the *cestui que trust* will not generally be appointed (*Wilding v. Bolder*, 21 Beav. 224); but the husband of a *cestui que trust* was appointed on undertaking to apply for the appointment of an additional trustee: (*Re Hattatt*, 18 W. R. 416.)

An unmarried lady of independent property, and not exercising any calling, was appointed: (*Re Campbell's Trusts*, 31 Beav. 176; but see *Brook v. Brook*, 1 Beav. 531.)

An alien has been appointed: (*Re Hill*, W. N. 1874, p. 228.)

Persons resident out of the jurisdiction will not in general be appointed (*Re Guibert*, 16 Jur. 852); but have been appointed under special circumstances: (*Re Curtis*, Ir. Rep. 5 Eq. 429.)

Where all the parties interested under a will resided in Australia, and the will permitted the investment of the trust funds in Australian securities, the court appointed new trustees residing in Australia, though some of the parties interested were infants, and the will contained a power of appointing a new trustee in place of any who went beyond the seas for permanent residence: (*Re Liddiard's Trusts*, 42 L. T. Rep. N. S. 621; L. Rep. 14 Ch. Div. 310; and see *Re Smith*, 20 W. R. 695.)

One of the firm of solicitors for the petitioners has been appointed (*Re Brentnall*, W. N. 1872, p. 77); but in a recent case (Nov. 13, 1880) Cotton, L. J., refused to appoint the three members constituting the firm of solicitors acting for the trust as trustees.

(20) Number Appointed.

But the court will not appoint a sole trustee where there were more originally (*Ellison's Trusts*, 2 Jur. N. S. 62; *Porter's Trusts*, *id.* 349; *Re Dickinson*, 1 Jur. N. S. 724; and see *Viscountess D'Adhemar v. Bertrand*, 35 Beav. 20; except under very special circumstances: (*Re Reynault*, 16 Jur. 233.)

Two trustees have been appointed in the place of one (*Ex parte Tunstall*, 4 De G. & S. 421; 3 My. & Cr. 292; *Birch v. Cropper*, 2 De G. & S. 255; *Plenty v. West*, 16 Beav. 356; and new trustees have been added to the original trustees: (*Re Boycott*, 5 W. R. 15; *Re Brackenbury*, L. Rep. 10 Eq. 45.)

The court has under special circumstances appointed two in place of three (*Re Marriott*, 18 L. T. Rep. N. S. 749; *Bulkeley v. Earl of Eglinton*, 1 Jur. N. S. 994); and three in place of four: (*Emmet v. Clarke*, 7 Jur. N. S. 404.)

Where a trustee has wished to retire or has gone abroad, and a successor could not be found, the continuing trustees have been appointed sole trustees: (*Re Stokes*, L. Rep. 13 Eq. 333; 26 L. T. Rep. N. S. 181; *Re Tatham's Trusts*, W. N. 1877, p. 259; *Re Harford*, L. Rep. 13 Ch. Div. 135; 41 L. T. Rep. N. S. 382; *Re Shipperdson*, W. N. 1880, p. 155; *Re Gibbin*, W. N. 1880, p. 99; *Re Northrop*, W. N. 1880, p. 184.)

Cotton, L.J., declined to follow *Re Stokes' Trusts*, and *Re Harford's Trusts*, and to reappoint the two existing trustees in the place of three, when the effect would be to oust one of the trustees; and required the original number to be filled up: (*Re Colyer*, W. N., 1880, p. 131; 43 L. T. Rep. N. S. 454); and the same judge and James, L.J., have twice followed this decision.

Ten trustees of a charity have been appointed, the estate being vested in the whole body, and a direction being given that when they were reduced to three the trustees should apply at chambers for a new appointment: (*Re Bergholt*, 2 Eq. Rep. 90.)

3. APPLICATIONS.

(a) *Where Made.*

Where the trustee or mortgagee is a lunatic, so found or not, the petition, if it affects his estate must be presented to the jurisdiction in lunacy (Tr. A., 1850, ss. 3, 6); unless such trustee is also an infant (*Re Arrowsmith*, *sup.*) or out of the jurisdiction: (*Re Gardner*, L. Rep. 10 Ch. Div. 29; 40 L. T. Rep. N. S. 52.)

Where the donee of the power of appointment is lunatic, the petition may be presented in the Chancery Division: (*Re Sparrow*, L. Rep. 5 Ch. App. 662.)

Where the unsoundness of mind is contested, the case is not within the Act at all: (*Re Walker*, Cr. & Phil. 147; *Re Campbell*, 18 L. T. Rep. N. S. 202.)

A petition must be presented in the Chancery Division and in lunacy:—

- (1) When one of several trustees is a lunatic, and a new trustee is to be appointed and a vesting order made of real estate: (*Re Pearson*, L. Rep. 5 Ch. Div. 982; 37 L. T. Rep. N. S. 299; 46 L. J. 670, Ch.; 25 W. R. 853.)
- (2) When a vesting order in new trustees is required of stock standing in the name of a lunatic trustee: (*Re Currie*, L. Rep. 10 Ch. Div. 93; 40 L. T. Rep. N. S. 110; 27 W. R. 369.)

A petition for appointment in place of a lunatic trustee of property partly Irish, and for a vesting order, must be presented in lunacy and in the Chancery Division: (*Re Lamotte*, L. Rep. 4 Ch. Div. 325; *Re Hodgson*, L. Rep. 11 Ch. Div. 888; 41 L. T. Rep. N. S. 327.)

Where an order appointing a trustee is made by the lunacy jurisdiction in place of a lunatic, other trustees may be appointed by the same order, although the petition is not intitled in the Chancery Division: (*Re Owen*, L. Rep. 4 Ch. App. 782; but see *Re Boyce*, 12 W. R. 359.)

A new trustee may be appointed in place of a lunatic not so found, either in lunacy or in the Chancery Division: (*Re Owen*, *sup.*; *Re Donisthorpe*, L. Rep. 10 Ch. App. 55; *Re Vickers*, L. Rep. 3 Ch. Div. 112.)

(b) *By whom Made.*

An order under any of the [previous] provisions for the appointment of a new trustee or trustees, or concerning any lands, stock, or *chose in action*, subject to a trust, may be made upon the application of any person beneficially interested in such lands, stock, or *chose in action*, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof; and . . . an order under any of the [previous] provisions . . . concerning any lands, stock, or *chose in action* subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the moneys secured by such mortgage: (Tr. A., 1850, s. 37.)

Where there are infants *cestuis que trustent* they should join by their next friend: (*Re Fellows*, 2 Jur. N. S. 62.)

A lunatic *cestui que trust* petitions by his next friend; an order not being made on the petition of the committee alone: (*Re Bourke*, 2 De G. J. & S. 426.)

In the case of a lunatic mortgagee, the committee may petition: (*Re Wheeler*, 1 De G. M. & G. 434.)

A person who has a contingent interest in real estate may petition for new trustees: (*Re Sheppard*, 4 D. F. & J. 423.)

A trustee with a power of sale represents the *cestuis que trustent*: (*Re Blanchard*, 3 D. F. & J. 131; PARTIES.)

Plaintiff creditors in an administration suit interested in proceeds of sale of real estate may apply for a vesting order: (*Re Wragg*, 1 De G. J. & S. 356.)

Where a decree for sale has been made, a petition may be presented by a purchaser whose money was in court: (*Ayles v. Cox*, 17 Beav. 584; *Gough v. Bage*, 25 L. T. Rep. N. S. 738.) Three purchasers of different lots may join in one petition: (*Rowley v. Adams*, 14 Beav. 130.)

A newly-appointed trustee may petition: (*Ex parte Russell*, 1 Sim. N. S. 404.)

(c) *How made.*

Any person or persons entitled . . . to apply for an order from the . . . court . . . may, should he so think fit, present a petition in the first instance to the court for such order as he may deem himself entitled to: (Tr. A., 1850, s. 40.)

[Application may be made by summons after] a decree or order . . . for sale or conveyance of any lands, manors, messuages, tenements or hereditaments, corporeal or incorporeal, of any tenure or description, whatever may be the estate or interest therein: (C. O., 35, r. 1.)

But a vesting order cannot be made in chambers, even by the judge himself, of the right to transfer stock: (*Frodsham v. Frodsham*, L. Rep. 15 Ch. Div. 317; 43 L. T. Rep. N. S. 558.)

A *cestui que trust* may, instead of petitioning, bring an action for the appointment of a trustee (*Legg v. Mackrell*, 4 L. T. Rep. N. S. 568); but the plaintiff may be ordered to pay the difference in costs (*Thomas v. Walker*, 18 Beav. 521.)

An action is necessary to remove a trustee against his will (*sup.* 2 (f) (18)); or where there is a disputed question of title: (*Re Draper*, 9 W. R. 805.)

An order may be made in a cause without a petition: (*Wood v. Beetlestone*, 1 Kay & J. 213; *Lechmere v. Clamp*, 30 Beav. 218; *Viscountess D'Adhemar v. Bertrand*, 35 Beav. 19; *Harrison v. Smith*, 17 W. R. 646; and see *Re Holbrook*, 8 W. R. 3.)

An order removing a trustee and vesting the trust property may be made on motion for judgment on default in pleading: (*Fisher v. Hughes*, 21 S. J. 478.)

A petition in a cause should be entitled in the matter of the Act, in the cause, if any (*Gough v. Bage*, 25 L. T. Rep. N. S. 738); and in the particular matter: (Ayck. 611.)

In case of a charity, the petition must also be intitled in Romilly's Act and any other Acts applicable: (*Re Gloucester Charities*, 10 Hare App. iii.; *Re Conyers Grammar School*, *Id.* v.)

As to obtaining the Attorney-General's fiat, see *Re Rolles Charity*, 22 L. J. 760, Ch.; and see CHARITIES, II., 9; Lewin, 723.)

Where property is vested in a lunatic, a petition in lunacy is necessary: (*Jeffryes v. Drysdale*, 9 W. R. 428.)

(d) *Service.*

[The petitioner] may serve such person or persons with notice of such petition as he may deem entitled to the service thereof: (Tr. A., 1850, s. 40.)

Where the appointment of trustees is petitioned for, as a general rule, all the *cestui que trustent* must be served or join in the application (*Re Richards*, 5 De G. & Sm. 636; *Re Fellows*, 2 Jur. N. S. 62; as to infants, see *Re Fellows* (*id.*), and *Re Young*, 21 L. T. Rep. N. S. 556.)

Trustees having a power of sale represent the *cestuis que trustent*: (*Re Blanchard*, 3 D. F. & J. 131.)

Where the parties are numerous, some of the *cestuis que trustent* may be represented by others: (*Re Smyth*, 2 De G. & Sm. 781; *Re Blanchard*, 3 De G. F. & J. 131; *Re Sharpley*, 1 W. R. 271.)

Where new trustees are appointed in the place of existing trustees, the latter must be served: (*Re Sloper*, 18 Beav. 596; *Futvoye v. Kennard*, 3 L. T. Rep. N. S. 687.)

Trustees refusing to transfer or convey need not be served with notice of an application for an order under sects. 23 or 24 (*Re Baxter*, 2 Sm. & Giff. App. v.); and the same rule applies as to a mortgagee: (*Re Crowe*, L. Rep. 13 Eq. 26; *Re Russell*, 1 Sim. N. S. 409.)

A petition for appointment in place of a bankrupt trustee need not be served when he has absconded: (*Combes v. Brookes*, L. Rep. 12 Eq. 61; *Re Renshaw*, L. Rep. 4 Ch. App. 783.)

And generally when the appointment is in place of a trustee permanently residing out of the jurisdiction, the petition need not be served on him: (*Re Pys*, 42 L. T. Rep. N. S. 247.)

In cases other than those of heirs of mortgagees, and bare trustees (37 & 38 Vict. c. 78, s. 4; 38 & 39 Vict. c. 87, s. 48), a petition for a vesting order, or appointment of person to convey, need not be served on the infant heir of a trustee or mortgagee, or his guardian: (*Re Tweedy*, 9 W. R. 398; *Re Wise*, 5 De G. & Sm. 415; *Re Little*, L. Rep. 7 Eq. 323; but see *Re Cooper*, 9 W. R. 531; *Re Jones*, 22 W. R. 837.)

Service of the petition on the infant heir is necessary where the vendor died before conveying: (*Re Russell*, W. N., 1866, p. 125, where a guardian was appointed.)

As to whether service is required where the heir is of age, compare *Purvis v. Abraham*, W. N., 1866, p. 126, and *Re Oxenham*, W. N., 1875, p. 6.)

Where all the trustees have died before the testator, his heir must be served: (*Gunson v. Simpson*, L. Rep. 5 Eq. 332; *Re Smirthwaite*, L. Rep. 11 Eq. 251.)

A mortgagor in whom the estate is vested, and by whom it is asked that it may be conveyed, should be served: (*Re Phillips*, L. Rep. 4 Ch. App. 629; *Re Jones*, L. Rep. 2 Ch. Div. 70.)

A trustee of unsound mind not so found need not be served with a petition for a trustee or vesting order: (*Re East*, L. Rep. 8 Ch. App. 735; *Re Green*, L. Rep. 10 Ch. App. 272.)

The committee of a lunatic must be served: (*Re Saumerez*, 8 D. M. & G. 390; *Re Wood*, 7 Jur. N. S. 323.)

A vesting order of an estate subject to an annuity may be obtained without service on the annuitant: (*Re Winteringham*, 3 W. R. 578.)

As to service on the freeholder where leaseholds are affected, compare *Re Matthews*, 2 W. R. 85; *Re Farrant*, 20 L. J. 532, Ch.)

A petition by a tenant for life for a vesting order to a new trustee, appointed in the place of a trustee out of the jurisdiction, must be served on the remainderman: (*Re Maynard's Settlement*, 16 Jur. 1084.)

The lord of the manor need not be served where copyholds are affected: (*Patterson v. Patterson*, L. Rep. 2 Eq. 31.)

Service out of the jurisdiction may be ordered: (*Re Wycherley*, 7 L. R. Ir. 12.)

A petition for a preliminary order, under sect. 4 of the Act of 1852, need not be served on the trustee: (*Re Mount*, 24 L. T. Rep. N. S. 290.)

4. EVIDENCE.

[The petitioner] may give evidence by affidavit, or otherwise, in support of such petition before the said court . . . : (Tr. A., 1850, s. 40.)

An application to divest an estate must be supported by strict evidence: (*Re Powell*, 4 K. & J. 338; *Re Wise*, 5 De G. & S. 415.)

The devolution of the beneficial estate may be traced by affidavit without strict evidence by certificates and affidavits of identity: (Lewin, 887, citing *Re Hoskins*, 4 De G. & J. 436.)

The legal title must be strictly proved.

Death or disability of trustees must be strictly proved: (Wms. Pet., 261.)

Affidavits used in an action have been allowed on petition: (*Re Picknance*, 10 Hare App. xxxv.)

An affidavit of fitness of proposed trustees ought not generally to be made by the solicitor: (*Grundy v. Buckridge*, 22 L. J. 1007, Ch.; *Re Hartley*, W. N., 1879, p. 197.)

An affidavit of one person as to fitness is sufficient to satisfy Cotton, L.J., sitting in lunacy, but Hall, V.C., requires two persons to testify,

An order will be made without a reference to chambers: (*Re Battersby*, 16 Jur. 900.)

The court requires the written consent of the proposed trustees: (*Id.*)

The signatures to the consent must be verified by affidavit: (*Id.*)

It is unnecessary to produce a disclaimer under seal: (Seton, 548.)

A renunciation of probate has been required from an executor before vesting the estate in a co-executor: (*Re Badcock*, 2 W. R. 386.)

New trustees were appointed, and a vesting order of real estate made, before a will was proved, on evidence of due execution: (*Re Wickens*, W. N. 1879, p. 151.)

The lord of the manor should not appear to consent to a vesting order of copyhold, but his written consent must be produced, verified by affidavit: (*Ayles v. Cox*, 17 Beav. 584.)

5. HEARING.

Upon the hearing of any such petition it shall be lawful for the said court, should it be deemed necessary, to direct a reference to [chambers for inquiry] into any facts which require such an investigation, or it shall be lawful for the said court to direct such motion or petition to stand over, to enable the petitioner or petitioners to adduce evidence or further evidence before the said court . . . or to enable notice or any further notice of such motion or petition to be served upon any person or persons: (Tr. A., 1850, s. 41; Stat. L. R. A., 1875.)

Generally the proposed trustees should not appear by counsel: (*Re Draper*, 2 W. R. 440; *Re Parker*, 21 L. T. Rep. 218.)

Upon any petition . . . being presented . . . the . . . court . . . [may] postpone making any order upon such petition until the right of the petitioner or petitioners has been declared in [an action] duly instituted for that purpose: (Tr. A., 1850, s. 53.)

For cases where suits have been directed, see *Re Burt*, 9 Hare, 289; *Re Carpenter*, Kay, 418; *Re Collinson*, 3 De G. M. & G. 409; *Re Weeding*, 4 Jur. N. S. 707.)

Upon the hearing, . . . whether any certificate or report shall have been obtained or not, it shall be lawful for . . . the court to dismiss such . . . petition, with or without costs, or . . . make an order thereupon in conformity with the provisions of [the] Act: (Tr. A., 1850, s. 42; Stat. L. R. A., 1875.)

6. ORDER.

Whensoever, in any cause or matter, either by the evidence adduced therein, or by the admissions of the parties, or by a report . . . the facts necessary for an order . . . appear to the court to be sufficiently proved, it shall be lawful for the said court, either upon the hearing of the said cause or of any petition or motion in the said cause or matter, to make such order: (Tr. A., 1850, s. 43.)

Where any order shall have been made under any of the provisions of [the Trustee Act], vesting the right to any stock in any person or persons appointed by . . . the Court . . . such legal right shall vest accordingly, and thereupon the person or persons so appointed are . . . authorised and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names or otherwise, or relating to the receipt of the dividends thereof, to the extent and in conformity with the terms of such order; and the Bank of England, and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order as the said Bank of England, or such companies, associations, or persons, would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made; and after notice in writing of any such order . . . of the Court . . . concerning any stock, shall have been given, it shall not be lawful for the Bank of England, or any company or association whatever, or any person having received such notice, to act upon the requisition of the person in whose place an appointment shall have been made in any matter whatever relating to the transfer of such stock, or the payment of the dividends or produce thereof: (Tr. A., 1850, s. 26.)

When any order, being or purporting to be under [the Trustee Extension Act, 1852], or under the Trustee Act, 1850, shall be made by the Court . . . vesting the right to any stock, or vesting the right to transfer any stock, or vesting the right to call for the transfer of any stock, in any person or persons, in every such case the legal right to transfer such stock shall vest accordingly; and the person or persons so appointed shall be authorised and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names, or otherwise, to the extent and in conformity with the terms of the order; and the Bank of England, and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as the said Bank of England, or such companies, associations or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made: (Tr. Ext. A., 1852, s. 6.)

Where any order shall have been made under the provisions of this Act by the Court . . . vesting the legal right to sue for or recover any *chose in action*, or any interest in respect thereof in any person or persons, such legal right shall vest accordingly, and thereupon it shall be lawful for the person or persons so appointed to carry on, commence, and prosecute in his or their own name or names, any action, suit, or other proceeding at law or in equity for the recovery of such *chose in action*,

in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such *chose in action*: (Tr. A., 1850, s. 27.)

It shall be lawful for the Court . . . to make declarations and give directions concerning the manner in which the right to any stock or *chose in action* vested under the provisions of [the Trustee Act, 1850], shall be exercised; and thereupon the person or persons in whom such right shall be vested shall be compellable to obey such directions and declarations by the same process as that by which other orders under [the] Act are enforced: (Tr. A., 1850, s. 31.)

The court may order the person, in whom the stock is, to transfer it into court under the Trustee Relief Act: (*Re Draper's Settlement*, 9 W. R. 805; *Re Thornton*, *Id.* 475.)

In an action the money has been ordered to be paid into court independently of the Trustee Relief Act: (*Gardner v. Cowles*, L. Rep. 3 Ch. Div. 304; but see *Re Parby*, 29 L. T. 72.)

For form of order on appointment of new trustees, where the trust funds are invested on unauthorised securities, and it is desired not to transfer them into the names of the new trustees, but to sell them and reinvest the funds in accordance with the trusts of the settlement, see *Re Peacock* (L. Rep. 14 Ch. Div. 212; 43 L. T. Rep. N. S. 99; 49 L. J. 228, Ch.)

A vesting order vests the estate from the date of the order: (*Woodfall v. Arbuthnot*, L. Rep. 3 P. & M. 108.)

Where two new trustees were appointed, and a vesting order made by the court, and one of the new trustees died before the transfer, the court added the words "or the survivor of them," and subsequently the words "and let them or him transfer the said bank annuities into their or his names or name": (*Re Glanville*, W. N. 1877, p. 248; W. N. 1878, p. 22.)

Whenever any order shall be made under [the Trustee Act, 1850,] for the purpose of conveying or assigning any lands, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction of the court . . . or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir or last surviving devisee of a mortgagee, be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then in any of such cases the fact that . . . the court . . . has made an order upon such an allegation shall be conclusive evidence of the matter so alleged in any court of law or equity upon any question as to the legal validity of the order. Provided always that nothing herein contained shall prevent the court . . . directing a re-conveyance or re-assignment of any lands conveyed or assigned by any order . . . or a re-disposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said court to direct any of the parties to any suit concerning such lands or contingent right to pay any costs occasioned by the order . . . when the same shall appear to have been improperly obtained: (Tr. A., 1850, s. 44.)

Every order made or to be made, being or purporting to be made under this or the Trustee Act, 1850 . . . or by the court . . . and duly passed and entered, shall be a complete indemnity to the Bank of England, and all companies and associations whatsoever, and all persons, for any act

done pursuant thereto; and it shall not be necessary for the Bank of England, or such company or association, or person, to inquire concerning the propriety of such order, or whether . . . the court . . . had jurisdiction to make the same: (Tr. Ext. A., 1852, s. 7.)

Every order . . . made under the Trustee Act, 1850, or [the Trustee Extension Act, 1852] which shall have the effect of a conveyance or assignment of any lands, or a transfer of any such stock as can only be transferred by stamped deed [is] chargeable with the like amount of stamp duty as it would have been chargeable with if it had been a deed executed by the person or persons seised or possessed of such lands, or entitled to such stock; and every such order shall be duly stamped for denoting the payment of the said duty: (Tr. Ext. A., 1852, s. 13.)

The Commissioners of Inland Revenue have intimated to the Chancery registrars that in their opinion the following descriptions of orders made under the Trustee Acts are chargeable, under 33 & 34 Vict. c. 97, with the following duties:—(1) Order appointing new trustees, one stamp of 10s.; (2) Order appointing new trustees, and vesting in them the right to transfer stock, one stamp of 10s.; (3) Order appointing new trustees, and vesting land in them, two stamps of 10s. each; (4) Order appointing new trustees, and vesting in them the right to sue for *choses in action*, two stamps of 10s. each. When the *choses in action* are in the nature of a mortgage, bond, debenture, covenant, or foreign security, or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment, and the total amount thereby secured is under 2000l., an *ad valorem* stamp at the rate of sixpence per 100l. is to be substituted for the second stamp of 10s. (33 & 34 Vict. c. 97, sched. tit. "Mortgage," par. *3). In no case where new trustees are appointed, and a vesting order made, are more than two 10s. stamps required. No stamp is required in respect of any order merely vesting the right to call for a transfer of and to transfer any stock: (Registrar's Notice, March, 1871; W. N. 1871, Pt. 2, p. 112.)

7. APPOINTMENT IN CHAMBERS.

For form of order, see Seton, 500.

Upon the return of the summons to proceed, evidence should be given of fitness, consent, and signature of written consent: (Dan. 1145.)

A concise statement showing the interest of the parties, and the nature of the property is sometimes directed to be brought in: (*Id.*)

On approval, a summons to appoint the trustees is served, on return of which the order is made.

[See CHAMBERS.]

8. COSTS.

The costs are in the discretion of the court: (see COSTS III., 1.)

The effect of Order LV., and of the Judicature Acts is, with the exceptions mentioned in the order, to repeal former enactments as to costs: (*Garnet v. Bradley*, L. Rep. 3 App. Cas. 944; 39 L. T. Rep. N. S. 261; 48 L. J. 186, Ex.; 26 W. R. 698; *Ex parte Mercers Company*, L. Rep. 10 Ch. Div. 481.)

But the old law may be looked at as a guide, and ought to be followed wherever practicable: (per Bramwell, L.J., *Myers v. Defries*, L. Rep. 5 Ex. Div. 180; 42 L. T. Rep. N. S. 137; 49 L. J. 266, Ex.; 28 W. R. 406.)

A petition may be dismissed with or without costs: (see Tr. A., 1850, s. 42, cited *sup.*)

The Court . . . may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, assignments, and transfers . . . to be made in pursuance of [the] Act, or any of them, to be paid and

raised out of or from the lands or personal estate, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the . . . court shall think proper: (Tr. A., 1850, s. 51.)

Where the application is for the benefit of the estate generally, the costs will be ordered to be paid out of the estate or fund: (Ayck, 613.) If made by a person partially interested for his own benefit, by such person: (*Id.*; *Re Brackenbury*, L. Rep. 10 Eq. 45.)

Where under a power in a settlement of real estate, a trustee was appointed in the place of a sole deceased trustee, and his heir could not be found, on petition an order was made to vest the estate in the new trustee, and that upon consent he might pay the costs, and that such costs with interest at 4l. per cent. might form a charge on the inheritance: (*Ex parte Davies*, 16 Jur. 882.)

In another case the costs of an appointment of trustees were ordered to be raised by a mortgage of the realty comprising the trust estate: (*Re Crabtree*, 14 W. R. 497.)

Where trustees of two funds are appointed the costs will be paid out of the funds in proportion to their value: (*Re Grant*, 2 Johns. & H. 754.)

Where two petitions by different beneficiaries for trustees of the same will were presented on the same day by different beneficiaries, and one prayed a reference to chambers while the other asked for the appointment of two persons whose fitness was proved, the two persons were appointed, the costs of the second petition only being allowed: (*Re Pring*, 55 L. T. 27.)

Upon a petition for appointment of new trustees the court has no jurisdiction to award costs adversely against respondents: (*Re Primrose*, 23 Beav. 590; *Re Sparks*, L. Rep. 6 Ch. Div. 361.)

But a respondent who had introduced unnecessary charges into his affidavit, was ordered to pay the costs thereby occasioned: (*Re Willis*, 12 W. R. 97.)

Where a trustee improperly opposed a petition for appointment of trustees, he was ordered to pay his own costs of the opposition, and the costs occasioned to other parties by his opposition were deducted from costs: (*Re Wiseman*, 18 W. R. 574.)

As between vendor and purchaser, the costs must be paid by the former: (*Bradley v. Munton*, 16 Beav. 294; *Ayles v. Cox*, 17 Beav. 584.)

As to costs occasioned by lunacy or unsoundness of mind, see *Williams on Petitions*, 263-4.

-9. MISCELLANEOUS PROVISIONS.

(a) Sale for Payment of debts.

When a decree shall have been made by any court of equity, directing the sale of any lands for the payment of the debts of a deceased person, every person seised or possessed of such lands, or entitled to a contingent right therein, as heir, or under the will of such deceased debtor [is] deemed to be so seised or possessed or entitled, as the case may be, upon a trust within the meaning of [the Trustee Act, 1850]; and the court . . . is empowered to make an order wholly discharging the contingent right, under the will of such deceased debtor, of any unborn person: (Tr. A., 1850, s. 29, and see *sup.* 2 (b) (8).)

Where decree for sale for payment of debts was made of copyholds devised to an infant for life, with remainder to his first and other sons in tail, and it was ordered, under 1 Will. 4, c. 47, that the guardian of the infant should surrender them to the purchaser, it was held, that the purchaser was entitled to require an order discharging the contingent

rights of the unborn issue of the infant : (*Wood v Beetlestone*, 1 Kay & J. 213.)

(b) *Specific Performance, Partition, or Exchange.*

Where any decree shall be made by any court of equity for the specific performance of a contract concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said court to declare that any of the parties to the said suit wherein such decree is made are trustees of such lands or any part thereof, within the meaning of . . . [the Trustee Act, 1850] or to declare concerning the interests of unborn persons who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased, who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who upon coming into existence would be trustees within the meaning of [the] Act, and thereupon it shall be lawful for . . . the court . . . to make such order or orders as to the estates, rights, and interests of such persons, born or unborn, as the said court might under the provision of [the] Act make concerning the estates, rights, and interests of trustees born or unborn : (Tr. A., 1850, s. 30, and see *sup.* 2, (b) (8).)

Applications under this section may be made at chambers : (C. O. 35, r. 1.)

Where a donee of a power of jointuring under settlement was ordered, in a suit by his wife, to execute the power by a deed to be approved by the master, whereby 1000*l.* per annum was to be appointed as the plaintiff's jointure, on his refusal to obey, it was held, that he might be declared a trustee of all the rights, interests, estates, and property acquired by him under the settlement, and the court appointed a person to execute : (*Wellesley v. Wellesley*, 4 De G. M. & G. 537.)

There is no power to make a vesting order or on adjudging specific performance of an agreement to grant a lease; the only remedy is by attachment : (*Grace v. Baynton*, W. N. 1877, p. 79.)

In a partition suit the court may, in lieu of giving an infant entitled to a share a day to show cause, declare him a trustee of such parts of the property as are allotted to other parties : (*Bowra v. Wright*, 4 De G. & Sm. 265.)

Where in a suit for partition of land, to an undivided share of which a lunatic was entitled, a partition has been made and the lunatic declared a trustee on a petition by the owner of the other undivided moiety, the court may make a vesting order : (*Re Molyneux*, 10 W. R. 512.)

And where a decree had been made for partition of lands, an undivided share in which was vested in a lunatic as tenant in tail, an order was made in lunacy and Chancery directing the committee to execute all necessary assurances for giving effect to the partition : (*Re Sherard*, 1 De G. J. & S. 421.)

Where after a sale under a decree for partition, it appeared that one-sixth of the estate was vested in B. (a party), a bachelor, for life, with remainder to his issue in tail, with remainder to the right heirs of the plaintiff, the court appointed a person to convey the legal estate in the one-sixth limited to the plaintiff's right heirs : (*Basnett v. Moxon*, L. Rep. 20 Eq. 20; 44 L. J. 556, Ch.; 23 W. R. 544.)

When the shares of the parties to a partition were very minute and complicated, the court declared each party trustee of the shares allotted to the others, and vested the entirety in a single trustee with directions to

convey the allotted share to each party: (*Shepherd v. Churchill*, 25 Beav. 21.)

See also 31 & 32 Vict. c. 40, s. 7.

On a sale of realty, where there is only a contract, an action is necessary, but not where there is an executed contract: (*Re Cuming*, L. Rep. 5 Ch. App. 72.)

Where in a suit for foreclosure by an equitable mortgagee the court gives an absolute judgment for foreclosure, and directs a conveyance, it may add a declaration that the mortgagor is a trustee for the mortgagee: (*Lechmere v. Clamp*, 30 Beav. 218; 31 Beav. 578.)

In a foreclosure action by an equitable mortgagee where the mortgagor's estate was devised in trust for sale, and had become vested in an infant, who had also a beneficial interest, Jessel, M.R. at the hearing directed that if the mortgage was not redeemed in six months the infant should be a trustee, and directed the executor to convey: (*Foster v. Parker*, L. Rep. 8 Ch. Div. 147.)

In another case a separate application was required: (*Smith v. Boucher*, 1 Sm. & Gif. 72.)

(c) *Payment into Court.*

Where any infant or person of unsound mind shall be entitled to any money payable in discharge of any lands, stock, or *choses in action* conveyed, assigned, or transferred under [the] Act, it shall be lawful for the person by whom such money is payable to pay the same into the Bank of England, in the name and with the privity of the [Paymaster-General], in trust in any cause then depending concerning such money, or, if there shall be no such cause, to the credit of such infant or person of unsound mind, subject to the order or disposition of the . . . court; and it shall be lawful for the court upon petition in a summary way, to order any money so paid to be invested in the public funds, and to order payment or distribution thereof, or payment of the dividends thereof, as to the said court shall seem reasonable; and every cashier of the Bank of England who shall receive any such money is . . . required to give to the person paying the same a receipt for such money, and such receipt shall be an effectual discharge for the money therein respectively expressed to have been received: (Tr. A., 1850, s. 48.)

IV. TRUSTEE RELIEF ACTS, 1847 AND 1849.

1. WHO MAY PAY, OR TRANSFER INTO COURT.

(a) *Without Order.*

All trustees, executors, administrators, or other persons, having in their hands any moneys belonging to any trust whatsoever, or the major part of them, shall be at liberty, on filing an affidavit shortly describing the instrument creating the trust, according to the best of their knowledge and belief, to pay the same, with the privity of the [Paymaster-General] into the Bank of England, to the account of such [Paymaster-General] in the matter of the particular trust (describing the same by the names of the parties, as accurately as may be, for the purpose of distinguishing it), in trust to attend the orders of the said court: (Tr. R. A., 1847; 10 & 11 Vict. c. 96, s. 1.)

A trustee must have ownership of the property subject only to an equity in favour of the *cestuis que trustent*: (*Smith v. Anderson*, L. Rep. 15 Ch. Div. 247; 43 L. T. Rep. N. S. 329.)

An owner of an estate charged with a sum in favour of another is not a trustee: (*Re Buckley*, 17 Beav. 110.)

The survivors or survivor of trustees may pay money in : (Ayck., 453.)

Trustees willing to execute the trust without the court's aid are not bound to pay in (*Mountain v. Young*, 18 Jur. 769); but where trustees, requested to pay trust funds into court by *cestuis que trustent*, declined, and a suit was accordingly instituted to secure the fund, the trustees had to pay the costs thereof : (Ayck., 453.)

Trustees of a charity may pay money in without the consent of the Charity Commissioners, but it is proper to apply first to such commissioners : (*Re Poplar and Blackwall School*, L. Rep. 8 Ch. Div. 543 ; 39 L. T. Rep. N. S. 88 ; 26 W. R. 827.)

The relation between an assurance company and a person claiming the moneys due under the policy is one of debtor and creditor ; there is no trust or constructive trust to entitle the company to pay the money into court under the Trustee Relief Act ; and the payment into court is no defence to an action for the moneys, unless the case comes within sect. 25, sub-sect. 6, of the Judicature Act, 1873 : (*Matthew v. Northern Assurance Company*, L. Rep. 9 Ch. Div. 80 ; 38 L. T. Rep. N. S. 468 ; 47 L. J. 562, Ch. ; 27 W. R. 51.)

As to whether a trustee holding a *chose in action* to which a married woman is entitled, is entitled to pay it into court, compare *Re Swan*, 2 H. & M. 34 ; *Re Roberts*, W. N., 1869, p. 88.)

The objection that there is no trust to justify payment in cannot be taken on a petition for payment out : (*Re Haycock*, L. Rep. 1 Ch. Div. 611 ; *Re Sutton*, L. Rep. 12 Ch. Div. 175 ; 48 L. J. 355, Ch. ; 27 W. R. 529.)

All trustees, or other persons, having any annuities or stocks standing in the books of the Governor and Company of the Bank of England, or of the East India Company, or South Sea Company, or any government or parliamentary securities standing in their names, or in the names of any deceased persons of whom they shall be personal representatives, upon any trusts whatsoever, or the major part of them, shall be at liberty to transfer or deposit such stocks or securities into or in the name of the said [Paymaster-General], with his privity, in the matter of the particular trust (describing the same as aforesaid), in trust to attend the orders of the said court : (Tr. R. A., 1847, s. 1.)

Bonds of a foreign Government are not included : (*Re Lloyd*, 2 W. R. 371.)

But railway stock may now be transferred into court under this Act and sect. 3 of the Chancery Funds Act : (*Re Ross*, 28 W. R. 418.)

[Where there has been] any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal *chose in action*, of which express notice in writing shall have been given to the debtor, trustee, or other person, from whom the assignor would have been entitled to receive or claim such debt or *chose in action* . . . , if the debtor, trustee, or other person liable in respect of such debt or *chose in action* shall have had notice that such assignment is disputed by the assignor, or any one claiming under him, or of any other opposing or conflicting claims to such debt or *chose in action*, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees : (J. A., 1875, s. 25, sub-s. 6.)

The section does not apply in the case of conflicting claims to money on deposit in a bank, where there has been no absolute assignment in writing : (*Re Sutton*, L. Rep. 12 Ch. Div. 175.)

(b) *Under Order.*

If, upon any petition presented to the [Chancery Division] in the matter of the [Trustee Relief] Act, it shall appear to the judge of the court . . . before whom such petition shall be heard, that any moneys, annuities, stocks, or securities, are vested in any persons as trustees, executors, or administrators, or otherwise, upon trusts within the meaning of the said . . . Act, and that the major part of such persons are desirous of transferring, paying, or delivering the same to the [Paymaster-General] of the . . . Court . . . under the provisions of the said . . . Act, but that for any reason the concurrence of the other or others of them cannot be had, it shall be lawful for such judge as aforesaid to order and direct such transfer, payment, or delivery, to be made by the major part of such persons without the concurrence of the other or others of them : (Tr. R. A., 1849; 12 & 13 Vict. c. 74, s. 1.)

Railway debenture stock, railway consolidated stock, and India 4l. per cent. stock, have been ordered to be paid in : (*Re Gledstane's Trusts*, W. N., 1868, p. 26.)

Where one of three trustees was of unsound mind, an order was made on the petition of the others : (*Re Broadwood*, 8 L. T. Rep. N. S. 632.)

The petition must be served on the non-concurring trustees : (*Re Bryant*, W. N. 1868, p. 123.)

Where any such moneys or Government or parliamentary securities shall be deposited with any banker, broker, or other depositary, it shall be lawful for such judge as aforesaid to make such order for the payment or delivery of such moneys, Government or parliamentary securities, to the major part of such trustees, executors, administrators, or other persons as aforesaid, for the purpose of being paid or delivered to the said [Paymaster-General] as to the said judge shall seem meet : (Tr. R. A., 1849, s. 1.)

Every transfer of any annuities, stocks, or securities, and every payment of money or delivery of securities, in pursuance of any such order, shall be as valid and effectual as if the same had been made on the authority or by the act of all the persons entitled to the annuities, stocks, or securities so transferred, or the moneys or securities so paid or delivered respectively, and shall fully protect and indemnify the Governor and Company of the Bank of England, the East India Company, and the South Sea Company, and all other persons acting under or in pursuance of such order : (Tr. R. A., 1849, s. 1.)

2. AMOUNT PAID IN.

Unless the trustees pay in the whole fund, if there is no mistake or ground of justification, they have to bear the costs of accounting for the balance : (*Mitchell v. Cobb*, 17 L. T. Rep. O. S., 25.)

The reasonable costs of payment in may be deducted where no dispute has arisen, or is likely to arise as to the deduction : (*Beaty v. Curson*, L. Rep. 7 Eq. 194.)

3. AFFIDAVIT.

(a) *Filing and Contents.*

A trustee or other person desiring to pay money or transfer securities into, or deposit securities in court, under the Act 10 & 11 Vict. c. 96, shall file an affidavit, entitled in the matter of the same Act, and in the matter of the trust, and setting forth :—

(1.) His own name and address.

(2.) The place where he is to be served with any petition, summons, or order, or with notice of any proceeding relating to such money or securities.

- (3.) The amount of money and description and amount of securities which he proposes to pay or transfer into, or deposit in court, and the credit to which he wishes it to be placed; and if such money or securities are chargeable with legacy or succession duty, a statement whether such duty or any part thereof has or has not been paid.
- (4.) A short description of the trust, and of the instrument creating it.
- (5.) The names of the persons interested in or entitled to the money or securities, and their places of residence, to the best of his knowledge and belief.
- (6.) His submission to answer all such inquiries relating to the application of the money, stock, or securities, paid or transferred into or deposited in court under the Act, as the court or judge may make or direct.
- (7.) A statement whether the money so to be paid into court, or the dividends on the securities so to be transferred into, or deposited in court, and all accumulations of dividends thereon, are desired to be invested in Consolidated 3*l.* per cent. Annuities, or reduced 3*l.* per cent. Annuities, or New 3*l.* per cent. Annuities, or whether it is deemed unnecessary so to invest the same, or to place the same on deposit: (Ch. F. R., 1874, r. 34.)

The affidavit must not relate the history of the trust (*Re Waring*, 16 Jur. 652); but it is the duty of a trustee paying money into court to mention in the affidavit, or by a supplemental affidavit, all claims on the fund of which he receives notice. Where a trustee who had filed an affidavit before transferring funds into court, subsequently, but before the money was paid in, became aware that an assignee of some of the funds had placed a *distringas* thereon, omitted to mention the claim of such assignee, in his subsequent affidavit, and the assignee, in order to prevent the funds being transferred out, obtained a stop-order, the trustee was held personally liable for the costs thereof: (*Re Allen*, 40 L. T. Rep. N. S. 456.)

All the trustees should properly join in the affidavit, but under particular circumstances the court orders the Paymaster-General to receive the affidavit of one of several: (1 Jur. N. S. 974.)

(b) *Printing.*

Affidavits under this rule are to be printed under the superintendence of the Masters of the Supreme Court, upon cream wove machine drawing foolscap folio paper 19*lb.* per mill ream, in pica type leaded, with an inner margin about three quarters of an inch wide, and an outer margin about two inches and a half wide: (Ch. F. R., 1874, r. 34; Ch. O. 15th May, 1862, r. 2; C. O. 9, r. 3.)

Dates and sums occurring therein are expressed by figures instead of words (C. O. 9, r. 3), and the affidavits are printed in all other respects in such form and manner as the Masters of the Supreme Court deem to be convenient: (*Id.*)

Solicitors and parties, on filing affidavits . . . required to be printed, are to leave with the Masters of the Supreme Court a fair copy of each affidavit . . . written on draft paper on one side only, and certified to be a correct copy: (Ch. F. R., 1874, r. 34; Ch. O. 16th May, 1862, r. 3.)

The Chancery Paymaster [will] not act upon an office copy of any such affidavit . . . which is not so printed: (Ch. F. R., 1874, r. 34.)

4. DIRECTION FOR PLACING TO TRUST ACCOUNT.

The Chancery Paymaster, on production of any such affidavit

[gives] the necessary directions for such payment, transfer, or deposit to the account of the particular trust mentioned in the affidavit: (Ch. F. R., 1874, r. 34.)

5. TITLE OF ACCOUNT.

The money must not be paid in by an executor to an account "The trusts of the testator's will," as this implies a general administration, but the account must be made as limited as possible: (Lewin, 855; Morg. & Ch. 67.)

Money paid in to a too general account may be ordered to be carried over to a more particular account: (Lewin, 855; Morg. & Ch. 67.)

6. RECEIPT OR CERTIFICATE FOR MONEY, STOCKS, OR SECURITIES.

In every such case [mentioned *sup.*, (a)] the receipt of one of the cashiers of the said bank for the money so paid, or, in the case of stocks or securities, the certificate of the proper officer, of the transfer or deposit of such stocks or securities, shall be a sufficient discharge to [the] trustees or other persons for the money so paid, or the stocks or securities so transferred or deposited: (Tr. R. A., 1847, s. 1.)

The payment into court is a discharge only as to the money paid in, and leaves the trustee liable to a suit in respect of the costs deducted by him, or in respect of any other moneys that might be recovered upon the footing of the trust; and the trustee cannot require a fund to be kept in court to indemnify him against threatened proceedings: (Lewin, 856.)

7. EFFECT OF PAYMENT IN.

The payment in gives the court jurisdiction only as to the fund paid in, and not generally over the trust: (Ayck, 453.)

The payment in does not invest the court or Paymaster-General with the character of trustee: (*Id.*)

The trustees, by paying in, retire from the trust, and cannot afterwards exercise its powers (Lewin, 856; *Re Poplar and Blackwall School*, L. Rep. 8 Ch. Div. 543; 39 L. T. Rep. N. S. 88; 26 W. R. 827); but it is otherwise where the trustees have a discretionary power as to the application of the fund: (*Re Landon*, 40 L. J. 370, Ch.)

8. NOTICE OF PAYMENT IN.

A person having made a payment or transfer of money or securities into, or a deposit of securities in court . . . [must] forthwith give notice thereof to the several persons named in his affidavit . . . as interested in or entitled to such moneys or securities: (Ch. F. A. O., 1874, r. 5.)

Where a *cestui que trust* was believed, but not known, to be in New York, notice by publication in two newspapers there was directed: (*Re Goodman*, W. N. 1870, p. 152; see also *Re Hansford*, 7 W. R. 199, 254; *Re Palmer*, W. N. 1873, p. 101.)

Where the parties are very numerous substituted notice may be ordered: (*Re Colson*, 2 W. R. 111.)

Where, on payment into court, the address of the person interested in the fund was not known, the court declined to give any direction as to how the notice required by the Chancery Funds (Amended) Orders, 1874, r. 5, should be given, holding that the party paying in the fund ought to take that responsibility upon himself (*Re Hardley*, L. Rep. 10 Ch. Div. 664; 40 L. T. Rep. N. S. 409; 48 L. J. 335, Ch.); James, L.J., intimated, however, that if the applicant wrote to the brother in England of such person and advertised in newspapers in the country in which he had last been heard of, the court would consider that the applicant had done everything incumbent on him: (*Id.*)

9. INVESTMENT AND PAYMENT OF DIVIDENDS.

Such orders as shall seem fit shall be from time to time made by the Court . . . in respect of the trust moneys, stocks, or securities so paid in, transferred, and deposited as aforesaid, and for the investment . . . of any such moneys, or of any dividends or interest on any such stocks or securities: (Tr. R. A., 1847, s. 2.)

[Application for such order may be made by] a petition to be presented in a summary way . . . by such party or parties as to the court . . . shall appear to be competent and necessary in that behalf: (Tr. R. A., 1847, s. 2.)

The service of the petition is regulated by the same section and rules as service of a petition for payment out: (see *post*, 10.)

An investment in New Three per Cent. Annuities has been ordered: (*Re Dunster*, 3 W. R. 267; see also *Re Sillar*, W. N. 1871, p. 3.)

All dividends subject at the commencement of [the] rules to be invested in pursuance of [the Consolidated Order 41, rule 3], may, where or so soon as they exceed 10*l.* be invested as if the said 3rd rule had not been abrogated: (Ch. F. R., 1874, r. 66.)

[Where it is deemed unnecessary to have the money or the dividends or interest of stock or securities invested in the mean time, the affidavit shall further contain a statement to that effect. But where the affidavit contains no such statement, the [Paymaster-General] shall be at liberty to invest, as soon as conveniently may be, the money in Bank 3*l.* per Cent. Annuities in the matter of the particular trust, or in cases of dividends or interest on stock or securities transferred, such dividends or interest in the like stock, and all accumulations of the dividends of the stock in which such money shall be invested, and of the dividends or interest on such stock or securities as aforesaid, from time to time in the like matter, without any special order made by the court in that behalf, and without any formal request for that purpose. Provided always, that where at any time a request in writing, by or on behalf of any party claiming to be entitled, that such investment be discontinued, is left with the [Paymaster-General], he shall be at liberty to cease making any further investment in the matter of the particular trust until the court shall have made some order in that behalf: (C. O. 41, r. 3.)]

When the affidavit contains a statement that it is desired that the money intended to be paid into court in pursuance of the Act, or the dividends accruing on the securities intended to be transferred or deposited in pursuance of the said Act, and the accumulations thereon, shall be invested in Consolidated 3*l.* per Cent. Annuities, or Reduced 3*l.* per Cent. Annuities, or New 3*l.* per Cent. Annuities, the Chancery Paymaster shall (if or so soon as such money shall amount to such dividends or shall amount to or exceed 10*l.*) invest the same respectively in Consolidated 3*l.* per Cent. Annuities, or Reduced 3*l.* per Cent. Annuities, or New Three per Cent. Annuities, without any order or further request for that purpose: (Ch. F. R., 1874, r. 66.)

If such money does not amount to 40*l.*, the Chancery Paymaster [will, unless the sum is under 10*l.*] as soon as conveniently may be, place such money on deposit without a request for that purpose, unless such affidavit contains a statement that it is deemed unnecessary to place such money on deposit, or unless notice in writing be left at his office of an order having been made, or of an intended application to the court affecting such money, securities or dividends: (Ch. F. R., 1874, r. 66.)

Income has, by one order, been directed to be paid to the first tenant for life, and after proof of his death, to the second tenant for life: (*Re Brent*, 8 W. R. 270.)

10. ADMINISTRATION AND PAYMENT OUT.

(a) *Application.*(1) *How made.*

Such orders as shall seem fit shall be from time to time made by the [Chancery Division] in respect of the trust moneys, stocks, or securities so paid in, transferred, and deposited as aforesaid, and for the investment and payment of any such moneys, or of any dividends or interest on any such stock or securities, and for the transfer and delivery out of any such stocks and securities, and for the administration of any such trusts generally, upon a petition to be presented in a summary way to the [Chancery Division] without [action]: (Tr. R. A., 1847, s. 2.)

Where an executor, after paying in, discovered debts of the testator, the money was paid back to him on his undertaking to apply it properly: (*Ex parte Tournay*, 3 De G. & Sm. 677.)

[An application may be made] by petition, or in cases where the fund does not exceed 300*l.* cash, or 300*l.* in securities, by summons, as occasion may require, respecting the investment, payment out, or distribution of the money or securities, or of the dividends or interest of such securities: (Ch. F. A. O., 1874, r. 6.)

The application cannot be made by motion (*Re Masselin*, 15 Jur. 1073); by action (*Pelling v. Goddard*, L. Rep. 9 Ch. Div. 185); on further directions in an action: (*Otte v. Castle*, 1 W. R. 64.)

Where an order has once been made on petition, further proceedings may be taken at chambers: (*Re Hodges*, 4 D. M. & G. 491.)

Proceedings may be taken by the claimant *in formâ pauperis*: (*Re Money*, 13 Beav. 109.)

Every petition for dealing with money or securities in court, chargeable with duty payable to the revenue under the Acts relating to legacies or succession duty, or the dividends on such securities, shall contain a statement whether such duty or any part thereof has or has not been paid: (Ch. F. A. O., 1874, r. 11.)

The petition must set out the material statements only of the original affidavits: (*Re Levett*, 5 De G. & Sm. 619; *Re Curtois*, 17 Jur. 852.)

A petition by a person entitled to an aliquot share should ask that the other shares should be carried to the separate accounts of the other persons entitled, to save service on future applications: (*Re Hawke*, 18 Jur. 33.)

Petitions and summonses [must] be entitled in the matter of the Act, and in the matter of the particular trust: (Ch. F. A. O., 1874, r. 10.)

(2) *Address for Service.*

No petition relating to such moneys or securities shall be set down to be heard, and no summons relating thereto shall be sealed until the petitioner or applicant has first named in his petition or summons a place where he may be served with any petition or summons, or notice of any proceeding or order relating to such money or securities or the dividends thereof: (Ch. F. A. O., 1874, r. 9.)

(3) *By whom Made.*

A petition [may] be presented by such party or parties as to the court shall appear to be competent and necessary in that behalf: (Tr. R. A., 1847, s. 2.)

The persons interested in or entitled to any [such] moneys or securities and named in the affidavit, or any of such persons, or the person so paying or transferring into or depositing in court, may apply

. . . respecting the investment, payment out, or distribution of the moneys or securities, or of the dividends or interest of such securities : (Ch. F. A. O., 1874, r. 6.)

Trustees are not proper persons to petition, unless asked to do so by all the *cestuis que trustent*, and will generally only get respondents' costs if they do so : (*Re Cazneau*, 2 K. & J. 249 ; *Re Hutchinson*, 1 Dr. & Sm. 27 ; *Re Cooper*, cited in *Re Cazneau*.)

A petition may be presented by a person entitled to an aliquot share without bringing the other parties interested before the court : (*Re Bafford*, 21 L. T. Rep. O. S. 164.)

Any person interested in or entitled to money paid into court under the Trustee Relief Act, whose name is omitted in the trustee's affidavit, should apply for payment out of court by petition and not institute an action : (*Pelling v. Goddard*, L. Rep. 9 Ch. Div. 185 ; 38 L. T. Rep. N. S. 811 ; 47 L. J. 646, Ch. ; *Re Puttrell*, L. Rep. 7 Ch. Div. 647.)

(4) Service and Notice.

Service of such petition shall be made upon such person or persons as the court shall see fit and direct : (Tr. R. A., 1847, s. 2.)

A person who has paid or transferred money or securities into, or deposited securities in court . . . [must] be served with notice of any application made to the court or judge in chambers, respecting such money or securities, or the dividends thereof, by any person interested therein or entitled thereto : (Ch. F. A. O., 1874, r. 7.)

The persons interested in or entitled to such money or securities [must] be served with notice of any application made by the trustee to the court or judges respecting such moneys or securities, or the dividends thereof : (Ch. F. A. O., 1874, r. 8.)

A trustee who has not concurred in the payment-in must be served : (*Re Bryant*, W. N. 1868, p. 123.)

Where part of the money has by order been carried to the separate account of a *cestui que trust*, trustees need not be served on an application for payment-out to him : (*Re Young*, 5 W. R. 400.)

The court, if satisfied that the trustees try to avoid service, will make the order without service : (*Ex parte Baughan*, 16 Jur. 325.)

On a petition for payment out of court of a fund to which numerous parties were entitled, most of whom were not before the court, a former order having been made directing class inquiries, and the chief clerk having made his certificate, it was ordered that the petitioner be at liberty to serve a copy of the petition, the former order, and the chief clerk's certificate, together with the present order, upon the several persons named in the certificate, and that the petition stand over till such persons had been served : (*Re Battersby*, L. Rep. 10 Ch. Div. 228.)

Where money has been paid into court under the Act, and the court, in an action brought for the fund, has declared the rights of the persons interested ; on an application made by the trustee and the person so interested, for payment-out, it is unnecessary to serve notice of the application on persons who, although stated in the trustee's affidavit as being interested in the fund, have been declared not to be so by the court : (*Re Fosbury*, 39 L. T. Rep. N. S. 422.)

It is unnecessary to serve remaindermen with petitions for payment of income, unless it is asked that the costs shall be thrown on the *corpus* : (*Re Marner*, L. Rep. 3 Eq. 432 ; *Re Whitting*, 9 W. R. 830 ; *Ex parte Peart*, 17 L. J. 168, Ch.)

Service on remaindermen was dispensed with, when they were very numerous, and the money was only carried over : (*Re Hodges*, 6 W. R. 487.)

Where an infant is to be served, a guardian *ad litem* should be appointed: (*Re Ward*, 2 Giff. 122.)

Substituted service, and service out of the jurisdiction, may be ordered: (*Re Bolton*, W. N. 1869, p. 226; *Re Bonelli's Electric Telegraph*, L. Rep. 18 Eq. 655; but see, as to service abroad, *Re Haney*, L. Rep. 10 Ch. App. 275; *Re Morant*, W. N. 1879, p. 144.)

(b) Order.

The court has not only administered the part of the fund paid in, but the remainder of the fund: (*Re Wright*, 1 Sm. & G. App., v.)

The court, if not satisfied as to the facts by affidavit or when asked, may order an inquiry: (*Re Wood*, 15 Sim. 469; *Re Trower*, 1 L. T. Rep. N. S. 54; O. XXXIII.)

In making the order, the court has a discretion: (*Re Garnier*, L. Rep. 13 Eq. 532.)

The court may delay the validity or invalidity of a deed (*Lewis v. Hillman*, 3 H. of L. Cas. 607; *Re Bird*, L. Rep. 3 Ch. Div. 214); or make a declaration as to the rights of parties: (*Re Walker*, 16 Jur. 1154.)

Where the petitioner turned out not to be entitled, the trustees desiring the opinion of the court, it declared the rights and gave all parties their costs: (*Re Woolard*, 18 Jur. 1012.)

The court has directed an issue to be tried: (*Re Allen*, Kay, App. li.)

Where money in which a lunatic is interested has been paid into court, a judge of the High Court has jurisdiction under the Act to order repayment to the Poor Law Guardians of the expenses incurred by them for support of the lunatic, or in the case of a lunatic not so found by inquisition to order his maintenance: (Lewin, 854; and see LUNATICS.)

On the petition of a person entitled to an aliquot share, liberty may be given to other parties entitled to apply at chambers: (*Winkworth v. Winkworth*, 32 Beav. 233.)

Where the persons claiming in opposition to the petitioner live abroad, time may be given to them to make out their case: (*Re Hodson*, 22 L. J. 1055, Ch.)

Every order made upon any such petition [has] the same authority and effect, and [is] enforced and subject to . . . appeal, in the same manner as if the same had been made in a suit regularly instituted in the court: (Tr. R. A., 1847, s. 2.)

An order for maintenance, out of the fund, of an infant entitled thereto, constitutes him a ward of court: (*Re Hodge*, 3 K. & J. 213.)

If it shall appear that any such trust funds cannot be safely distributed without the institution of one or more suit or suits, the [judge] may direct any such suit or suits to be instituted: (Tr. R. A., 1847, s. 2.)

A suit is directed for the court's own satisfaction only, not for the convenience of the petitioner: (*Re Harris*, 18 Jur. 721.)

See also *Re Way's Settlement*, 10 Jur. N. S. 1166; *Re Foyard*, 1 K. & J. 233; *Re Puttrell*, L. Rep. 7 Ch. Div. 647.

11. Costs.

Even before the Judicature Acts, the costs were in the discretion of the court: (*Roberts v. Ball*, 24 L. J. 471, Ch.)

The former rules as to costs may still be looked at as a guide: (*Myers v. Defries*, L. Rep. 5 Ex. Div. 180; 42 L. T. Rep. N. S. 137; 49 L. J. 266, Ex.; 28 W. R. 406.)

A trustee commencing an action when he might have paid in under the Act, will only be allowed such costs as he would have got under the Act: (*Wells v. Malbon*, 31 Beav. 48; *Gunnell v. Whitear*, L. Rep. 10 Eq. 664.)

An objection that the moneys were not properly paid in and that the trustee is therefore not entitled to his costs of payment-in and appearance, cannot be taken on a petition for payment-out: (*Re Haycock*, L. Rep. 1 Ch. Div. 611; *Re Sutton*, L. Rep. 12 Ch. Div. 175.)

The court has no jurisdiction as to the costs deducted by the paying-in trustee (*Re Bloye*, 1 Mac. & G. 504; *Re Barber*, 9 Jur. N. S. 1098); but where he is allowed the costs of the petition, his costs, including those deducted, will be taxed: (*Re Hue*, 27 Beav. 337.)

An action may be brought for recovery of costs improperly deducted: (*Beaty v. Curson*, L. Rep. 7 Eq. 194.)

A trustee who objected to act with a proposed new trustee, and on his appointment paid the fund into court, was allowed his costs: (*Re Williams*, 6 W. R. 218.)

A trustee holding money in respect of which equity to a settlement is claimed, may pay it in: (*Re Swan*, 2 Hem. & M. 34; but see *Re Roberts*, W. N. 1869, p. 88.)

Costs, charges, and expenses of trustees of properly paying in are, if not previously deducted, paid out of corpus: (*Re Whitton*, L. Rep. 8 Eq. 353.)

A trustee guilty of gross misconduct in paying in may be made to pay the costs of the petition personally: (*Re Woodburn*, 1 De G. & J. 333; *Re Cates*, 25 Beav. 361, 366; *Re Elliott*, L. Rep. 15 Eq. 194; *Re Hoskins*, L. Rep. 5 Ch. Div. 230; L. Rep. 6 Ch. Div. 281.)

Per Jessel, M.R.—When it is doubtful to whom a legacy is payable, the better course is not by payment in under the Act, but by an administration summons, waiving accounts, simply to obtain the judge's decision, or, after taking out such summons, when both parties agree, by submitting a statement of facts in the nature of special cases for the judge's opinion. If the executor does pay the legacy in, he will be left to take his costs out of the residuary estate, and will not have them out of the legacy: (*Re Birkett*, L. Rep. 9 Ch. Div. 576.)

Trustees who are served are *prima facie* entitled to their costs as between solicitor and client: (*Re Erskine*, 1 K. & J. 302; *Re Wylly*, 28 Beav. 458; *Re Wright*, 3 K. & J. 419; *Re Maclean*, L. Rep. 19 Eq. 282; *Re Haycock*, L. Rep. 1 Ch. Div. 611.)

A trustee will not have his costs of appearance where he pays money in capriciously (*Re Leake*, 32 Beav. 135); for insufficient reason (*Re Covington*, 1 Jur. N. S. 1157; *Re Heming*, 3 K. & J. 40; *Re Cull*, L. Rep. 20 Eq. 561); to avoid an action: (*Re Waring*, 16 Jur. 652.)

An executor must take his costs of paying in out of the estate of the testator, whose awkwardly framed will has created the doubt, the subsequent costs coming out of the fund: (*Re Cawthorne*, 12 Beav. 56; *Re Jones*, 3 Drew. 679.)

If the fund has been first severed, and then paid in by a trustee, all the costs come out of the severed fund: (*Re Lorimer*, 12 Beav. 521.)

Costs cannot be directed to be paid out of another fund paid in to another account, though forming the testator's residuary estate: (*Re Hodgson*, 18 Jur. 786.)

As to throwing costs on residue, though not paid in, see *Re Ham*, 2 Sim. N. S. 106; *Re Bartholomew*, 13 Jur. 380; *Re Sharpe*, 15 Sim. 470; *Re Trick*, L. Rep. 5 Ch. App. 170.

Trustees who are served are not allowed costs of taking copies of claimant's affidavits: (*Re Lazarus*, 3 K. & J. 555.)

Where a life assurance company paid money into court, and appeared to raise a question on which they failed, they were allowed their costs of paying in, but refused their costs of appearance: (*Re Rosier*, W. N., 1877, p. 225.)

The costs of a petition by a tenant for life for payment of income, and of the trustees, and all other parties necessarily appearing on the petition, will come out of income: (*Re Marner*, L. Rep. 3 Eq. 258; *Re Evans*, L. Rep. 7 Ch. App. 609.)

But a tenant for life, who is about to petition for payment of income, should write to the trustee that the *corpus* is not intended to be affected. If the tenant for life's title is clear, the trustee should not appear: (*Re Evans*, *sup.*)

Parties served, who have no interest in the money ought not to appear: (*Re Smith*, 3 Jur. N. S. 659.)

A remainderman served who appears merely to look after his own interests will not be allowed costs: (*Re Thornton*, 9 W. R. 475.)

As to notice not to appear and tender of costs to persons served, see Add. R., Aug. 1875, Sp. All., r. 17, cited Costs.

A person, who does not appear by the affidavit to have any interest, is served, and disclaims at the bar, is not allowed costs: (*Re Parry*, 12 Jur. 615; *Re Smith*, *sup.*)

If a petitioner's incumbrancer will take all the fund, and he serves a subsequent incumbrancer with notice that his costs will be objected to, the latter will not be allowed costs of appearance: (*Roberts v. Ball*, 24 L. J. 471, Ch.)

Costs of an unsuccessful claimant may be allowed: (*Re Birch*, 2 K. & J. 369; *Re Dickson*, 1 Sim. N. S. 37.)

A respondent, whose wrongful claim has caused the payment in, may, on his appearance and opposition, be ordered to pay the costs: (*Re Armston*, 4 N. R. 450; 4 D. J. & Sm. 454.)

V. OF CHARITIES.

[See CHARITIES.]

VI. LEAVE TO SELL MINES OR LANDS SEPARATELY.

[See CONFIRMATION OF SALES.]

VII. PURCHASE OF REVERSION OF ECCLESIASTICAL ESTATE.

[See ECCLESIASTICAL ESTATES.]

VIII. AS PARTIES.

[See PARTIES.]

UNCLAIMED STOCK.

[See NATIONAL DEBT ACT.]

UNSOUND MIND, PERSONS OF.

[See LUNATICS, II.; PARTIES; WRIT OF SUMMONS; APPEARANCE; JUDGMENT.]

VACANT POSSESSION.

[See RECOVERY OF LAND, III.]

VACATIONS.

I. PERIODS ASSIGNED FOR.

The vacations to be observed in the several courts and offices of the Supreme Court shall be four in every year, viz., the Long Vacation, the Christmas Vacation, the Easter Vacation, and the Whitsun Vacation.

The Long Vacation shall commence on the 10th Aug. and terminate on the 24th Oct.: (O. LXI., r. 2.)

The Christmas Vacation shall commence on the 24th Dec. and terminate on the 6th Jan.: (*Id.*)

The Easter Vacation shall commence on Good Friday and terminate on Easter Tuesday: (*Id.*)

The Whitsun Vacation shall commence on the Saturday before Whitsunday and shall terminate on the Tuesday after Whitsunday: (*Id.*)

The days of the commencement and termination of each . . . vacation shall be included in such . . . vacation: (O. LXI., r. 3.)

II. TRANSACTION OF BUSINESS.

Provision shall be made by Rules of Court for the hearing, in London or Middlesex, during vacation by judges of the High Court of Justice and the Court of Appeal respectively, of all such applications as may require to be immediately or promptly heard: (J. A., 1873, s. 28.)

No rule as to applications to the Court of Appeal has been made.

Two of the judges of the High Court shall be selected at the commencement of each Long Vacation for the hearing in London or Middlesex during vacation of all such applications as may require to be immediately or promptly heard. Such two judges shall act as vacation judges for one year from their appointment: (O. LXI., r. 5.)

The vacation judges may sit either separately or together as a divisional court as occasion shall require, and may hear and dispose of all actions, matters, and other business to whichever division the same may be assigned: (O. LXI., r. 6.)

Any other judge of the High Court may sit in vacation for any vacation judge: (*Id.*)

Every vacation judge shall have the same power and authority as heretofore: (O. LVIIA., r. 3, Dec. 1876.)

In the interval between the close of the sittings . . . and the commencement of the [next] sittings, any judge of the court may sign and adopt any certificate made by the chief clerk of any other judge; and decrees or orders made by any judge of the court may be prosecuted at the chambers of any other judge by his permission; and in case the prosecution thereof shall not be completed during such interval, the prosecution may be continued at the chambers of the same judge, if and so far as he shall think fit. In all cases in which any judge signs and adopts a certificate made in pursuance of a decree or order made by any other judge, it shall be expressed that he does so for such other judge; and such certificate shall in all future proceedings be deemed to be signed and adopted by the judge for whom it is signed and adopted, save that no application to discharge or vary such certificate

shall be made to the judge for whom the same is signed and adopted, without the consent of the judge by whom it has been signed and adopted; and the judge by whom it has been signed and adopted shall have the same power to discharge or vary the certificate as he would have had if it had been made in pursuance of a decree or order made by himself: (C. O. 35, r. 59.)

The vacation judges of the High Court may dispose of all actions, matters, and other business of an urgent nature during any interval between the sittings of any division of the High Court to which such business may be assigned, although such interval may not be called or known as a vacation: (O. LXI., r. 7.)

This rule applies where a judge has, during the sittings, adjourned his court: (*Wilson v. Watson*, 38 L. T. Rep. N. S. 380.)

A chief clerk has no power in vacation to give special leave to serve notice of motion. Applications for such leave must be made to the vacation judge: (*Conacher v. Conacher*, 70 L. T. 186.)

No order made by a vacation judge shall be reversed or varied except by a Divisional Court or the Court of Appeal, or a judge thereof, or the judge who made the order: (O. LXI., r. 6.)

VENDITIONI EXPONAS.

[See EXECUTION, XV., (1).]

VENDOR AND PURCHASER.

I. ON SALES BY THE COURT.

[See PROPERTY, VIII.]

II. SPECIFIC PERFORMANCE OF CONTRACTS BETWEEN.

[See SPECIFIC PERFORMANCE.]

III. SUMMARY PROCEDURE ON SALES.

(1) JURISDICTION.

A vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times, and from time to time, apply in a summary way to a judge of the [Chancery Division] in England in chambers, in respect of

Any requisitions or objections; or

Any claim for compensation; or

Any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract):

(V. & P. Act, 1874, 37 & 38 Vict. c. 78, s. 9.)

The judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid: (V. & P. A., 1874, s. 9.)

The Act does not apply in the case of voluntary grants, but a nominal consideration is sufficient as a foundation for proceedings under it: (Seton, 1318, citing *Re Marquis of Salisbury*, 23 W. R. 824.)

The following questions have been determined under the Act—

Whether the purchaser's objections and requisitions have been sufficiently answered, and whether a good title has been shown in

- accordance with the particulars and conditions of sale (*Re Burroughes, Lynn, and Sexton*, L. Rep. 5 Ch. Div. 601; *Re Osborne to Rowlett*, L. Rep. 13 Ch. Div. 774; 42 L. T. Rep. N. S. 650; 49 L. J. 310, Ch.; 28 W. R. 365; *Re Coleman and Jarrom*, L. Rep. 4 Ch. Div. 165; *Re Brown and Sibly*, L. Rep. 3 Ch. Div. 156; *Re Cooke's Contract*, W. N. 1877, p. 5; *Re Kearsley and Clayton's Contract*, L. Rep. 7 Ch. Div. 615);
- Whether a trustee under a liquidation was able to convey (*Re Waddell's Contract*, L. Rep. 2 Ch. Div. 176);
- Question of construction (*Re Coleman and Jarrom*, L. Rep. 4 Ch. Div. 165);
- As to compensation (*Re Springall and Goldsack*, W. N. 1875, p. 225; W. N. 1876, p. 44);
- Whether the legal estate passed under a will, part of the title (*Re Packman and Moss*, L. Rep. 1 Ch. Div. 214);
- Whether a power has been properly exercised (*Re Frith and Osborne*, L. Rep. 3 Ch. Div. 618); or is exercisable (*Re Cooke's Contract*, W. N. 1877, p. 5);
- Whether the survivor of two liquidators could affix the company's seal to an assignment (*Re Metropolitan Bank and Jones*, L. Rep. 2 Ch. Div. 366);
- Whether succession duty is payable (*Re Cooper and Allen's Contract*, L. Rep. 4 Ch. Div. 802);
- Whether a post-nuptial settlement was void as against the vendor (*Re Foster and Lister*, L. Rep. 6 Ch. Div. 87);
- Whether an appointment of trustees was good (*Re Cunningham and Bradley's Contract*, W. N. 1877, p. 258);
- Whether an estate in fee simple passed by the words of a will (*Re White and Hindle's Contract*, W. N. 1877, p. 260);
- Whether a surety had been discharged by the operation of an Act of Parliament (*Finch v. Jukes*, W. N. 1877, p. 211);
- Whether the vendor was bound to answer completely the requisition as to incumbrances (*Re Ford and Hill*, L. Rep. 10 Ch. Div. 365).

2. APPLICATION.

The application is by summons: (see *sup.* 1, and CHAMBERS, XIII., 4.)

The summons is entitled in the matter of the agreement, and in the matter of the Act. The title should shortly state the date of the agreement, the parties to it, and the particulars of the property comprised in it: (Seton, 1318.)

Where the court decides a question of whether duty is payable the Crown will not be bound unless represented on the summons: (*Re Cooper and Allen's Contract*, L. Rep. 4 Ch. Div. 802, 827.)

The summons may be adjourned into court: (*Re Brown and Sibley*, L. Rep. 3 Ch. Div. 156; *Re Cooper and Allen's Contract*, L. Rep. 4 Ch. Div. 802.)

3. EVIDENCE.

The Court of Appeal has intimated an opinion that the summary jurisdiction was not intended to apply to a case where there were disputed facts, but was only meant to afford a ready means of settling short points of law or construction: (*Re Popple and Barratt*, 25 W. R. 248.)

In a subsequent case, Jessel, M.R. refused to admit affidavits and cross-examinations on the ground that evidence by affidavit upon requisitions as to title ought not be given unless required by the judge; but on appeal it was held that the evidence ought to have been admitted, for

that, on a summons under the Act, the parties are in the same position as they would have been under a reference as to title in a suit for specific performance: (*Re Burroughes, Lynn, and Sexton*, L. Rep. 5 Ch. Div. 601.)

Where a witness refused to make an affidavit, the court, on an *ex parte* application, directed that his evidence should be taken before an examiner: (*Re Springhall and Goldsack*, W. N. 1875, p. 225.)

4. APPEAL.

An order under the Act must be appealed from within twenty-one days: (*Re Blyth and Young*, L. Rep. 13 Ch. Div. 416; 41 L. T. Rep. N. S. 746; 28 W. R. 266.)

5. COSTS.

The costs are in the discretion of the court: (see *sup.*, 1.)

The summons may be dismissed with costs: (*Re Packman*, L. Rep. 1 Ch. Div. 214.)

A purchaser who has raised an objection, which he has failed to sustain on a vendor's summons, may be ordered to pay the costs of the summons: (*Re Waddell's Contract*, L. Rep. 2 Ch. Div. 172, 176; *Re Cooke's Contract*, W. N. 1877, p. 5.)

Where a purchaser failed on an objection as to incumbrances, each party had to pay his own costs of a vendor's summons: (*Finch v. Jukes*, W. N. 1877, p. 211.)

Per Jessel, M.R., the general rule is that a purchaser must pay the costs if he fails on a vendor's summons caused by an objection to the title: (*Re Osborne to Rowlett, sup.*)

But the Master of the Rolls made no order as to costs where the former decisions on the question were conflicting: (*Id.*)

Where a purchaser makes an improper requisition, his summons should be dismissed with costs: (Per James, L.J. *Re Ford and Hill*, L. Rep. 10 Ch. Div. 365, 371.)

Where the court decided in favour of the propriety of a purchaser's requisition, the vendor was ordered to pay the costs of the purchaser's summons: (Hall, V.C. in *Re Ford and Hill, sup.*)

Quære, whether, on reversing the order of the court below, the Court of Appeal will give the appellant costs below: (see *Re Ford and Hill, sup.*)

VENUE.

[See TRIAL, VIII.]

VERDICT.

[See TRIAL, XI.; NEW TRIAL.]

VESTING ORDER.

[See TRUSTEES, IV.]

WANT OF PROSECUTION.

[See DISMISSING ACTION; JUDGMENT, II., 2 (a) (c) and 4;
DISCOVERY; COSTS, I., 1 (g).]

WARD.

[See INFANTS, II.]

WINDING-UP.

I. REGISTERED COMPANIES AND ASSOCIATIONS UNDER THE COMPANIES ACT, 1862.

1. BY THE COURT.

(a) *Under what Circumstances.*

(b) *Who may Petition.*

(1) Shareholders' Petition.

(2) Creditors' Petition.

(3) Security for Costs.

(c) *The Petition.*

(1) Title.

(2) Service.

(3) Verification.

(4) Advertisement.

(5) Furnishing Copies.

(6) Amendment.

(7) Transfer.

(8) Priority.

(9) Costs.

(d) *Hearing.*

(e) *Winding-up Order.*

(1) In Case of Two or More Companies.

(2) On Several Petitions.

(3) Appointment of Liquidator [see *post* (l) (3)].

(4) Copy for Registrar.

(5) Advertisement and Service.

(6) Effect.

(i.) Dispositions of Property.

(ii.) Actions.

(iii.) Process.

(f) *Staying and Transferring Winding-up and Other Proceedings.*

(1) Power to Stay Winding-up Proceedings.

(2) Power to Transfer Winding-up Proceedings to Bankruptcy Court.

(3) Power to Refer Winding-up Proceedings to County Court.

(4) Transfer from one County Court to another.

(5) Staying and Transferring Actions, &c.

(i.) Before Winding-up Order.

(ii.) After Winding-up Order.

(g) *Carrying into Chambers.*

(h) *Summons to Proceed.*

(i) *Directions on Return of Summons.*

(k) *Adjournment.*

(l) *Liquidators.*

- (1) Power to Appoint.
 - (2) Provisional Liquidator.
 - (i.) Appointment of.
 - (ii.) Application for.
 - (iii.) Powers.
 - (iv.) Rules Applicable.
 - (3) Official Liquidator.
 - (i.) Person Appointed.
 - (ii.) When Appointed.
 - (iii.) How Appointed.
 - (iv.) Security.
 - Power to Order.
 - How Given.
 - Time.
 - Certificate of Chief Clerk.
 - Fresh Security.
 - (v.) Advertisement of Appointment.
 - (vi.) Description.
 - (vii.) Duties.
 - (viii.) Representative Character.
 - (ix.) Powers.
 - Without Court's Sanction.
 - With Court's Sanction.
 - General Scheme of Liquidation.
 - Compromise of Claims, &c.
 - Sanction of Judge :
 - As to Bills and Notes.*
 - As to Compromising Claims.*
 - As to Other Proceedings.*
 - (x.) Application of Moneys and Securities in Hands of Official Liquidator.
 - Payment into Bank.
 - Neglect to Pay.
 - Account.
 - Investment of Moneys.
 - Dividends Thereon.
 - Depositing Securities.
 - Delivery out of Securities.
 - (xi.) Accounts.
 - Keeping.
 - Passing.
 - (xii.) Solicitor.
 - (xiii.) Costs.
 - (xiv.) Remuneration.
 - (xv.) Removal.
 - (xvi.) Custody of Property where no Liquidator Appointed.
- (m) *Creditors.*
- (1) Claims.
 - (i.) Directions as to Bringing in.
 - (ii.) What Claims Admissible.
 - (iii.) Application of Assets in Payment.
 - (iv.) Sales of Property.
 - (2) Advertisement for Creditors.
 - (3) Attendance of Creditors.
 - (4) List of Debts.
 - (5) Allowance of Debts.
 - (6) Proof of Debts.
 - (i.) Date of Valuation.
 - (ii.) Interest.

- (iii.) Costs of Proof.
- (7) Chief Clerk's Certificate upon Adjudication.
- (n) *Contributories.*
 - (1) Preparation and Verification of List.
 - (2) Varying List.
 - (3) Appointment for Judge to Settle List.
 - (4) Notice of Appointment.
 - (5) Settlement by Judge; Rectification of Register.
 - (i.) Laches on Part of Contributory.
 - (ii.) Costs when Liability is Disputed.
 - (6) Chief Clerk's Certificate of Settlement.
 - (7) Delivery of Property by Contributory.
 - (8) Payment of Debts by Contributory.
 - (9) Calls.
 - (i.) Power to Make.
 - (ii.) Application for.
 - (iii.) Notice of.
 - (iv.) Adjournment of Proceedings.
 - (v.) Payment.
 - (vi.) Payment into Bank.
 - Notice.
 - Affidavit of Liquidator.
 - Account of Liquidator to be Credited.
 - (vii.) Default by Representative Contributory.
- (10) Order Conclusive Evidence.
- (11) Rights of Contributories to be Adjusted.
- (12) Costs.
- (13) Absconding Contributory.
- (14) Powers of Court Cumulative.
- (o) *General Practice in Chambers.*
 - (1) General Practice to Apply.
 - (2) Judge at Chambers.
 - (3) Power of Judge.
 - (4) Register and File of Proceedings.
 - (5) Parties Entitled to Attend.
 - (6) Representative Parties.
 - (7) Name, &c., of Parties to be Registered.
- (p) *Evidence.*
 - (1) Affidavits.
 - (i.) Filing.
 - (ii.) Title.
 - (iii.) May be Sworn Abroad.
 - (2) Evidence of Books.
 - (3) Inspection of Books.
 - (4) Admission of Documents.
 - (5) Special Commissioners for Receiving Evidence.
 - (6) Examination of Persons in Scotland.
- (q) *Summonses, Notices, &c.*
 - (1) Title.
 - (2) How Served.
 - (3) Service not to be Invalidated.
- (r) *Orders.*
- (s) *Advertisements.*
- (t) *Fees.*
 - (1) Solicitor's.
 - (2) How Collected.
 - (3) Taxation of Costs.
- (u) *Dissolution.*
 - (1) Order for.

- (2) Minute.
 - (3) Disposal of Books, &c.
 - (v) *Termination of Winding-up.*
 - (1) Balance Sheet of Liquidator.
 - (2) Certificate of Chief Clerk.
 - (3) Deposit of Documents in Central Office.
 - (w) *Enforcement of Orders.*
 - (1) In what Manner.
 - (2) In Other Courts.
 - (3) Mode of Dealing with Orders.
 - (x) *Appeals.*
 - (1) From Winding-up Order [see APPEAL].
 - (2) From Orders during Winding-up.
 - (3) Who may Appeal.
 - (4) Time.
 - (5) Notice.
 - (y) *Incidental Powers.*
 - (1) Consulting Wishes of Creditors or Contributories.
 - (i.) Notice of Meetings.
 - (ii.) Votes at Meetings.
 - (iii.) Chief Clerk's Certificate Respecting Meetings.
 - (2) Sanctioning Arrangement.
 - (3) Summoning Officers, &c., to Inform as to Property.
 - (i.) Power to Summon.
 - (ii.) Examination of Parties.
 - (iii.) Production of Documents, &c.
 - (iv.) Lien on Documents, &c.
 - (v.) Refusal to Appear.
 - (4) Assessment of Damages against Delinquent Officers.
 - (5) Prosecution of Delinquent Officers.
- 2. VOLUNTARILY.**
- (a) *Application to the Court.*
 - (b) *Liquidator.*
 - (1) Appointment.
 - (2) Removal.
 - (c) *Exercise of Compulsory Process.*
 - (d) *Appeal.*
 - (e) *Effect.*
 - (f) *Adopting Previous Proceedings.*
 - (g) *Order for Criminal Prosecution.*
- 3. SUBJECT TO SUPERVISION OF COURT.**
- (a) *Voluntary Winding-up may be Continued Subject to Supervision of Court.*
 - (b) *Who may Petition.*
 - (c) *Wishes of Creditors to be Regarded.*
 - (d) *The Petition.*
 - (1) Title [see *sup.* 1 (c) (1)].
 - (2) Service.
 - (3) Verification.
 - (4) Advertisement.
 - (5) Furnishing Copies.
 - (6) Effect.
 - (7) Amendment.
 - (8) Transfer.
 - (9) Priority.
 - (10) Costs.
 - (e) *Hearing* [see *sup.* 1 (d)].
 - (f) *Winding-up Order*
 - (1) Generally [see *sup.* 1 (e)].
- [See *sup.* 1 (c)].

- (2) Copy for Registrar [see *sup.* 1 (e) (4)].
- (3) Advertisement and Service [see *sup.* 1 (e) (5)].
- (4) Effect.
 - (i.) Dispositions of Property [see *sup.* 1 (e) (6) (i.)].
 - (ii.) Actions.
 - (iii.) Process [see *sup.* 1 (e) (6) (iii.)].
- (g) *Staying and Transferring Winding-up and other Proceedings* [see *sup.* (f) (4) (iii.) ; and 1 (f)].
- (h) *Liquidators.*
 - (1) Additional Liquidators.
 - (i.) Power to Appoint.
 - (ii.) Person Appointed.
 - (2) Security [see *sup.* 1 (l) (3) (iv.)].
 - (3) Description.
 - (4) Powers.
 - (5) Remuneration [see *sup.* 1 (l) (3) (xiv.)].
 - (6) Removal.
- (i) *Contributories.*
 - (1) Calls.
 - (2) Order Conclusive Evidence [see *sup.* 1 (n) (10)].
 - (3) Costs [see *sup.* 1 (n) (12)].
 - (4) Absconding Contributory [see *sup.* 1 (n) (13)].
 - (5) Powers of Court Cumulative [see *sup.* 1 (n) (14)].
- (k) *General Practice in Chambers* [see *sup.* 1 (o)].
- (l) *Evidence* [see *sup.* 1 (p)].
- (m) *Summonses, Notices, &c.* [see *sup.* 1 (q)].
- (n) *Orders* [see *sup.* 1 (r)].
- (o) *Advertisements* [see *sup.* 1 (s)].
- (p) *Fees* [see *sup.* 1 (t)].
- (q) *Dissolution* [see *sup.* 1 (u)].
- (r) *Enforcement of Orders* [see *sup.* 1 (w)].
- (s) *Appeals.*
 - (1) From Winding-up Order [see APPEALS.]
 - (2) From Orders during Winding-up [see *sup.* 1 (x)].
- (t) *Incidental Powers* [see *sup.* 1 (y)].

II. UNREGISTERED COMPANIES (BY THE COURT).

- 1. WHAT COMPANIES.
- 2. UNDER WHAT CIRCUMSTANCES.
- 3. EFFECT OF WINDING-UP ORDER.
- 4. PROPERTY TO VEST IN OFFICIAL LIQUIDATORS.
- 5. APPLICATION OF PROVISIONS RELATING TO THE WINDING-UP OF REGISTERED COMPANIES.

III. LIFE ASSURANCE COMPANIES (SPECIAL PROVISIONS).

- 1. REGISTRATION.
- 2. HOW WOUND-UP.
 - (a) *Under what Circumstances.*
 - (1) Insolvency.
 - (2) Other Circumstances.
 - (b) *Calling Up of Capital.*
 - (c) *Who may Petition.*
 - (d) *The Petition.*
 - (e) *Hearing.*
 - (1) Security for Costs.
 - (2) *Prima facie* Case.
 - (f) *Reduction of Contracts in Lieu of Winding-up.*
 - (g) *Liquidator.*
 - (h) *Valuation of Policies and Annuities.*
 - (i) *Subsidiary Company.*

- (1) May be Wound-up in conjunction with Principal Company.
- (2) Who may Petition.
- (3) Commencement of Winding-up.
- (4) Liquidator.
- (5) Regard to Circumstances.
- (6) Consideration, in Ordering Winding-up, when not included in Original Winding-up.
- (7) When being Wound-up by Different Branches of Court.
- (8) May be Wound-up together or in Separate Groups.

IV. RAILWAY COMPANIES.

I. REGISTERED COMPANIES AND ASSOCIATIONS UNDER THE COMPANIES ACT, 1862.

1. BY THE COURT.

(a) *Under what Circumstances.*

(1) Whenever the company has passed a special resolution requiring the company to be wound-up by the court: (C. A., 1862, s. 79 (1).)

(2) Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year: (C. A., 1862, s. 79 (2).)

The jurisdiction to wind up a company which does not commence its business within a year from its incorporation is discretionary, and an order may be refused if the delay is satisfactorily accounted for: (Buckley, 3rd edit. 169.)

Delay arising from a wish to wait for a time when business can be carried on more profitably is not sufficient: (*Re Middlesborough Company*, L. Rep. 14 Ch. Div. 104; 42 L. T. Rep. N. S. 609.)

(3) Whenever the members are reduced in number to less than seven: (C. A., 1862, s. 79 (3).)

(4) Whenever the company is unable to pay its debts: (C. A., 1862, s. 79 (4).)

A company shall be deemed to be unable to pay its debts,

- (i.) Whenever a creditor, by assignment or otherwise, to whom the company is indebted, at law or in equity, in a sum exceeding fifty pounds then due, has served on the company, by leaving the same at their registered office, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the reasonable satisfaction of the creditor: (C. A., 1862, s. 80 (1).)

A petitioner, who relies upon statutory demand and non-payment for twenty-one days, must allow the period to expire before presenting his petition, otherwise he has no ground for his petition.

Neglect of a statutory notice must be proved, and that it took place before petition presented: (Buck. 174.)

If the petitioning creditor's debt be less than 50*l.*, he must show his right to a winding-up order otherwise than by non-payment of his debt three weeks after demand: (Buck. 177.)

- (ii.) Whenever, in England and Ireland, execution or other process issued on a judgment, decree, or order obtained in any court in favour of any creditor, at law or in equity, in any proceeding instituted by such creditor against the company, is returned unsatisfied in whole or in part;

- (iii.) Whenever, in Scotland, the *induciae* of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest have expired without payment being made;
- (iv.) Whenever it is proved to the satisfaction of the court that the company is unable to pay its debts: (C. A., 1862, s. 80.)
- (5) Whenever the court is of opinion that it is just and equitable that the company should be wound-up: (C. A., 1862, s. 79 (5).)

This clause is interpreted only in reference to matters *ejusdem generis* as those in the preceding clauses.

If the company were plainly and commercially—though not in a technical sense—insolvent, the court would probably consider it “just and equitable” to wind-up the company. Thus, if the company is unable to meet its current demands,

If the company never had a proper foundation, and was a mere “bubble company,” the court considers it comes within this clause.

It is no bar to the jurisdiction of the court to wind-up a company that all the operations of the company are in a foreign country, if the management be in this country, and the business be substantially transacted here: (Buck. 170-2.)

(b) Who may Petition.

[A petition] may be presented by the company, or by any one or more creditor or creditors, contributory or contributories of the company, or by all or any of the above parties, together or separately: (C. A. 1862, s. 82.)

If the petitioner dies before the hearing of the petition, his legal personal representative may obtain an order to carry it on: (Buck. 471.)

(1) Shareholders' Petition.

No contributory . . . shall be capable of presenting a petition . . . unless the members of the company are reduced in number to less than seven, or unless the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him and registered in his name for a period of at least six months during the eighteen months previously to the commencement of the winding-up, or have devolved upon him through the death of a former holder.

Provided that where a share has, during the whole or any part of the six months, been held by or registered in the name of the wife of a contributory, either before or after her marriage, or by or in the name of any trustee or trustees for such wife or for the contributory, such share shall, for the purposes of [the] section, be deemed to have been held by and registered in the name of the contributory: (C. A., 1867, s. 40.)

A shareholder *de jure*, who by the company's default is not registered as a shareholder *de facto*, may petition.

The petition of a shareholder, who is in arrear in the payment of calls, due from him to the company, may, on that account, be dismissed.

A holder of fully paid-up shares may present a petition: (Buck. 177-8.)

A petition to wind-up a company, presented by a shareholder who has not paid his calls, will be heard if he undertakes to pay before the order is made. A petition by a fully paid-up shareholder to wind-up a company which it alleges to be insolvent is demurrable. *Secus*, if it alleges that the insolvency is caused by the fraud of the directors, and that enough can be recovered from them under sect. 165 of the Companies Act, 1862, to make the company solvent: (*Re Diamond Fuel Company*, L. Rep. 13 Ch. Div. 400; 41 L. T. Rep. N. S. 572; 49 L. J. 301, Ch.; 28 W. R. 309.)

It is not imperative on the court to issue a winding-up order, and it will exercise its judicial discretion if the application be made by a shareholder.

If the court is satisfied that the petition is presented in bad faith it will dismiss the petition. Where the number of shareholders is very small, and there are no difficulties in the way of a voluntary winding-up, the court will, in its discretion, refuse to make an order on a shareholder's petition: (Buck. 165.)

Where, on a winding-up petition, fraud is alleged, the facts constituting the fraud must be stated, although it is not necessary to state the evidence of the facts alleged. Where there is only a vague allegation of fraud, evidence of the act of fraud is not admissible. *Quere*, whether a winding-up petition can be maintained, where the petitioner, a fully paid-up shareholder, alleges there are no available assets except those to be obtained by the successful prosecution of proceedings against directors and others to get back money they were liable to pay by reason of fraud: (*Re Rica Gold Washing Company*, L. Rep. 11 Ch. Div. 36; 40 L. T. Rep. N. S. 531.)

(2) Creditors' Petition.

Where a creditor, who cannot obtain payment of his debt, comes for a winding-up order, the court must, *ex debito justitiæ*, make it, if he brings his case within the Act. But the court may order the petition to stand over to give the company an opportunity of arranging for payment of its debts, when there is reasonable hope of such an arrangement being made.

If also the company has no assets that a winding-up order can reach, and other creditors oppose, the court may refuse an immediate order. For the court has, in all cases of winding-up, complete discretion, and may consider what is most for the interest of all parties.

A winding-up petition is not a legitimate method for a creditor to adopt in order to obtain payment of a debt which is *bonâ fide* disputed by the company, and any attempts so to enforce payment will be discouraged by the court (Buck. 166-8); and an injunction will be granted to restrain the presentation of the petition: (*John Brown and Co. v. Keeble*, W. N., 1879, p. 173.)

In a proper case, however, the dispute will be decided by the court at the hearing of the petition, and it will make a winding-up order without waiting until the debt has been established at law. But if the court sees that the debt is disputed on some ground which is not reasonable and substantial, it will itself decide on the question of fact, and will make a winding-up order, with a direction that it be not drawn up for some short time, in order to give the company the opportunity to meet the demand. If the creditor have, by reason of the constitution of the company, a special remedy by the appointment of a receiver, he cannot claim an order *ex debito justitiæ* until the special remedy has been tried and has failed: (Buck. 166-168.)

A creditor who has presented and advertised a petition is not bound to bring the petition to a hearing, but he is entitled to dismiss it, or to agree with the company to its withdrawal upon terms: (Buck. 179.)

Where bonds with coupons attached were issued by a limited company, each bondholder being entitled to a "bonus share" under a trust deed by which the company bound itself to pay to the trustees interest on the bond, and an annual sum as sinking fund to provide for the repayment of the bonds, each bond containing a covenant by the company with the trustees to pay the bearer thereof 100*l.*, and to pay interest to the holder of the coupon, it was held (1), that a bondholder was not entitled to a winding-up order in respect of unpaid interest, on the ground that, as he had no right of action except through the trustees, he was not a creditor of the company either in respect of the bond as to principal, or of the

coupon as to interest; and (2) that even if he were a creditor, inasmuch as a large majority of the bondholders opposed the petition, and he would be in no better a position by obtaining his order, the court had a discretion under sect. 91 of the Act of 1862 [see *post*, y (1)], which in this case was properly exercised by a refusal of the winding-up order: (*Re Uruguay, &c., Railway Company*, 41 L. T. Rep. N. S. 267; L. Rep. 11 Ch. Div. 372.)

(3) Security for Costs.

A petitioner residing out of the jurisdiction (including Scotland) must give security for costs, and the amount under the old practice was 100*l*. Under the new practice the amount is discretionary, but special reason ought to be shown if more than 100*l*. is asked for: (Buck. 178.)

(c) *The Petition.*

Any application to the court for the winding-up of a company . . . shall be by petition: (C. A., 1862, s. 82.)

A winding-up . . . by the court shall be deemed to commence at the time of the presentation of the petition . . . : (C. A., 1862, s. 84.)

Where the order is made upon more than one petition, the order, and therefore the commencement of the winding-up, dates from the earliest: (Buck. 183.)

(1) Title.

Every petition for the winding-up of any company by the court, or subject to the supervision of the court, shall be intituled in the matter of "The Companies Acts, 1862 and 1867," and of the company to which such petition shall relate, describing the company by its most usual style or firm: (G. O. 1868, r. 1.)

(2) Service.

Every . . . petition shall, unless presented by the company, be served at the registered office, if any, of the company, and if no registered office, then at the principal or last known principal place of business of the company, if any such can be found, upon any member, officer, or servant of the company there, or in case no such member, officer, or servant can be found there, then by being left at such registered office or principal place of business, or by being served on such member or members of the company as the court may direct: (G. O., 1862, r. 3.)

Where service cannot be effected according to the rule, on account of there being no office, &c., the court will direct the manner of service: (Buck. 473.)

Where a company was in voluntary liquidation and its registered office was unoccupied, and there was no one on the premises upon whom service of a petition for a compulsory winding-up could be effected, service of the petition upon the liquidator in the voluntary winding-up was held sufficient: (*Re Stewart and Bro.*, W. N., 1880, p. 15.)

A petition for winding-up a company had not been served at the registered office of the company, but service had been accepted by a solicitor on its behalf, and he had been instructed to take proceedings with reference to it at a meeting attended by all the directors. Held that, as the solicitor had been duly authorised to act for the company, his acceptance of service rendered it unnecessary to serve the petition at the registered office. Rule 3, G. O., 1862 (see *sup.*), which provides for service of a petition at the registered office of the company, is not imperative, but is merely directory: (*Re Regent United Service Stores Association*, L. Rep. 8 Ch. Div. 75, 616; 38 L. T. Rep. N. S. 84, 130, 493; 47 L. J. 677, Ch.)

(3) Verification.

Every petition for the winding-up of any company by the court, or subject to the supervision of the court, shall be verified by an affidavit referring thereto . . . made by the petitioner, or by one of the petitioners, if more than one, or, in case the petition is presented by the company, by some director, secretary, or other principal officer thereof; and . . . sworn after and filed within four days after the petition is presented, and such affidavit shall be sufficient *prima facie* evidence of the statements in the petition: (G. O., 1862, r. 4.)

For the form see G. O., 1862, sch. 3, form No. 2.

The time for filing the affidavit may, in a proper case, be enlarged. In the case of a corporation, other than a liquidating company being a petitioner, an order must be obtained allowing the affidavit to be made by some officer of the petitioning company, otherwise the affidavit will be insufficient: (Buck. 474-5.)

Where one company presents a petition to wind-up another company, it seems unnecessary that leave should be obtained for the affidavit to be made by the manager in support of the petition, but on application being made leave was granted: (*Re Cakemore Causeway, &c., Company*, W. N., 1880, p. 15.)

(4) Advertisement.

Every . . . petition shall be advertised seven clear days before the hearing, as follows:

- (i.) In the case of a company whose registered office, or if there shall be no such office, then whose principal, or last known principal place of business is or was situate within ten miles from Lincoln's Inn Hall, once in the *London Gazette*, and once at least in two London daily morning newspapers.
- (ii.) In the case of any other company, once in the *London Gazette*, and once at least in two local newspapers circulating in the district where such registered office, or principal or last known place of business, as the case may be, of such company is or was situate.

The advertisement shall state the day on which the petition was presented, and the name and address of the petitioner, and of his solicitor and London agent (if any): (G. O., 1862, r. 2.)

The seven days may be counted in the vacation. Advertisement on a Friday for hearing on the following Friday is not sufficient; but the court may, under special circumstances, waive the irregularity.

It does not invalidate the petition that the advertisements have appeared on the morning of the day on which the petition is presented, and have thus actually preceded by a few hours the presentation of the petition.

An error in the name of the company in the advertisement renders the advertisement absolutely void.

The advertisement of the petition is notice to all the world of its presentation, that is, if the parties have had such reasonable time as that knowledge of the advertisement may be imputed to them; and is notice to parties interested, if not properly represented, to appear: (Buck. 470-1.)

(5) Furnishing Copies.

Every contributory or creditor of the company shall be entitled to be furnished, by the solicitor to the petitioner, with a copy of the petition, within twenty-four hours after requiring the same, on paying at the rate

of fourpence per folio of seventy-two words for such copy : (G. O., 1862, r. 5.)

(6) Amendment.

The petition may by leave be amended at the hearing : (Buck. 195.)

If petitioner has petitioned in a wrong character, the petition may be amended, and an order made upon it : (Buck. 180.)

(7) Transfer.

Where several petitions are presented in different branches of the court, they are transferred to that branch of the court where the first petition was presented : (Buck. 180.)

(8) Priority.

Where two or more petitions are presented, they will take priority according to their dates of advertisement, not according to their dates of presentation : (Buck. 182.)

(9) Costs.

The order usually made as to costs gives them to the petitioner if the petition succeeds, and to the company if it fails, and further gives one set of costs to the contributories, and one to the creditors who support the winning side. If the petition succeeds, these costs are given out of the company's estate ; if it fails, they are given against the petitioner.

There is no exception to deprive of their costs creditors appearing on a shareholders' petition which fails. They are invited by the petitioner to appear by the advertisement of the petition, and if he fails he must pay their costs : (Buck. 197.)

A creditor who appears upon an abandoned petition for winding-up a company is entitled to his costs of appearance where the circumstances indicate an invitation to appear : (*Re Anglo-Virginian Freehold Land Company*, W. N., 1880, p. 154.)

Costs were given to a creditor who opposed a petition by a paid-up shareholder to wind-up an insolvent company : (*Re Carnarvonshire Slate Company*, 40 L. T. Rep. N. S. 35.)

Where on a creditor's winding-up petition the company consented to an order, the court declined to give costs to creditors and contributories who supported the petition, it appearing that all the counsel, including counsel for the company, had been instructed by the same solicitor : (*Re Military and General Tailoring Company*, 47 L. J. 141, Ch.)

Where successive petitions are presented in ignorance of prior petitions, the court in making the order allows one set of costs on all the petitions. Where, at desire, a shareholder's petition is dismissed, the dismissal, if at the time of the presentation of the petition there was a *bonâ fide* case for petitioning, may be without costs : (Buck. 197.)

The court may direct the petition to be filed in order to enable the costs of a person who has appeared thereon to be paid : (*Re Northfleet Brick Company*, W. N., 1880, p. 83.)

(d) Hearing.

Upon hearing the petition the court may dismiss the same with or without costs, may adjourn the hearing conditionally or unconditionally, and may make an interim order, or any other order that it deems just : (C. A., 1862, s. 86.)

The only persons entitled to be heard upon the petition are the company, its creditors and contributories, and although the court may, in its discretion, hear other persons who have an interest in the matter, yet such persons can be heard only as *amici curiæ*, and have no *locus standi* to appeal against the decision. At the hearing of the petition any creditor

or shareholder will be heard to support or oppose; but this does not apply to applications made in the winding-up: (Buck. 195.)

(e) *Winding-up Order.*

(1) In Case of Two or More Companies.

Two companies cannot be included in one winding-up order: (Buck. 199.)

(2) On Several Petitions.

Where several petitions are presented under justifiable circumstances, an order is made on all the petitions: (Buck. 200.)

When a winding-up order is made upon two petitions, the advertisements of which appear in the same number of the *London Gazette*, the petitioner whose petition has been first presented is entitled to the carriage of the order: (*Re Storforth Lane Colliery Company*, L. Rep. 10 Ch. Div. 487.)

(3) Appointment of Liquidator [see *post* (l) (3)].

(4) Copy for Registrar.

When an order has been made for winding-up . . . a copy of such order shall forthwith be forwarded by the company to the Registrar of Joint Stock Companies, who shall make a minute thereof in his books relating to the company: (C. A., 1862, s. 88.)

(5) Advertisement and Service.

Every order for . . . winding-up of a company by the court or subject to its supervision, shall, within twelve days after the date thereof, be advertised by the petitioner once in the *London Gazette*, and shall be served upon such persons (if any) and in such manner as the court may direct: (G. O., 1862, r. 6.)

Where from delay in obtaining the order the time has expired, leave may be given to post-date the order; but leave will not be given except in the presence of all parties: (Buck. 195.)

(6) Effect.

(i.) Dispositions of Property.

Where any company is being wound-up by the court or subject to the supervision of the court, all dispositions of the property, effects, and things in action of the company, and every transfer of shares, or alteration in the status of the members of the company made between the commencement of the winding-up and the order for winding-up, shall, unless the court otherwise orders, be void: (C. A., 1862, s. 153.)

(ii.) Actions.

When an order has been made for winding-up . . . no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the court, and subject to such terms as the court may impose: (C. A., 1862, s. 87.)

No suit, action, or other legal proceeding shall be commenced or proceeded with against any contributory of the company in respect of any debt of the company, except with the leave of the court, and subject to such terms as the court may impose: (C. A., 1862, s. 198.)

(iii.) Process.

Where any company is being wound-up by the court or subject to the supervision of the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents: (C. A., 1862, s. 163.)

(f) *Staying and Transferring Winding-up and other Proceedings.*(1) *Power to Stay Winding-up Proceedings.*

The court may at any time after an order has been made for winding-up . . . upon the application by motion of any creditor or contributory of the company, and upon proof to the satisfaction of the court that all proceedings in relation to such winding-up ought to be stayed, make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as it deems fit: (C. A., 1862, s. 89.)

(2) *Power to Transfer Winding-up Proceedings to Bankruptcy Court.*

. . . . Where the court . . . makes an order for winding-up . . . it may, if it thinks fit, direct all subsequent proceedings . . . to be had in the Court of Bankruptcy: (C. A., 1862, s. 81.)

(3) *Power to refer Winding-up Proceedings to County Court.*

Where the [Chancery Division] makes a [winding-up order], it may, if it thinks fit, direct all subsequent proceedings to be had in a County Court . . . and thereupon such County Court shall . . . be deemed to be "the court" . . . and shall have . . . all the jurisdiction and powers of the [Chancery Division]: (C. A., 1867, s. 41.)

(4) *Transfer from one County Court to another.*

If during the progress of a winding-up it is made to appear to the [Chancery Division] that the same could be more conveniently prosecuted in any other County Court, it shall be competent for the [Chancery Division] to transfer the same to such other County Court, and thereupon the winding-up shall proceed in such other County Court: (C. A., 1867, s. 42.)

(5) *Staying and Transferring Actions, &c.*(i.) *Before Winding-up Order.*

As formerly the Court of Chancery might upon the application of the company or any creditor or contributory, restrain actions, &c., against the company, so the court in which such actions are pending may, upon the application of the company, &c., stay the actions, &c.: (J. A., 1873, s. 24 (5).)

See *Re Artistic Colour Company*, L. Rep. 14 Ch. Div. 502; 42 L. T. Rep. N. S. 802.

See also STAYING PROCEEDINGS.

(ii.) *After Winding-up Order.*

When [a winding-up] order has been made . . . the judge in whose court such winding-up . . . shall be pending shall have power without any further consent to order the transfer to such judge of any action pending in any other division brought or continued by or against [the] company: (J. A., 1873, O. L.I., r. 2a.; see Buck. 201.)

See TRANSFER II., 2 (b) (4).

Unless the application is made soon after the winding-up to stay an action in which execution has been issued, the order will only be made on condition of the company paying the amount of the execution into court: (*Everingham v. Co-operative Beer Company*, W. N., 1880, p. 99.)

Except under special circumstances, a mortgagee will have leave, as a matter of course, to continue a foreclosure action, unless the company offer to give him at once a foreclosure or sale, as the case may be: (Buck. 202.)

An order in a winding-up, directing inquiries to ascertain the priorities of the incumbrancers of the company's property, raises no equity to prevent an action for foreclosure being brought by persons claiming to be first mortgagees, in whose presence the order had been made, and who had

obtained an order to attend the proceedings and to have their costs made costs in the winding-up; but leave to bring the action was given on the terms that, notwithstanding the latter order, the costs of attending the proceedings should be in the discretion of the court: (*Re Hamilton's Windsor Ironworks Company, Ex parte General Credit and Discount Company*, 39 L. T. Rep. N. S. 658; 57 W. R. 827.)

Leave to commence an action against a company in liquidation should not be given on an *ex parte* application: (*Williams v. Bristol Marine Insurance Company*, 39 L. J. 504, Ch.; dissented from in *Western and Brazilian Telegraph Company v. Bibby*, 42 L. T. Rep. N. S. 822.)

(g) *Carrying Order into Chambers.*

A copy of every order certified to be a true copy thereof as passed and entered, shall be left by the petitioner at the chambers of the judge, within ten days after the same shall have been passed and entered, and in default thereof any other person interested in the winding-up may leave the same, and the judge may, if he thinks fit, give the carriage and prosecution of the order to such person: (G. O., 1862, r. 7.)

(h) *Summons to Proceed.*

Upon such copy being left a summons shall be taken out to proceed with the winding-up and be served upon all parties who may have appeared upon the hearing of the petition: (G. O., 1862, r. 7.)

(i) *Directions on Return of Summons.*

Upon the return of such summons, a time shall, if the judge thinks fit, be fixed for the appointment of an official liquidator, and for the proof of debts, and for the list of contributories to be brought in, and directions may be given as to the advertisements to be issued for all or any of such purposes, and generally as to the proceedings and the parties to attend thereon: (G. O. 1862, r. 7.)

(k) *Adjournment.*

The proceedings under the order shall be continued by adjournment, and, when necessary, by further summons, and any such direction as aforesaid may be given, added to, or varied, at any subsequent time, as may be found necessary: (G. O. 1862, r. 7.)

(l) *Liquidators.*

(1) *Power to Appoint.*

For the purpose of conducting the proceedings in winding-up and assisting the court therein, there may be appointed an official liquidator or official liquidators; and the court may appoint such person or persons, either provisionally or otherwise, as it thinks fit; in all cases if more persons than one are appointed the court shall declare whether any act to be done by the official liquidator is to be done by all or any one or more of such persons: (C. A. 1862, s. 92.)

(2) *Provisional Liquidator.*

(i.) *Appointment of.*

The court may at any time after the presentation of [the] petition, and before the first appointment of liquidators, appoint provisionally an official liquidator of the estate and effects of the company: (C. A., 1862, s. 85.)

A provisional liquidator will not in general be appointed before the hearing of the petition, unless the company be shown to be insolvent, or unless the petition be presented by the company itself, or be shown to be unopposed. But in case of urgency the court will appoint a provisional liquidator to take possession of and protect the assets upon his undertaking to give security forthwith: (Buck. 194.)

(ii.) Application for.

Where it is desired to appoint provisionally an official liquidator [the] application may at any time after the presentation of the petition be made by summons, without advertisement or notice to any person, unless the judge shall otherwise direct; and such provisional official liquidator may, if the judge shall think fit, be appointed without security: (G. O., 1862, r. 15.)

(iii.) Powers.

Where an official liquidator is provisionally appointed [the court] may limit and restrict his powers by the order appointing him: (C. A., 1862, s. 96.)

(iv.) Rules Applicable.

All the rules relating to official liquidators shall, as far as the same are applicable, and subject to the directions of the [court] in each case, apply to provisional official liquidators: (G. O., 1862, r. 59.)

(3) Official Liquidator.

(i.) Person Appointed.

Generally the person who is nominated by the petitioner will be appointed, and the choice of the official liquidator by the person having the carriage of the winding-up order would not be interfered with, except on the ground of personal disqualification: (Buck. 211.)

Where an order has been made for the winding-up of a company subject to the supervision of the court, and such order is afterwards superseded by an order directing the company to be wound-up compulsorily, the court may in such last-mentioned order, or in any subsequent order, appoint the voluntary liquidators or any of them, either provisionally or permanently, and either with or without the addition of any other persons, to be official liquidators: (C. A., 1862, s. 152.)

A compulsory order will generally continue the voluntary liquidator as official liquidator: (Buck. 275.)

(ii.) When Appointed.

The official liquidator may be appointed at the hearing of the petition, but he will not be so appointed except by consent (*Commercial Discount Company*, 32 Beav. 198; 11 W. R. 353; 1 N. R. 416); and the present practice is to direct a reference to chambers: (Buck, 210.)

The liquidator will be appointed in court on the request of a majority of the creditors, notwithstanding the opposition of the others: (*Re South Kensington Stores*, W. N. 1880, p. 199.)

An official liquidator had been appointed in chambers. Upon motion made on behalf of a very large majority of the unsecured creditors of the company, who alone were interested in the realisation of the assets, two creditors, who were willing to act without remuneration, were appointed liquidators instead of the liquidator already appointed: (*Re Association of Land Financiers*, L. Rep. 10 Ch. Div. 269; 27 W. R. 224.)

(iii.) How Appointed.

The judge may appoint [an] official liquidator, without previous advertisement, or notice to any party, or fix a time and place for [such] appointment, and may appoint or reject any person nominated at such time and place, and appoint any person not so nominated: (G. O., 1862, r. 8.)

The judge may, on the return of the summons to proceed, fix the time for the appointment: (see *sup.* (i).)

[But] when a time and place are fixed for the appointment of an official liquidator, such time and place shall be advertised in such manner as the judge shall direct, so that the first or only advertisement shall be

published within fourteen days, and not less than seven days before the day so fixed : (G. O., 1862, r. 9.)

The official liquidator shall be appointed by order : (G. O., 1862, r. 11.)

(iv.) Security.

Power to Order.

The court may determine whether any and what security is to be given by any official liquidator on his appointment : (C. A., 1862, s. 92.)

How Given.

. . . . Security [shall be given] by entering into a recognisance with two or more sufficient sureties, in such sum as the judge may approve ; and the judge may, if he shall think fit, accept the security of any guarantee society established by charter or Act of Parliament in England, in lieu of the security of such sureties as aforesaid, or of any of them : (G. O., 1862, r. 10.)

Time.

Unless he shall have given security, a time shall be fixed by such order within which he is to do so : (G. O., 1862, r. 11.)

Certificate of Chief Clerk.

When an official liquidator has given security the same shall be certified by the chief clerk, as in the case of a receiver appointed in a cause subject to giving security : (G. O., 1862, r. 12.)

Fresh Security.

The official liquidator shall, on each occasion of passing his account, and also whensoever the judge may so require, satisfy the judge that his sureties are living, and resident in Great Britain, and have not been adjudged bankrupt or become insolvent, and, in default thereof, he may be required to enter into fresh security within such time as shall be directed [see Accounts, *post* (xi.)] : (G. O., 1862, r. 13.)

(v.) Advertisement of Appointment.

Every appointment of an official liquidator shall be advertised, in such manner as the judge shall direct, immediately after he has been appointed, and has given security : (G. O., 1862, r. 14.)

(vi.) Description.

The official liquidator shall be described by the style of the official liquidator of the particular company in respect of which he is appointed, and not by his individual name : (C. A., 1862, s. 94.)

(vii.) Duties.

[The official liquidator] shall take into his custody, or under his control, all the property, effects, and things in actions to which the company is, or appears to be, entitled, and shall perform such duties in reference to the winding-up of the company as may be imposed by the court : (*Id.*)

(viii.) Representative Character.

The official liquidator represents at the same time both the creditors and the company. Although the liquidator is substituted for and enforces the rights of the creditors in right of the company, yet equities which might have been set up against the company cannot prevail against him as representing the creditors : (Buck. 216.)

The official liquidator, resisting a claim in the winding-up, is in the same position as the defendant in an action, and is entitled to the leave asked under Order XXXI., r. 4, to deliver interrogatories, as a matter of right, without making out a special case for the granting of such leave : (*Re Alexandra Palace Company*, L. Rep. 16 Ch. Div. 58 ; 43 L. T. Rep. N. S. 406 ; 50 L. J. 7, Ch.)

An action was commenced in the Exchequer Division against the liquidator of a company which was being wound-up in the Chancery Division, claiming damages for injuries sustained through the negligence of the company. A motion by the liquidator to transfer the action from the Exchequer Division to the Chancery Division was refused on the plaintiff undertaking to amend his writ by suing the liquidator personally; the plaintiff's right to prove against the company in the winding-up not to be prejudiced thereby: (*Re Thames Ferry Company*, 40 L. T. Rep. N. S. 422.)

(ix.) Powers.

Without Court's Sanction.

The court may provide by any order that the official liquidator may exercise any of the powers [given to him (*infra*)] without the sanction or intervention of the court: (C. A., 1862, s. 96.)

Upon the application of a creditor presenting a winding-up petition, assented to by the company, the court, in order to save expense, declared that all the acts, required or authorised by the Companies Acts, 1862, and 1867, to be done by the official liquidator, might be done without the previous sanction or interference of the court: (*Re Rochdale Property, &c., Company*, L. Rep. 12 Ch. Div. 775; 41 L. T. Rep. N. S. 16.)

For form of order giving official liquidator power to do all acts required or authorised to be done without the previous sanction of the court, see *Re Rochdale Property, &c., Company, supra*.)

With Court's Sanction.

The official liquidator shall have power, with the sanction of the court, to do [*inter alia*] the following things:

To bring or defend any action, suit, or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company;

To carry on the business of the company, so far as may be necessary for the beneficial winding up of the same;

To do and execute all such other things as may be necessary for winding up the affairs of the company and distributing its assets: C. A., 1862, s. 95.)

In order to give the court jurisdiction to sanction a contract by the liquidator in carrying on the business of the company under the above section, it must be shown that its object is the beneficial winding-up of the company, and that it is highly expedient for that purpose. Where the object of a proposed business contract was to facilitate the reconstruction of the company, it was held that the court had no jurisdiction to sanction the contract: (*Re Wreck Recovery and Salvage Company*, L. Rep. 15 Ch. Div. 353.)

General Scheme of Liquidation.

The liquidators may, with the sanction of the court, where the company is being wound-up by the court or subject to the supervision of the court, . . . pay any classes of creditors in full, or make such compromise or other arrangement as the liquidators may deem expedient with creditors or persons claiming to be creditors, or persons having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable: (C. A., 1862, s. 159.)

Compromise of Claims, &c.

The liquidators may, with the sanction of the court, where the company is being wound-up by the court or subject to the supervision of the court,

... compromise all calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and all claims, whether present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and any contributory or alleged contributory, or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets of the company or the winding-up of the company, upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon, with power for the liquidators to take any security for the discharge of such debts or liabilities, and to give complete discharges in respect of all or any such calls, debts, or liabilities : (C. A., 1862, s. 160.)

The court has no jurisdiction to compel the liquidator to consent to a compromise with a contributory. The compromise can only be made with the consent both of the liquidator and of the court : (Buck. 314.)

A creditor of a company took out a summons in the winding-up to enforce his security. Negotiations for a compromise having taken place the summons was ordered to stand over generally, to be restored to the list on application. A compromise was agreed upon and sanctioned by the judge. The creditor not having fully carried out the terms of the agreement, the liquidator took out a summons in the winding-up to enforce it. Held, that the creditor by his summons had submitted the determination of his rights to the court in the winding-up; that that summons was still a pending matter; and that the court had jurisdiction to enforce the compromise against the creditor by summons in the winding-up : (*Re Gaudet Frères Steamship Company*, 41 L. T. Rep. N. S. 503.)

Sanction of Judge.

As to Bills and Notes.

The sanction of the judge to the drawing, accepting, making, and indorsing of any bill of exchange or promissory note by any official liquidator, shall be tested by a memorandum on such bill of exchange or promissory note, signed by the chief clerk of the judge : (G. O., 1862, r. 48.)

As to Compromising Claims.

Every application for the sanction of the judge to a compromise with any contributory or other person indebted to the company, shall be supported by the affidavit of the official liquidator that he has investigated the affairs of such contributory or person, and stating his belief that the proposed compromise will be beneficial to the company, and his reasons for such belief; and the sanction of the judge thereto shall be testified by a memorandum, signed by the chief clerk of the judge, on the agreement of compromise, unless any party shall desire to appeal from the decision of the judge, in which case an order shall be drawn up for that purpose : (G. O., 1862, r. 49.)

As to Other Proceedings.

The direction or sanction of the judge for any other proceeding or act to be taken or done by the official liquidator, shall be obtained upon summons, and an order shall be drawn up thereon, unless the judge shall otherwise direct : (G. O., 1862, r. 50.)

(x.) Application of Moneys and Securities in Hands of Official Liquidator.

Payment into Bank.

The order [appointing the official liquidator] shall direct that all moneys to be received [by him] shall be paid into the Bank of England,

immediately after the receipt thereof, to the account of the official liquidator of the company, and an account shall be opened there accordingly; and an office copy of the order shall be lodged at the Bank of England: (G. O., 1862, r. 11.)

Neglect to Pay.

If any official liquidator shall not pay all the moneys received by him into the Bank of England, to the account of the official liquidator of the company, within seven days next after the receipt thereof, unless the judge shall have otherwise directed, such official liquidator shall be charged in his account with ten shillings for every 100*l.*, and a proportionate sum for any larger amount, retained in his hands beyond such period, for every seven days during which the same shall have been so retained, and the judge may, for any such retention, disallow the salary or remuneration of such official liquidator: (G. O., 1862, r. 36.)

Account.

All moneys, bills, notes, and other securities paid and delivered into the Bank of England or any branch thereof in the event of a company being wound-up by the court, shall be subject to such order and regulation for the keeping of the account of such moneys and other effects, and for the payment and delivery in, or investment and payment and delivery out, of the same as the court may direct: (C. A., 1862, s. 104.)

Investment of Moneys.

All or any part of the money for the time being standing to the credit of the account of the official liquidator at the Bank of England, and not immediately required for the purposes of the winding-up, may be invested in the purchase of Bank 3*l.* per Cent. Annuities, Reduced 3*l.* per Cent. Annuities, New 3*l.* per Cent. Annuities, or New 2*l.* 10*s.* per Cent. Annuities, in the name of the official liquidator, or in the purchase of Exchequer Bills. All such investments shall be made by the Bank of England, upon a request signed by the official liquidator, and countersigned by the chief clerk of the judge, and which request shall be a sufficient authority for debiting the account with the purchase money; and such Exchequer Bills, and in case of an exchange thereof any new Exchequer Bills shall be retained by or deposited with the Bank of England, in the name and on behalf of the official liquidator; and such Annuities or Exchequer Bills shall not afterwards be sold or transferred or otherwise dealt with except upon a direction for that purpose, signed by the official liquidator, and countersigned by the chief clerk of the judge, or under an order to be made by the judge: (G. O., 1862, r. 43.)

Dividends thereon.

All dividends and interest to accrue due upon any such Annuities shall from time to time be received by the Bank of England, under a power of attorney to be executed by the official liquidator, and placed to the credit of the account of such official liquidator; and such of the Exchequer Bills as shall from time to time be in course of payment, shall be delivered by the Bank of England to one of their cashiers, who is to receive the interest due thereon, and exchange the same for new bills, in case such new bills are issued, or otherwise to receive the principal and interest due on such of the said bills, so in course of payment, as cannot be exchanged, and pay the said interest, or principal and interest, as the case may be, into the Bank of England to the credit of the account of the official liquidator of the company: (G. O., 1862, r. 44.)

Depositing Securities.

All bills, notes, and other securities payable to the company or to the official liquidator thereof, shall, as soon as they shall come to the hands of such official liquidator, be deposited by him in the Bank of England for the purpose of being presented by the bank for acceptance and payment, or for payment only, as the case may be : (G. O., 1862, r. 37.)

Delivery out of Securities.

All bills, notes, and other securities delivered into the Bank of England shall be delivered out upon a request signed by the official liquidator, and countersigned by the chief clerk of the judge ; and moneys placed to the account of the official liquidator shall be paid out upon cheques or orders, signed by the official liquidator, and countersigned by the chief clerk of the judge : (G. O., 1862, r. 42.)

(xi.) Accounts.

Keeping.

The official liquidator shall, with all convenient speed after he is appointed, proceed to make up, continue, complete, and rectify the books of account of the company ; and shall provide and keep such books of account as shall be necessary, or as the judge may direct, for the purposes aforesaid, and for showing the debts and credits of the company, including a ledger which shall contain the separate accounts of the contributories, and in which every contributory shall be debited from time to time with the amount payable by him in respect of any call : (G. O., 1862, r. 17.)

[At the Rolls] it is particularly requested that the items in accounts and the names in list of creditors and contributories, may be numbered consecutively, and that the same number may not be repeated either in different part of the same account or list or in any supplementary account or list.

(Notice, July, 1880, 70 L. T. 34.)

Passing.

The accounts of the official liquidator shall be left at the judge's chambers at the times directed by the order appointing him, and at such other times as may from time to time be required by the judge, and such accounts shall, upon notice to such parties (if any) as the judge shall direct, be passed and verified in the same manner as receivers' accounts : (G. O., 1862, r. 19.)

(xii.) Solicitor.

The official liquidator may, with the sanction of the court, appoint a solicitor or law agent to assist him in the performance of his duties : (C. A., 1862, s. 97.)

The solicitor of the official liquidator shall conduct all such proceedings as are ordinarily conducted by solicitors of the court ; and where the attendance of his solicitor is required on any proceeding in court or chambers, the official liquidator need not attend in person, except in cases where his presence is necessary in addition to that of his solicitor, or the judge shall direct him to attend : (G. O., 1862, r. 68.)

(xiii.) Costs.

Where the official liquidator's costs are not payable by any other party before the court, he will take them out of the estate if properly incurred : (Buck. 223.)

The Court of Appeal will not order payment of the official liquidator's costs out of the estate when he is unsuccessful on appealing in an action,

and if costs are given against him will order him personally to pay them, it being left to the court below, which has charge of the assets, to say whether costs incurred in unsuccessful litigation ought to be borne by the estate or not: (Buck. 217.)

Where an official liquidator has failed on a summons to recover money for the company, and has been ordered to pay the costs of the summons out of the assets of the company, these costs will be paid out of the assets in priority to the costs of the winding-up: (*Re Home Investment Society*, L. Rep. 14 Ch. Div. 167.)

(xiv.) Remuneration.

There shall be paid to the official liquidator such salary or remuneration, by way of per-centage or otherwise, as the court may direct; and if more liquidators than one are appointed such remuneration shall be distributed amongst them in such proportions as the court directs: (C. A., 1862, s. 93.)

[The salary or remuneration of] the official liquidator shall [include] any necessary employment of assistants or clerks by [him] to which regard shall be had; and such salary or remuneration may either be fixed at the time of his appointment, or at any time thereafter, as the judge may think fit. Every allowance of such salary or remuneration, unless made at the time of his appointment, or upon passing an account, shall be made upon application for that purpose by the official liquidator, on notice to such persons (if any), and supported by such evidence as the judge shall require; nevertheless, the judge may from time to time allow any sum he may think fit to the official liquidator, on account of the salary or remuneration to be thereafter allowed: (G. O., 1862, r. 18.)

Every application by an official liquidator for remuneration must be supported by an affidavit shewing the number of hours devoted by him and his clerks respectively to the business of the liquidation.

The judge may during the progress of the liquidation sanction payments to the liquidator on account of his remuneration, for which purpose the amount of such remuneration will be estimated by the judge: (Buck. 215.)

(xv.) Removal, &c.

Any official liquidator may resign or be removed by the court on due cause shown, and any vacancy in the office of an official liquidator appointed by the court shall be filled by the court: (C. A., 1862, s. 93.)

An application to remove a liquidator by a shareholder who, at the date of such application, has not paid his call, will be dismissed with costs, even though the validity of the call was disputed by the shareholder, and in the meantime he has offered to pay the amount of the call into court, to abide the decision as to the validity of such call: (*Re Norwich Provident Company*; *Hesketh's case*, 41 L. T. Rep. N. S. 673; 28 W. R. 272.)

In case of the death, removal, or resignation of an official liquidator another shall be appointed in his room, in the same manner as directed in the case of a first appointment; and the proceedings for that purpose may be taken by such party interested as may be authorised by the judge: (G. O., 1862, r. 16.)

The creditors are entitled to regulate their own proceedings, and where there is a deficiency of assets and the liquidator insists on prosecuting an action contrary to the will of a majority of the creditors, this will be a sufficient ground for removing him: (Buck. 214.)

(xvi.) Custody of Property, where no Liquidator Appointed.

If no official liquidator is appointed, or during any vacancy in such appointment, all the property of the company shall be deemed to be in the custody of the court: (C. A., 1862, s. 92.)

(m) Creditors.

(1) Claims.

(i.) Directions as to Bringing in.

The court may fix a certain day or certain days on or within which creditors of the company are to prove their debts or claims, or to be excluded from the benefit of any distribution made before such debts are proved: (C. A., 1862, s. 107.)

(ii.) What Claims Admissible.

. . . . All debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as is possible, of the value of all such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value: (C. A., 1862, s. 158.)

Dismissal for want of prosecution of an action against a company does not bar a claim for the same matter in the winding-up: (*Re Orrell Colliery, &c., Company, Holt's case*, 48 L. J. 655, Ch.)

As to liquidator's powers to compromise claims, see *sup.* (l.) (3) (ix.).

(iii.) Application of Assets in Payment.

[As soon as may be after making an order for winding-up, the court] shall cause the assets of the company to be collected, and applied in discharge of its liabilities: (C. A., 1862, s. 98.)

[Any share capital of a] company limited by guarantee, and having a capital divided into shares . . . that may not have been called up, shall be deemed to be assets of the company, and to be a debt (in England and Ireland of the nature of a specialty) due to the company from each member to the extent of any sums that may be unpaid on any shares held by him, and payable at such time as may be appointed by the court: (C. A., 1862, s. 90.)

(iv.) Sales of Property.

Any real or personal property belonging to the company may be sold with the approbation of the judge, in the same manner as in the case of a sale under a decree or order of the court in a suit, or, if the judge shall so direct, by the official liquidator; and upon any such sale by the official liquidator, the conditions or contracts of sale shall be settled and approved of by the judge, unless he shall otherwise direct; and the judge may, if he thinks fit, direct such conditions and contracts, and the abstract of the title of the property, to be submitted to one of the conveyancing counsel of the court, under the 2nd of the Consolidated General Orders, and may, on any sale by public auction, fix a reserved bidding; and, unless on account of the small amount of the purchase moneys or other cause, it shall, having regard to the amount of the security given by the official liquidator, be thought proper that the purchase moneys shall be paid to him, all conditions and contracts of sale shall provide that the purchase moneys shall be paid by the respective purchasers into the Bank of England, to the account of the official liquidator of the company: (G. O., 1862, r. 32; see PROPERTY, VIII.)

(2) Advertisement for Creditors.

For the purpose of ascertaining the debts and claims due from the company, and of requiring the creditors to come in and prove their debts or claims, an advertisement shall be issued at such time as the judge shall direct; and such advertisement shall fix a time for the creditors to send their names and addresses, and the particulars of their debts or claims, and

the names and addresses of their solicitors (if any) to the official liquidator, and appoint a day for adjudicating thereon: (G. O., 1862, r. 20.)

A creditor must produce all documents which he would have to produce under sect. 18 of the Chancery Amendment Act (15 & 16 Vict. c. 86) or he will not be allowed to proceed in establishing his claim: (Buck. 479; see CHAMBERS.)

(3) Attendance of Creditors.

The creditors need not attend upon the adjudication, nor prove their debts or claims, unless they are required to do so by notice from the official liquidator; but upon such notice being given, they are to come in and prove their debts or claims within a time to be therein specified: (G. O., 1862, r. 21.)

(4) List of Debts.

The official liquidator shall investigate the debts and claims sent in to him, and ascertain, so far as he is able, which of such debts and claims are justly due from the company; and he shall make out and leave at the chambers of the judge a list of all the debts and claims sent into him, distinguishing which of the debts and claims, or parts of debts and claims so claimed, are, in his opinion, justly due and proper to be allowed without further evidence, and which of them, in his opinion, ought to be proved by the creditors; and he shall make and file, prior to the time appointed for adjudication, an affidavit setting forth which of the debts and claims, in his opinion, are justly due and proper to be allowed without further evidence, and stating his belief that such debts and claims are justly due and proper to be allowed, and the reasons for such belief: (G. O., 1862, r. 22.)

(5) Allowance of Debts.

At the time appointed for adjudicating upon the debts and claims, or at any adjournment thereof, the judge may either allow the debts and claims upon the affidavit of the official liquidator, or may require the same, or any of them, to be proved by the claimants, and adjourn the adjudication thereof to a time to be then fixed; and the official liquidator shall give notice to the creditors whose debts or claims have been so allowed, of such allowance: (G. O., 1862, r. 23.)

(6) Proof of Debts.

The official liquidator shall give notice to the creditors whose debts or claims have not been allowed upon his affidavit, that they are required to come in and prove the same by a day to be therein named, being not less than four days after such notice, and to attend at a time to be therein named being the time appointed by the advertisement, or by the adjournment (as the case may be) for adjudicating on such debts and claims: (G. O., 1862, r. 24.)

After an order for winding-up a fire insurance company had been made, but before the date fixed for creditors to send in their claims, a fire destroyed certain property covered by a policy granted by the company. The policy-holder sent in a claim for the full amount of the policy, there being, as alleged, a total loss. Held that, as the amount insured for had become a debt before the date fixed for creditors to send in their claims, the policy-holder was entitled to prove for the whole amount of his policy, and not merely for such a sum as would have enabled him at the date of the winding-up order, to effect a similar insurance in another office: (*Re The Northern Counties of England Fire Insurance Company*, W. N., 1880, p. 198; 70 L. T. 115.)

In the winding-up of any company . . . whose assets may prove to be insufficient for the payment of his debts and liabilities and the costs of

winding-up, the same rules shall prevail . . . as to the respective rights of secured and unsecured creditors . . . as may be in force for the time being under the law of bankruptcy . . . : (J. A., 1875, s. 10; see *Re Withernsea Brickworks Company*, 43 L. T. Rep. N. S. 713; 29 W. R. 178; *Re Association of Land Financiers*, 70 L. T. 223.)

(i) Data of Valuation.

The value of such debts and claims as are made admissible to proof . . . shall, so far as is possible, be estimated according to the value thereof at the date of the [winding-up] order : (G. O., 1862, r. 25.)

(ii) Interest.

Interest on such debts and claims as shall be allowed shall be computed, as to such of them as carry interest, after the rate they respectively carry; any creditor whose debt or claim so allowed does not carry interest shall be entitled to interest, after the rate of 4l. per centum per annum, from the date of the [winding-up] order, out of any assets which may remain after satisfying the costs of the winding-up, the debts and claims established, and the interest of such debts and claims as by law carry interest : (C. O., 1862, r. 26.)

This rule is *ultra vires* and unauthorised by the Act : (Buck. 481.)

Creditors whose debts carry interest are entitled to dividends only upon what was due for principal and interest at the date of the winding-up (*i.e.*, of its commencement); and it is only in the event of there being a surplus that they have any claim for subsequent interest, and in that case the dividends will be treated as applicable, first on payment of interest and then on reduction of principal : (Buck. 295.)

(iii) Costs of Proofs.

Such creditors as come in and prove their debts or claims pursuant to the notice from the official liquidator, shall be allowed their costs of proof, in the same manner as in the case of debts proved in a cause : (G. O., 1862, r. 27.)

The costs of proof will, therefore, be added to the debt : (C. O. 40, r. 24.)

A creditor appearing on a winding-up petition is not entitled to his costs as a matter of right: to entitle him to them he must show a reasonable ground for appearing; and if he appears merely to ask for them, and nothing more, they will be refused : (*Re Hull and County Bank*, L. Rep. 10 Ch. Div. 130; 27 W. R. 377.)

(7) Chief Clerk's Certificate upon Adjudication.

The result of the adjudication upon debts and claims shall be stated in a certificate to be made by the chief clerk, and certificates as to any of such debts and claims may be made from time to time. All such certificates shall state whether the debts or claims are allowed or disallowed, and whether allowed as against any particular assets, or in any other qualified or special matter : (G. O., 1862, r. 28.)

(n) Contributories.

(1) Preparation and Verification of List.

The official liquidator shall, with all convenient speed after his appointment, or at such time as the judge shall direct, make out and leave at the chambers of the judge a list of the contributories of the company; and such list shall be verified by the affidavit of the official liquidator, and shall, so far as is practicable, state the respective addresses of, and the number of shares or extent of interest to be attributed to each such contributory, and distinguish the several classes of contributories : (G. O., 1862, r. 29.)

The judge may fix the time, on the return of the summons to proceed, for bringing in the list of contributories: (see *sup.* (i).)

(2) Varying List.

[The list of contributories] may from time to time, by leave of the judge, be varied or added to by the official liquidator: (G. O., 1862, r. 29.)

(3) Appointment for Judge to Settle List.

Upon the list of contributories being left at the chambers of the judge, the official liquidator shall obtain an appointment for the judge to settle the same: (G. O., 1862, r. 30.)

An alleged contributory may be summoned to be sworn and examined in chambers: (Buck. 483.)

(4) Notice of Appointment.

[The official liquidator] shall give notice in writing of [the] appointment [for the judge to settle the list of contributories] to every person included in such list, and stating in what character, and for what number of shares or interest such person is included in the list; and in case any variation or addition to such list shall at any time be made by the official liquidator, a similar notice in writing shall be given to every person to whom such variation or addition applies. All such notices shall be served four clear days before the day appointed to settle such list, or such variation or addition: (G. O., 1862, r. 30.)

(5) Settlement by Judge; Rectification of Register.

As soon as may be after making an order for winding-up the company, the court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required in pursuance of [the] Act: (C. A., 1862, s. 98.)

See *Winstone's case*, 41 L. T. Rep. N. S. 838.

Where one or both classes of shareholders were liable on a certain class of policies, it was held that the question could not properly be discussed in the absence of the claimants under the policies: (*Re Norwich Provident Insurance Company*; *Hesketh's case*, L. Rep. 13 Ch. Div. 693.)

Where a person's name has in a winding-up been placed on the list of contributories by the judge in chambers after hearing such person in opposition, the hearing of a summons taken out by him to have his name struck off such list, though not a rehearing within sect. 124 of the Companies Act, 1862, is so far analogous to such a rehearing that it will not be allowed after the time when such rehearing would have been allowed, unless the judge enlarges the time: (*Re Eltham Valley Railway Company*; *Dickson's case*, L. Rep. 12 Ch. Div. 298; 41 L. T. Rep. N. S. 184; 27 W. R. 880.) [See *post* (x)].

In settling the list of contributories the court shall distinguish between persons who are contributories in their own right, and persons who are contributories as being representatives of or being liable to the debts of others; it shall not be necessary, where the personal representative of any deceased contributory is placed on the list, to add the heirs or devisees of such contributory, nevertheless such heirs or devisees may be added as and when the court thinks fit: (C. A., 1862, s. 99.)

If any creditor who is entitled in respect of any debt or claim to object to the reduction of the capital of a company under [the Companies Act, 1867] is [ignorant of] the proceedings taken with a view to such reduction, or of their nature and effect with respect to his claim, . . . on the company being wound-up, . . . on the application of such creditor, and on proof [of such ignorance on his part, the court may settle a list of contributories comprising every person who was a member of the

company at the date of the registration of the order and minute relating to the reduction of the capital of the company, and such person shall be liable to contribute an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound-up on the day prior to such registration; and the court may] make and enforce calls and orders on the contributories settled on such list in the same manner in all respects as if they were ordinary contributories in the winding-up: (C. A., 1867, s. 17; see REDUCTION OF CAPITAL.)

(i.) Laches on Part of Contributory.

A person whose name has been wrongly placed on the list of contributories does not, by delaying in making application to have it removed, thereby raise an equity against his right to relief, at any rate where no loss is occasioned to the estate by the delay: (Buck. 223.)

(ii.) Costs when Liability is Disputed.

The costs of a contest by a person disputing his liability as a contributory must, except under very special circumstances, be paid by such contributory: (Buck. 223.)

(6) Chief Clerk's Certificate of Settlement.

The result of the settlement of the list of contributories shall be stated in a certificate by the Chief Clerk; and certificates may be made from time to time for the purpose of stating the result of such settlement down to any particular time, or as to any particular person, or stating any variation of the list: (G. O., 1862, r. 31.)

(7) Delivery of Property by Contributory.

The court may, at any time after making an order for winding-up, . . . require any contributory for the time being settled on the list of contributories, trustee, receiver, banker, or agent, or officer of the company, to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the court directs, to or into the hands of the official liquidator, any sum or balance, books, papers, estate, or effects which happen to be in his hands for the time being, and to which the company is *primâ facie* entitled: (C. A., 1862, s. 100.)

(8) Payment of Debts by Contributory.

The court may, at any time after making an order for winding-up . . . , make an order on any contributory for the time being settled on the list of contributories, directing payment to be made, in manner in the said order mentioned, of any moneys due from him or from the estate of the person whom he represents to the company, exclusive of any moneys which he or the estate of the person whom he represents may be liable to contribute by virtue of any call made or to be made by the court in pursuance of this part of this Act; and it may, in making such order, when the company is not limited, allow to such contributory by way of set-off any moneys due to him or the estate which he represents from the company on any independent dealing or contract with the company, but not any moneys due to him as a member of the company in respect of any dividend or profit:

Provided that when all the creditors of any company, whether limited or unlimited, are paid in full, any moneys due on any account whatever to any contributory from the company may be allowed to him by way of set-off against any subsequent call or calls: (C. A., 1862, s. 101.)

In the . . . winding-up of any limited company, the court . . . may make to any director or manager of such company, whose liability is unlimited, the same allowance by way of set-off as . . . it may make to a contributory where the company is not limited: (C. A., 1867, s. 6.)

(9) Calls.

(i.) Power to Make.

The court may, at any time after making an order for winding-up . . . , and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves, and it may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same : (C. A., 1862, s. 102.)

A shareholder who has been placed on the list of contributories is not entitled, on the ground of fraudulent misrepresentation contained in the promoters' prospectus, to rescind his contract to take shares, although the assets in the hands of the liquidators are enough to meet in full all the liabilities of the company to creditors and the costs of the winding-up : (*Re Hull and County Bank, Burgess' case*, 43 L. T. Rep. N. S. 45.)

Where, in the winding-up of a company by the Court of Session in Scotland, an order for a call has been made by that court, and it has become necessary to enforce the call against contributories resident in England, the order must be made an order of the Chancery Division in England : (*Re Hollyford Copper Mining Company*, L. Rep. 5 Ch. App. 93; *Re City of Glasgow Bank*, L. Rep. 14 Ch. Div. 628; 43 L. T. Rep. N. S. 279.)

(ii.) Application for.

Every application to the judge to make any call on the contributories or any of them . . . shall be made by summons, stating the proposed amount of such call; and such summons shall be served four clear days at the least before the day appointed for making the call, on every contributory proposed to be included in such call; or, if the judge shall so direct, notice of such intended call may be given by advertisement : (G. O., 1862, s. 33.)

On a summons for a call, the propriety or validity of the winding-up cannot be called into question : (Buck. 230.)

(iii.) Notice of.

When any order for a call has been made, a copy thereof shall be forthwith served upon each of the contributories included in such call, together with a notice from the official liquidator specifying the amount or balance due from such contributory (having regard to the provisions of the . . . Act) in respect of such call; but such order need not be advertised unless, for any special reason, the judge shall so direct : (G. O., 1862, r. 34.)

(iv.) Adjournment of Proceedings.

At the time of making an order for a call, the further proceedings relating thereto shall be adjourned to a time subsequent to the day appointed for the payment thereof, and afterwards from time to time so long as may be necessary : (G. O., 1862, r. 33.)

(v.) Payment.

At the time appointed by any . . . adjournment [of proceedings], or upon a summons to enforce payment of the call, duly served, and upon proof of the service of the order and notice of the amount due, and non-payment, an order may be made for such of the contributories who have made default, or of such of them against whom it shall be thought

proper to make such order, to pay the sum which by such former order and notice they were respectively required to pay, or any less sum which may appear to be due from them respectively: (G. O., 1862, r. 35.)

An order may be made under sect. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), for payment by instalments: (*Lewis' case*, 28 L. T. Rep. N. S. 396.)

An order for payment will not be made in the winding-up against a bankrupt contributory. Payment must be enforced in the Court of Bankruptcy: (*Mitchell's case*, L. Rep. 5 Ch. App. 400.)

(vi.) Payment into Bank.

The court may order any contributory, purchaser, or other person from whom money is due to the company to pay the same into the Bank of England or any branch thereof to the account of the official liquidator instead of to the official liquidator, and such order may be enforced in the same manner as if it had directed payment to the official liquidator: (C. A., 1862, s. 103.)

All orders for payment of calls, balances, or other moneys due from any contributory or other person, shall direct the same to be paid into the Bank of England, to the account of the official liquidator of the company, unless, on account of the smallness of the amount or other cause, it shall, having regard to the amount of the security given by the official liquidator, be thought proper to direct payment thereof to the official liquidator. Provided that where any such order has been made directing payment of a specific sum into the Bank of England, in case it shall be thought proper for the purpose of enabling the official liquidator to issue execution or take other proceedings to enforce the payment thereof, or for any other reason, an order may, either before service of such former order, or after the time thereby fixed for payment, be made, without notice, for payment of the same sum to the official liquidator: (G. O., 1862, r. 38.)

Notice.

At the time of the service of any order for payment into the Bank of England, the official liquidator shall give to the party served a notice . . . for the purpose of informing him how the payment is to be made; and before the time fixed for such payment the official liquidator shall furnish the cashier of the Bank of England with a certificate . . . to be signed by such cashier, and delivered to the party paying the money therein mentioned: (G. O., 1862, r. 39.)

For the forms of notice and certificate, see G. O., 1862, Sched. 3, Nos. 40, 41.

Affidavit of Liquidator.

For the purpose of enforcing any order for payment of money into the Bank of England an affidavit of the official liquidator . . . shall be sufficient evidence of the non-payment thereof: (G. O., 1862, r. 40.)

For the form, see G. O., 1862, Sched. 3, No. 43.

Account of Liquidator to be Credited.

All moneys, bills, notes, and other securities paid and delivered into the Bank of England, shall be placed to the credit of the account of the official liquidator of the company; and orders for any such payment and delivery shall direct the same accordingly: (G. O., 1862, r. 41.)

(vii.) Default by Representative Contributory.

If any person made a contributory as personal representative of a deceased contributory makes default in paying any sum ordered to be paid by him, proceedings may be taken for administering the personal

and real estates of such deceased contributory, or either of such estates, and of compelling payment thereof of the moneys due: (C. A., 1862, s. 105.)

(10) Order Conclusive Evidence.

Any order made by the court . . . upon any contributory shall, subject to the provisions . . . for appealing against such order [see *post*, (x)], be conclusive evidence that the moneys, if any, thereby appearing to be due or ordered to be paid are due, and all other pertinent matters stated in such order are to be taken to be truly stated as against all persons, and in all proceedings whatsoever, with the exception of proceedings taken against the real estate of any deceased contributory, in which case such order shall only be *prima facie* evidence for the purpose of charging his real estate, unless his heirs or devisees were on the list of contributories at the time of the order being made: (C. A., 1862, s. 106.)

(11) Rights of Contributories to be Adjusted.

The court shall adjust the rights of the contributories amongst themselves, and distribute any surplus that may remain amongst the parties entitled thereto: (C. A., 1862, s. 109.)

(12) Costs.

The court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the estate of the company of the costs, charges, and expenses incurred in winding-up . . . in such order of priority as the court thinks just: (C. A., 1862, s. 110.)

Where an action has been commenced on behalf of the shareholders of the company, which, if successful, would result in benefit to the company, and the company subsequently goes into liquidation, no leave being given to continue the action, which is dismissed by consent, without costs, the court has no power to order the costs to be paid out of the assets of the company in the winding-up: (*Re Hull Central Drapery Company*, L. Rep. 15 Ch. Div. 326; 43 L. T. Rep. N. S. 679.)

(13) Absconding Contributory.

The court may, at any time before or after it has made an order for winding-up . . . , upon proof being given that there is probable cause for believing that any contributory to such company is about to quit the United Kingdom, or otherwise abscond, or to remove or conceal any of his goods or chattels, for the purpose of evading payment of calls, or for avoiding examination in respect of the affairs of the company, cause such contributory to be arrested, and his books, papers, moneys, securities for moneys, goods, and chattels to be seized, and him and them to be safely kept until such time as the court may order: (C. A., 1862, s. 118.)

(14) Powers of Court Cumulative.

Any powers by [the] Act conferred on the court shall be deemed to be in addition to and not in restriction of any other powers subsisting, either at law or in equity, of instituting proceedings against any contributory, or the estate of any contributory, or against any debtor of the company for the recovery of any call or other sums due from such contributory or debtor, or his estate, and such proceedings may be instituted accordingly: (C. A., 1862, s. 119.)

(o) General Practice in Chambers.

(1) General Practice to Apply.

The general practice of the court, including the course of proceeding and practice at the judges' chambers, as provided by the statute 15 & 16 Vict. c. 80, and the general orders of the court relative thereto, shall, in

cases not provided for by the Companies Act, 1862, or [the] rules, and so far as the same are applicable, and not inconsistent with the said Act, or [the] rules, apply to all proceedings for winding-up: (G. O., 1862, r. 74; and see CHAMBERS.)

(2) Judge at Chambers.

Any judge of the High Court . . . may do in chambers any act which the court is hereby authorised to do . . . : (C. A., 1862, s. 83.)

(3) Power of Judge.

The power of the court, and of the judge sitting in chambers, to enlarge or abridge the time for doing any act, or taking any proceeding, to adjourn, or review any proceeding, and to give any direction as to the course of proceeding, is unaffected by [the] rules: (G. O., 1862, r. 73.)

(4) Register and File of Proceedings.

A register shall be kept of all proceedings in the judge's chambers, in each matter, in the same manner as required by the 57th rule of the 35th of the Consolidated General Orders, and no documents or proceedings are to be filed in the judge's chambers, unless the judge shall otherwise direct: (G. O., 1862, r. 57.)

(5) Parties entitled to Attend.

Every person, for the time being, on the list of contributories of the company . . . and every person having a debt or claim against the company, allowed by the judge, shall be at liberty, at his own expense, to attend the proceedings before the judge, and shall be entitled, upon payment of the costs occasioned thereby, to have notice of all such proceedings as he shall by written request desire to have notice of; but if the judge shall be of opinion that the attendance of any such person upon any proceeding has occasioned any additional costs which ought not to be borne by the funds of the company, he may direct such costs, or a gross sum in lieu thereof, to be paid by such person; and such person shall not be entitled to attend any further proceedings until he has paid the same: (G. O., 1862, r. 60.)

(6) Representative Parties.

The judge may from time to time appoint any one or more of the contributories, or creditors, as he thinks fit, to represent before him, at the expense of the company, all or any class of the contributories or creditors, upon any question as to a compromise with any of the contributories or creditors, or in and about any other proceedings before him relating to the winding-up of the company, and may remove the person or persons so appointed. In case more than one person shall be so appointed, they shall unite in employing the same solicitor to represent them: (G. O., 1862, r. 61.)

(7) Name, &c., of Parties to be Registered.

No contributory or creditor shall be entitled to attend any proceedings at the chambers of the judge, unless and until he has entered in a book to be kept there for that purpose his name and address, and the name and address of his solicitor (if any), and upon any change of his address or of his solicitor, his new address, and the name and address of his new solicitor: (G. O., 1862, r. 62.)

(p) Evidence.

(1) Affidavits.

(i.) Filing.

Any person intending to use any affidavit in any proceeding under [a winding-up] order, shall file the same in the [Central] Office, and

give notice thereof to the official liquidator. The person, other than the official liquidator, filing the affidavit shall not be required to take an office copy thereof, but an office copy thereof shall be taken by the official liquidator, and he shall produce the same at the hearing of any application or proceeding upon which it is intended to be used, unless the judge shall otherwise direct: (G. O., 1862, r. 55.)

(ii.) Title.

All affidavits shall be intituled in the matter of the Companies Acts, 1862 and 1867, and of the company to which [the] petition shall relate, describing the company by its most usual style or firm: (G. O., 1868, r. 1.)

(iii.) May be sworn abroad.

Any affidavit, affirmation, or declaration required to be sworn or made, under the provisions or for the purposes of this part of this Act, may be lawfully sworn or made in Great Britain or Ireland, or in any colony, island, plantation or place under the dominion of Her Majesty in foreign parts, before any court, judge, or person lawfully authorised to take and receive affidavits, affirmations, or declarations, or before any of Her Majesty's consuls or vice-consuls, in any foreign parts out of Her Majesty's dominions, and all courts, judges, justices, commissioners, and persons acting judicially shall take judicial notice of the seal or stamp or signature (as the case may be) of any such court, judge, person, consul, or vice-consul attached, appended, or subscribed to any such affidavit, affirmation, or declaration, or to any other document to be used for the purposes of [the] Act: (C. A., 1862, s. 128.)

(2) Evidence of Books.

All books, accounts, and documents of the company and of the liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded: (C. A., 1862, s. 154.)

(3) Inspection of Books.

. . . . Where an order has been made for winding-up a company by the court, or subject to the supervision of the court, the court may make such order for the inspection by the creditors and contributories of the company of its books and papers as the court thinks just, and any books and papers in the possession of the company may be inspected by creditors or contributories, in conformity with the order of the court, but not further or otherwise: (C. A., 1862, s. 156.)

Special circumstances must generally be shown in order to obtain an order for inspection of books; but where the debts are large, and the transactions of the company have been complicated, the court will make an order, without any special reason being given for it: (Buck. 279.)

(4) Admission of Documents.

Any party to any proceeding in court or chambers relating to the winding-up of a company may, by notice in writing in the form No. 6, in Schedule N. to the Consolidated General Orders, or to the like effect, call on any other party thereto competent to admit the same, to admit any document, saving all just exceptions; and in case of refusal or neglect so to admit, the costs of proving such document shall be paid by the party so refusing or neglecting, unless the judge shall be of opinion that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice shall have been given, except in cases where the omission to give such notice has been, in the opinion of the taxing master, a saving of expense: (G. O., 1862, r. 54.)

(5) Special Commissioners for receiving Evidence.

The commissioners of the Court of Bankruptcy and the judges of the County Courts in England who sit at places more than twenty miles from the General Post Office, and the commissioners of bankrupt and the assistant barristers and recorders in Ireland, and the sheriffs of counties in Scotland, shall be commissioners for the purpose of taking evidence under this Act in cases where any company is wound-up in any part of the United Kingdom, and it shall be lawful for the court to refer the whole or any part of the examination of any witnesses under this Act to any person hereby appointed commissioner, although such commissioner is out of the jurisdiction of the court that made the order or decree for winding-up the company; and every such commissioner shall, in addition to any power of summoning and examining witnesses, and requiring the production or delivery of documents, and certifying or punishing defaults by witnesses, which he might lawfully exercise as a commissioner of the Court of Bankruptcy, judge of a County Court, commissioner of bankrupt, assistant barrister, or recorder, or as a sheriff of a county, have in the matter so referred to him all the powers of summoning and examining witnesses, and requiring the production or delivery of documents, and punishing defaults by witnesses, and allowing costs and charges and expenses to witnesses, as the court which made the order for winding-up the company has; and the examination so taken shall be returned or reported to such last-mentioned court in such manner as it directs: (C. A., 1862, s. 126.)

(6) Examination of Persons in Scotland.

The court may direct the examination in Scotland of any person for the time being in Scotland, whether a contributory of the company or not, in regard to the estate, dealings, or affairs, of any company in the course of being wound up, or in regard to the estate, dealings, or affairs of any person being a contributory of the company, so far as the company may be interested therein by reason of his being such contributory, and the order or commission to take such examination shall be directed to the sheriff of the county in which the person to be examined is residing or happens to be for the time, and the sheriff shall summon such person to appear before him at the time and place to be specified in the summons for examination upon oath as a witness or as a haver, and to produce any books, papers, deeds, or documents, called for which may be in his possession or power, and the sheriff may take such examination either orally or upon written interrogatories, and shall report the same in writing in the usual form to the court; and shall transmit with such report the books, papers, deeds, or documents produced, if the originals thereof are required and specified by the order, or otherwise such copies thereof, or extracts therefrom, authenticated by the sheriff, as may be necessary; and, in case any person so summoned fails to appear at the time and place specified, or, appearing, refuses to be examined or to make the production required, the sheriff shall proceed against such person as a witness or haver duly cited, and failing to appear, or refusing to give evidence or make production, may be proceeded against by the law of Scotland; and the sheriff shall be entitled to such and the like fees, and the witness shall be entitled to such and the like allowances, as sheriffs when acting as commissioners under appointment from the Court of Session, and as witnesses and havers are entitled to in the like cases according to the law and practice of Scotland: If any objection is stated to the sheriff by the witness, either on the ground of his incompetency as a witness, or as to the production required to be made, or on

any other ground whatever, the sheriff may, if he thinks fit, report such objection to the court, and suspend the examination of such witness until such objection has been disposed of by the court: (C. A., 1862, s. 127.)

(g) *Summonses, Notices, &c.*

(1) Title.

All notices, &c., shall be intituled in the matter of the Companies Acts, 1862 and 1867, and of the company to which [the same] shall relate, describing the company by its most usual style or firm: (G. O., 1868, r. 1.)

(2) How Served.

Services upon contributories and creditors shall be effected (except when personal service is required) by sending the notice, or a copy of the summons, or order, or other proceeding, through the post in a pre-paid letter, addressed to the solicitor of the party to be served (if any) or otherwise to the party himself at the address entered, or last entered, pursuant to [rule 62 (see *sup.* (o) (7))]; or, if no such entry has been made, then, if a contributory, to his last known address or place of abode; and, if a creditor, to the address given by him [see *sup.* (m) (2)]; and such notice, or copy summons, order, or other proceeding, shall be considered as served at the time the same ought to be delivered in the due course of delivery by the post-office, and notwithstanding the same may be returned by the post-office: (G. O., 1862, r. 63.)

As to service out of the jurisdiction, see *Re British Imperial Company*, W. N. 1877, p. 129; *Re Maughan*, 22 W. R. 748.

(3) Service Not to be Invalidated.

No service [upon contributories and creditors] shall be deemed invalid by reason that the Christian name, or any of the Christian names, of the person on whom service is sought to be made, has been omitted, or designated by initial letters, in the list of contributories, or in the summons, order, notice, or other document wherein the name of such contributory or creditor is contained, provided the judge is satisfied that such service is in other respects sufficient: (G. O., 1862, r. 64.)

(r) *Orders.*

All orders made in chambers shall be drawn up in chambers, unless specially directed to be drawn up by the registrar, and shall be entered in the same manner, and in the same office, as other orders made in chambers: (G. O., 1862, r. 52.)

(s) *Advertisements.*

When an advertisement is required for any purpose, except where otherwise directed by [the General Orders] the advertisement shall be inserted once in the *London Gazette*, and, in such other newspaper or newspapers, and for such number of times as may be directed. The judge may, in such cases as he shall think fit, dispense with any advertisement required by [the General Orders]: (G. O., 1862, r. 53.)

(t) *Fees.*

(1) Solicitor's.

Solicitors shall be entitled to charge, and be allowed the fees set forth and referred to in the first schedule [to the General Orders, 1862], unless the court or judge shall otherwise specially direct: (G. O., 1862, r. 70.)

(2) How Collected.

The fees of court set forth and referred to in the second schedule [to the General Orders, 1862] shall be paid in relation to proceedings in

the Court . . . under the Companies Act, 1862, and shall be collected by means of stamps, in the manner prescribed by the 39th of the Consolidated General Orders : (G. O., 1862, r. 71.)

(3) *Taxation of Costs.*

Where an order is made in court or chambers for payment of any costs, the order shall direct the taxation thereof by the taxing master ; except in cases where a gross sum in lieu of taxed costs is fixed by the order, in accordance with the 37th rule of the 40th of the Consolidated General Orders : (G. O., 1862, r. 72.)

(u) *Dissolution.*

(1) *Order for.*

When the affairs of the company have been completely wound-up, the court shall make an order that the company be dissolved from the date of such order, and the company shall be dissolved accordingly : (C. A., 1862, s. 111.)

An order is seldom or never taken under this section, since great inconvenience might result if anything should afterwards turn up (if, for instance, assets should be afterwards discovered) which might render further proceedings in the winding-up necessary : (Buck. 237.)

(2) *Minute.*

Any order [of dissolution] shall be reported by the official liquidator to the registrar, who shall make a minute accordingly in his books of the dissolution of such company : (C. A., 1862, s. 112.)

(3) *Disposal of Books, &c.*

Where any company has been wound-up . . . and is about to be dissolved, the books, accounts, and documents of the company and of the liquidators may be disposed of in the following way ; that is to say, where the company has been wound-up by or subject to the supervision of the court, in such way as the court directs, and where the company has been wound-up voluntarily, in such way as the company by an extraordinary resolution directs ; but after the lapse of five years from the date of such dissolution, no responsibility shall rest on the company, or the liquidators, or any one to whom the custody of such books, accounts, and documents has been committed, by reason that the same, or any of them, cannot be made forthcoming to any party or parties claiming to be interested therein : (C. A., 1862, s. 155.)

(v) *Termination of Winding-up.*

(1) *Balance Sheet of Liquidator.*

Upon the termination of the proceedings in chambers for the winding-up of any company, a balance-sheet shall be brought in by the official liquidator of his receipts and payments, and verified by his affidavit ; and the official liquidator shall pass his final account, and the balance (if any) due thereon shall be certified. And upon payment of such balance, in such manner as the court or judge shall direct, the recognisance entered into by the official liquidator and his sureties may be vacated : (G. O., 1862, r. 65.)

(2) *Certificate of Chief Clerk.*

When the official liquidator has passed his final account, and the balance (if any) certified to be due thereon has been paid in such manner as the judge shall direct, a certificate shall be made by the chief clerk, that the affairs of the company have been completely wound up ; and in case the company has not been already dissolved, the official liquidator shall, immediately after such certificate has become binding, apply to the judge

for an order that the company be dissolved from the date of such order : (G. O., 1862, r. 66.) [See *sup.* (l.)]

(3) Deposit of Documents in Central Office.

When the proceedings for winding-up any company have been completed, the file of proceedings, and the book containing the official liquidator's account, shall be deposited in the [Central] Office: (G. O., 1862, r. 67.)

(w) *Enforcement of Orders.*

(1) In What Manner.

All orders [in winding-up] made by the court may be enforced in the same manner in which orders of such court made in any suit pending therein may be enforced : (C. A., 1862, s. 120 ; and see EXECUTION.)

(2) In other Courts.

Any order made by the court in England . . . shall be enforced in Scotland and Ireland in the courts that would respectively have had jurisdiction . . . if the registered office of the company had been situate in Scotland or Ireland, and in the same manner in all respects as if such order had been made by the courts that are hereby required to enforce the same ; and in like manner orders, interlocutors, and decrees made by the court in Scotland . . . shall be enforced in England and Ireland ; and orders made by the court in Ireland . . . shall be enforced in England and Scotland by the courts which would respectively have had jurisdiction . . . if the registered office of the company were situate in the division of the United Kingdom where the order is required to be enforced, and in the same manner in all respects as if such order had been made by the court required to enforce the same in the case of a company within its own jurisdiction : (C. A., 1862, s. 122.)

(3) Mode of Dealing with Orders.

Where any order, interlocutor, or decree made by one court is required to be enforced by another court, as . . . before provided, an office copy of the order, interlocutor, or decree so made shall be produced to the proper officer of the court required to enforce the same, and the production of such office copy shall be sufficient evidence of such order, interlocutor, or decree having been made, and thereupon such last-mentioned court shall take such steps in the matter as may be requisite for enforcing such order, interlocutor, or decree, in the same manner as if it were the order, interlocutor, or decree of the court enforcing the same : (C. A., 1862, c. 123.)

(x) *Appeals.*

(1) From Winding-up Order [see APPEAL].

(2) From Orders during Winding-up.

. . . Appeals from any order or decision made or given in the matter of the winding-up of a company by any court having jurisdiction . . . may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same court in cases within its ordinary jurisdiction : (C. A., 1862, s. 124.)

(3) Who may Appeal.

Creditors and contributories who appeared below may appeal, and besides the official liquidator and the parties to the application in the court below, any creditor or contributory of the company may appeal without leave obtained for that purpose.

A contributory who has been settled on the list may make an original motion to settle other persons on the list as well, and a contributory may by leave appeal from an order excluding another contributory from the list: (Buck. 250.)

(4) Time.

Under C. A., 1862, s. 124, and J. A., 1873, O. LVIII., rr. 9, 15, an appeal from an order made on a winding-up petition must be brought within twenty-one days: (Buck. 248.)

As a general rule an application to discharge an order made in chambers to place a person on the list of contributories of a company ought to be made within three weeks, which is the time limited for bringing an appeal: (*Dickson's case*, L. Rep. 12 Ch. Div. 298; 41 L. T. Rep. N. S. 184.)

(5) Notice.

[No] appeal shall be heard unless notice of the same is given within three weeks after any order complained of has been made, in manner in which notices of appeal are ordinarily given, according to the practice of the court appealed from, unless such time is extended by the Court of Appeal: (C. A., 1862, s. 124.)

(y) *Incidental Powers.*

(1) Consulting Wishes of Creditors or Contributories.

The court may, as to all matters relating to the winding-up, have regard to the wishes of the creditors or contributories, as proved to it by any sufficient evidence, and may, if it thinks it expedient, direct meetings of the creditors or contributories to be summoned, held, and conducted in such manner as the court directs, for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the court: in the case of creditors, regard is to be had to the value of the debts due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the regulation of the company: (C. A., 1862, s. 91.)

This section applies whether a winding-up order has been made or not: (Buck. 207.)

As to cases where the section has been acted upon, see Buck. 207; *Re Horbury Bridge Coal Company*, W. N., 1879, p. 51.

(i.) Notice of Meetings.

When the judge shall direct a meeting of the creditors or contributories of the company to be summoned, the official liquidator shall give notice in writing, seven clear days before the day appointed for such meeting, to every creditor or contributory, of the time and place appointed for such meeting, and of the matter upon which the judge desires to ascertain the wishes of the creditors or contributories; or, if the judge shall so direct, such notice may be given by advertisement, in which case the object of the meeting need not be stated, and it shall not be necessary to insert such advertisement in the *London Gazette*: (G. O., 1862, r. 45.)

(ii.) Votes at Meetings.

The votes of the creditors or contributories of the company at any meeting summoned by the direction of the judge, may be given either personally or by proxy; but no creditor shall appoint a proxy who is not a creditor of the company whose debt or claim has been allowed, and no contributory shall appoint a proxy who is not a contributory of the company: (G. O., 1862, r. 46.)

(iii.) Chief Clerk's Certificates Respecting Meetings.

The direction of the judge for any meeting of creditors or contributories and the appointment of a person to act as chairman of any such meeting, shall be testified by a memorandum signed by the chief clerk of the judge: (G. O., 1862, r. 47.)

(2) Sanctioning Arrangement.

Where any compromise or arrangement shall be proposed between a company which is being wound-up either voluntarily or by or under the supervision of the court, and the creditors of such company, or any class of such creditors the court [may] on application in a summary way of any creditor, or the liquidator order that a meeting of such creditors shall be summoned in such manner as the court shall direct; and if a majority in number representing three-fourths in value of such creditors present either in person or by proxy at such meeting shall agree to any arrangement or compromise, such arrangement or compromise shall, if sanctioned by order of the court, be binding on all such creditors and also on the liquidator and contributories of the company: (J. S. C. A. A., 1870, s. 2.)

Where the approval of the shareholders of a company, by the requisite majority, has been given to an honest arrangement between the company and its creditors, such approval is not a condition precedent to giving the sanction of the court: (*Smith v. The Dynevor, Dyffryn, &c., Collieries Company*, 40 L. T. Rep. N. S. 409.)

The court will not sanction a compromise when the effect of such an arrangement, if sanctioned, would be to affect a non-assenting creditor, who has a preferential right, which would have been respected if a winding-up order had been made. Where a petition for winding-up has been presented, whether by the company or by creditors thereof, the court will not allow a judgment creditor, who has been induced by the representations and prayers of a company for delay of execution not to issue execution, to be deprived of the benefits which he would otherwise have obtained: (*Re Richards and Co. Limited*; *Ex parte Crawshay*, L. Rep. 11 Ch. Div. 676; 40 L. T. Rep. N. S. 315; 48 L. J. 555, Ch.)

(3) Summoning Officers, &c., to Inform as to Property.

(i.) Power to Summon.

The court may, after it has made an order for winding-up summon before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company: (C. A., 1862, s. 115.)

Where the liquidator is one of the parties charged, he may be summoned by a contributory on making out a *prima facie* case, and before instituting any proceedings.

A witness who is summoned under the section must be so by a summons in the form, No. 54, in the schedule to the General Order, 1862, and not by subpoena.

The witness is entitled to a reasonable notice, but not necessarily to the forty-eight hours required by the 22nd rule of the Order of the 5th Feb. 1861.

The liquidator need only show the court that there is a *prima facie* probability that the person is capable of giving important information.

Witnesses refusing to attend will be made to pay the costs of compelling their attendance.

The witness may be attended by his counsel and solicitor: (Buck. 239-42.)

Except in an extreme case the Court of Appeal will not interfere with the discretion of a judge who has ordered persons to be summoned for examination on the ground that they are capable of giving information concerning the trade dealings, estate or effects of the company: (*Re Gold Company*, L. Rep. 12 Ch. Div. 77.)

(ii.) Examination of Parties.

The court may examine upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought before them concerning the affairs, dealings, estate, or effects of the company, and may reduce into writing the answers of every such person, and require him to subscribe the same: (C. A., 1862, s. 117.)

(iii.) Production of Documents, &c.

The court may require any such officer or person to produce any books, papers, deeds, writings, or other documents in his custody or power relating to the company: (C. A., 1862, s. 115.)

(iv.) Lien on Documents, &c.

In cases where any person claims any lien on papers, deeds, or writings or documents produced by him, such production shall be without prejudice to such lien, and the court shall have jurisdiction in the winding-up to determine all questions relating to such lien: (*Id.*)

(v.) Refusal to Appear.

If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the court at the time appointed, having no lawful impediment (made known to the court at the time of its sitting, and allowed by it), the court may cause such person to be apprehended, and brought before the court for examination: (*Id.*)

(4) Assessment of Damages against Delinquent Officers.

Where, in the course of the winding-up, it appears that any past or present director, manager, official or other liquidator, or any officer of such company, has misapplied or retained in his own hands or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager, or other officer, and compel him to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust, as the court thinks just: (C. A., 1862, s. 165.)

Leave may be obtained to summon officers of the company resident in Scotland: (Buck. 493.)

The executors of a director, deceased, not being officials of a company, cannot be proceeded against by summons taken out under the provisions of the above section.

On summons by the liquidator and a whole life policy holder jointly, under the 165th section, for a declaration that the directors were liable to account to the company for premiums received, it was held that the summons was maintainable as against the surviving directors; that the directors were liable, as for a breach of trust, for the premiums which

ought to have been invested; and that the policy holder was a creditor of the company and rightly joined with the liquidator in the summons: (*Re British Guardian Life Assurance Company*, L. Rep. 14 Ch. Div. 335.)

(5) Prosecution of Delinquent Officers.

Where any order is made for winding-up a company by the court or under the supervision of the court, if it appear in the course of such winding-up that any past or present director, manager, officer, or member of such company has been guilty of any offence in relation to the company for which he is criminally responsible, the court may, on the application of any person interested in such winding-up, or of its own motion, direct the official liquidators . . . to institute and conduct a prosecution or prosecutions for such offence, and may order the costs and expenses to be paid out of the assets of the company: (C. A., 1862, s. 167.)

2. VOLUNTARILY.

(a) *Application to the Court.*

Every application . . . [to the court] shall be made by petition or motion, or, if the judge shall so direct, by summons at chambers: (G. O., 1862, r. 51.)

(b) *Liquidator.*

(1) Appointment.

If from any cause whatever there is no liquidator acting in the case of a voluntary winding-up, the court may, on the application of a contributory, appoint a liquidator or liquidators: (C. A., 1862, s. 141.)

(2) Removal.

The court may . . . on due cause shown, remove any liquidator, and appoint another liquidator to act in the matter of a voluntary winding-up: (*Id.*)

The jurisdiction of the court to remove a liquidator for "due cause shown" is not to be exercised in the same way as if the power had been for the court to remove the liquidator "if the court shall think fit." Some unfitness in the liquidator must be shown in order to justify his removal, and the removing him is not a matter of pure judicial discretion: (*Re Sir John Moore Gold Mining Company*, L. Rep. 12 Ch. Div. 325.)

(c) *Exercise of Compulsory Process.*

. . . . The liquidators or any contributory of the company may apply to the court . . . to determine any question arising in the matter of [a voluntary] winding-up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court; and the court . . . if satisfied that the determination of such question, or the required exercise of power, will be just and beneficial, may accede, wholly or partially, to such application, on such terms and subject to such conditions as the court thinks fit, or it may make such other order, interlocutor, or decree on such application as the court thinks fit: (C. A., 1862, s. 138.)

The liquidators may apply by motion or summons to determine any question fairly arising in the winding-up: (*Re Union Bank of Kingston-upon-Hull*, L. Rep. 13 Ch. Div. 808; 42 L. T. Rep. N. S. 390.)

A voluntary liquidator who applies to the court under the above section of the Companies Act, for an order under the 115th section to examine a person in respect of the affairs of the company, is not entitled as of right to the order, but must satisfy the court that it will be just and beneficial for the purposes of the winding-up: (*Re Metropolitan Bank*, *inf.*)

Where a voluntary liquidator has brought an action on behalf of the company against an officer of the company, and has exhibited interrogatories which have been fully answered by the defendant, he will not be entitled to an order under the 115th section for the examination of the defendant unless he satisfy the court that, notwithstanding the interrogatories already exhibited, he has a strong case for a further examination: (*Re Metropolitan Bank, Heiron's Case*, 15 Ch. Div. 139.)

(d) *Appeal.*

Any creditor or contributory of a company that has . . . entered into any arrangement with its creditors may, within three weeks from the date of the completion of such arrangement, appeal to the court against such arrangement, and the court may thereupon, as it thinks just, amend, vary, or confirm the same: (C. A., 1862, s. 137.)

The remedy of a creditor of a company in voluntary liquidation, who cannot get payment of his debt, is to obtain a winding-up order before the expiration of a year after the passing of the special resolution. When a liquidator in a voluntary winding-up wishes to appeal against an order of a judge, he must first obtain leave from the judge, otherwise, in the event of his appeal failing, as a general rule, he will have his costs disallowed: (*Re City and County Investment Company*, 42 L. T. Rep. N. S. 303; L. Rep. 13 Ch. Div. 475.)

The court has no jurisdiction over a company when dissolved, under sect. 143 of the Companies Act, 1862, or any of its shareholders in a voluntary winding-up under supervision, after the expiration of three months from the date of the registration of a return by the liquidators of a meeting having been held in pursuance of sect. 142 of the Act, where the creditor making the claim has had notice of the winding-up proceedings. And where the summons has been served on the former liquidators, shareholders, opposing on the ground that the liquidators have been discharged by reason of the dissolution, will not be allowed their costs of appearance: (*Re The Westbourne Grove Drapery Company, Limited*, 39 L. T. Rep. N. S. 30.)

A company being in voluntary liquidation, and a petition for a compulsory winding-up having been dismissed, the court, on the motion of the petitioner, who alleged misfeasance on the part of certain officers of the company, gave liberty to summon such persons for the purpose of giving information as to the alleged misfeasance, but upon the terms that the costs should be reserved, and should be dealt with as the court should think fit: (*Ex parte Carter; Re The Gold Company*, 40 L. T. Rep. N. S. 772.)

The court has no jurisdiction to make an order for winding up a company which has been voluntarily wound up and dissolved under the 142nd and 143rd sections of the Companies Act, 1862, unless the dissolution can be impeached on the ground of fraud: (*Re London and Caledonian Marine Insurance Company*, L. Rep. 11 Ch. Div. 140; 40 L. T. Rep. N. S. 666; 27 W. R. 713.)

(e) *Effect.*

The voluntary winding-up of a company shall not be a bar to the right of any creditor of such company to have the same wound-up by the court, if the court is of opinion that the rights of such creditor will be prejudiced by a voluntary winding-up: (C. A., 1862, s. 145.)

As to the circumstances under which a company may be wound-up by the court, see *sup.* 1 (a); see also *post*.

As to whether the section, by specifying creditors, does not exclude contributories, and whether after the commencement of a voluntary

winding-up, a compulsory order can be made on a contributory's petition, see Buck. 145-6.

After a resolution has been passed for winding-up a company voluntarily, a shareholder cannot, as a general rule, obtain a compulsory order for winding-up, or an order for continuing the voluntary winding-up under supervision. The only exceptions to the rule are where the resolution has been passed fraudulently, or where creditors appear to support the petition: (*Re Gold Company*, L. Rep. 11 Ch. Div. 701; 40 L. T. Rep. N. S. 5; 48 L. J. 281, Ch.)

(f) *Adopting previous Proceedings.*

Where a company is in course of being wound-up voluntarily, and proceedings are taken for the purpose of having the same wound-up by the court, the court may, if it thinks fit, notwithstanding that it makes an order directing the company to be wound-up by the court, provide in such order or in any other order for the adoption of all or any of the proceedings taken in the course of the voluntary winding-up: (C. A., 1862, s. 146.)

(g) *Order for Criminal Prosecution.*

Application for leave to prosecute delinquent officers or members must be made by petition: (G. O., 1862, r. 51.)

3. SUBJECT TO SUPERVISION OF COURT.

(a) *Voluntary Winding-up may be continued subject to Supervision of Court.*

When a resolution has been passed by a company to wind-up voluntarily the court may make an order directing that the voluntary winding-up should continue, but subject to such supervision of the court, and with such liberty for creditors, contributories, or others, to apply to the court, and generally upon such terms and subject to such conditions as the court thinks just: (C. A., 1862, s. 147.)

It is cheaper and better in a large liquidation to get a compulsory order at once, as it saves the costs of frequent applications by the liquidator to the court: (Per Jessel, M.R.; *Re Western District Bank*, W. N. 1879, p. 151.)

The winding-up under supervision is deemed to commence at the commencement of the voluntary winding-up (Buck. 271); and at the appointment of the provisional liquidator: (*Bradshaw's case*, L. Rep. 15 Ch. Div. 465.)

The court has jurisdiction to make a compulsory winding-up order after a voluntary winding-up has been continued, subject to supervision of court, but will only do so in exceptional cases: (*Re Orrell Colliery Company*, W. N. 1879, p. 106.)

(b) *Who may Petition.*

[See *sup.* 1 (b)].

Unless it appears that in passing the resolution for a voluntary winding-up the minority have been overborne by fraud, &c., the court will not generally on the petition of a contributory make an order to continue the voluntary winding-up under supervision: (Buck. 270.)

(c) *Wishes of Creditors or Contributories to be regarded.*

The court may, in determining whether a company is to be wound up altogether by the court or subject to the supervision of the court, in the appointment of liquidator or liquidators, and in all other matters relating to the winding-up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence, and may direct meetings of the creditors or contributories to be

summoned, held, and regulated in such manner as the court directs for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the court: In the case of creditors, regard shall be had to the value of the debts due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the regulations of the company: (C. A., 1862, s. 149.)

(d) *The Petition.*

(1) Title [see *sup.*, 1 (c) (1)].

(2) Service.

Every petition . . . shall also be served upon the liquidator (if any) appointed for the purpose of winding-up the affairs of the company: (G. O., 1862, r. 3.)

The petition must be served on the company also: (Buck. 271.)

[See *sup.*, 1 (c) (2).]

(3) Verification [see *sup.*, 1 (c) (3)].

(4) Advertisement [see *sup.*, 1 (c) (4)].

(5) Furnishing Copies [see *sup.*, 1 (c) (5)].

(6) Effect.

A petition, praying wholly or in part that a voluntary winding-up should continue, but subject to the supervision of the court . . . shall, for the purpose of giving jurisdiction to the court over suits and actions, be deemed to be a petition for winding-up the company by the court: (C. A., 1862, s. 148.)

(7) Amendment [see *sup.*, 1 (c) (6)].

(8) Transfer [see *sup.*, 1 (c) (7)].

(9) Priority [see *sup.*, 1 (c) (8)].

(10) Costs [see *sup.*, 1 (c) (9)].

(e) *Hearing* [see *sup.*, 1 (d)].

(f) *Winding-up Order.*

(1) Generally [see *sup.*, 1 (e)].

(2) Copy for Registrar [see *sup.*, 1 (e) (4)].

(3) Advertisement and Service [see *sup.*, 1 (e) (5)].

(4) Effect.

(i.) Dispositions of Property [see *sup.*, 1 (e) (6) (i.)].

(ii.) Actions.

Any order made by the court for a winding-up subject to the supervision of the court shall for all purposes, including the staying of actions, suits, and other proceedings, be deemed to be an order of the court for winding-up the company by the court: (C. A., 1862, s. 151.)

(iii.) Process [see *sup.*, 1 (e) (6) (iii.)].

(f) *Staying and Transferring Winding-up and other Proceedings* [see *sup.* (f) (4) (iii.) and 1 (f)].

(h) *Liquidators* [see *sup.*, 1 (l)].

(1) Additional Liquidators.

(i.) Power to Appoint.

Where any order is made by the court for a winding-up subject to the supervision of the court, the court may, in such order or in any subsequent order, appoint any additional liquidator or liquidators: (C. A., 1862, s. 150.)

(ii.) Person Appointed.

The court will have regard to the wishes of the creditors or contributories in the appointment: (see *sup.* 3 (c).)

(2) Security [see *sup.*, 1 (l) (3) (iv.).]

(3) Description.

In the construction of the provisions whereby the court is empowered to direct any act or thing to be done to or in favour of the official liquidators, the expression official liquidators shall be deemed to mean the liquidators conducting the winding-up, subject to the supervision of the court: (C. A., 1862, c. 151.)

(4) Powers.

Any [additional] liquidators appointed by the court shall have the same powers, be subject to the same obligations, and in all respects stand in the same position as if they had been appointed by the company: (C. A., 1862, s. 150.)

The liquidators appointed to conduct [a] winding-up [under supervision of the court] may, subject to any restrictions imposed by the court, exercise all their powers, without the sanction or intervention of the court, in the same manner as if the company were being wound-up altogether voluntarily: (C. A., 1862, s. 151.)

(5) Remuneration [see *sup.* 1 (l) (3) (xiv.).]

(6) Removal.

The court may from time to time remove any [additional] liquidators appointed by the court, and fill up any vacancy occasioned by such removal, or by death or resignation: (C. A., 1862, s. 150.)

See *sup.* 2 (b) (2), as to power of court to remove the liquidators appointed by the company or the court in a voluntary winding-up.

(i) Contributories.

(1) Calls.

[The order for a winding-up subject to the supervision of the court] shall confer full authority on the court to make calls, or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding-up the company altogether by the court: (C. A., 1862, s. 151.)

[And see *sup.*, 1 (n) (9).]

(2) Order Conclusive Evidence [see *sup.*, 1 (n) (10).](3) Costs [see *sup.*, 1 (n) (12).](4) Absconding Contributory [see *sup.*, 1 (n) (13).](5) Powers of Court Cumulative [see *sup.*, 1 (n) (14).](k) General Practice in Chambers [see *sup.*, 1 (o).](l) Evidence [see *sup.*, 1 (p).](m) Summonses, Notices, &c. [see *sup.*, 1 (q).](n) Orders [see *sup.*, 1 (r).](o) Advertisements [see *sup.*, 1 (s).](p) Fees [see *sup.*, 1 (t).](q) Dissolution [see *sup.*, 1 (u).](r) Enforcement of Orders [see *sup.*, 1 (w).]

(s) *Appeals.*

- (1) From Winding-up Order [see APPEAL.]
- (2) From Orders During Winding-up [see *sup.*, 1, (x).]
- (7) Incidental Powers [see *sup.*, 1 (y).]

II. UNREGISTERED COMPANIES (BY THE COURT).

1. WHAT COMPANIES.

Any, partnership, association, or company, except railway companies incorporated by Act of Parliament, consisting of more than seven members, and not registered under [the] Act, and . . . included under the term unregistered company, may be wound-up under [the] Act, and all the provisions of [the] Act with respect to winding-up shall apply to such company [subject to the] exceptions and additions [set forth in the Act] (see *infra*): (C. A., 1862, s. 199.)

Where an unregistered society, which was insolvent, had at one time more than seven members, but at the date of the petition consisted of only four members, although six former members who had withdrawn (without authority to do so in the society's rules) were then living, Jessel, M.R., refused a winding-up order on the ground of there not being eight actual members: (*Re Bolton Benefit Loan Society*, L. Rep. 12 Ch. Div. 679.)

This was contrary to an earlier decision of Lord Romilly in a case where an unregistered society, which at one time consisted of thirty members, had, at the date of the petition, five only. It was held that the court had jurisdiction to wind-up an unregistered company of less than seven members, which had formerly consisted of more than seven members, and an order was made accordingly: (*Re National Building Society*, W. N. 1867, p. 225.)

An unregistered company shall, for the purpose of determining the court having jurisdiction in the matter of the winding-up, be deemed to be registered in that part of the United Kingdom where its principal place of business is situate, or, if it has a principal place of business situate in more than one part of the United Kingdom, then in each part of the United Kingdom where it has a principal place of business; moreover the principal place of business of an unregistered company, or (where it has a principal place of business situate in more than one part of the United Kingdom) such one of its principal places of business as is situate in that part of the United Kingdom in which proceedings are being instituted, shall, for all the purposes of the winding-up of such company, be deemed to be the registered office of the company: (C. A., 1862, s. 199 (1).)

No unregistered company shall be wound-up under [the] Act voluntarily or subject to the supervision of the court: (C. A., 1862, s. 199 (2).)

2. UNDER WHAT CIRCUMSTANCES.

(1) Whenever the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs: (C. A., 1862, s. 199 (3) (a).)

(2) Whenever the company is unable to pay its debts: (*Id.* (b).)

An unregistered company shall, for the purposes of this Act, be deemed to be unable to pay its debts,

- (i.) Whenever a creditor to whom the company is indebted, at law or in equity, by assignment or otherwise, in a sum exceeding fifty pounds then due, has served on the company, by leaving the same at the principal place of business of the company, or by delivering to the secretary or some director or principal officer of the company, or by otherwise serving the same in such manner as the court may approve or direct, a demand under his hand

requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor.

- (ii.) Whenever any action, suit, or other proceeding has been instituted against any member of the company for any debt or demand due or claimed to be due, from the company, or from him in his character of member of the company, and notice in writing of the institution of such action, suit, or other legal proceeding having been served upon the company by leaving the same at the principal place of business of the company, or by delivering it to the secretary, or some director, manager, or principal officer of the company, or by otherwise serving the same in such manner as the court may approve or direct, the company has not within ten days after service of such notice paid, secured, or compounded for such debt or demand, or procured such action, suit, or other legal proceeding to be stayed, or indemnified the defendant to his reasonable satisfaction against such action, suit, or other legal proceeding, and against all costs, damages, and expenses to be incurred by him by reason of the same.
 - (iii.) Whenever, in England or Ireland, execution or other process issued on a judgment, decree, or order obtained in any court in favour of any creditor in any proceeding at law or in equity instituted by such creditor against the company, or any member thereof as such, or against any person authorised to be sued as nominal defendant on behalf of the company, is returned unsatisfied.
 - (iv.) Whenever, in the case of an unregistered company engaged in working mines within and subject to the jurisdiction of the Stannaries, a customary decree or order absolute for the sale of the machinery, materials, and effects of such mine has been made in a creditor's suit in the court of the Vice-Warden.
 - (v.) Whenever, in Scotland, the *induciae* for a charge for payment or an extract decree, or an extract registered bond, or an extract registered protest, have expired without payment being made.
 - (vi.) Whenever it is otherwise proved to the satisfaction of the court that the company is unable to pay its debts: (C. A., 1862, s. 199 (4).)
 - (3) Whenever the court is of opinion that it is just and equitable that the company should be wound-up: (C. A., 1862, s. 199 (3) (c.))
- See further, hereon, Buck. 346-351.

3. EFFECT OF WINDING-UP ORDER.

Where an order has been made for winding-up an unregistered company, in addition to the provisions . . . contained [in the Act] in the case of companies formed under [the] Act, it is hereby further provided that no suit, action, or other legal proceeding shall be commenced or proceeded with against any contributory of the company in respect of any debt of the company, except with the leave of the court, and subject to such terms as the court may impose: (C. A., 1862, s. 202.)

4. PROPERTY TO VEST IN OFFICIAL LIQUIDATORS.

If any unregistered company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the court may by the order made for winding-up such company, or by any subsequent order, direct that all such property, real and personal, including all interest, claims, and rights into and out of property, real and personal, and including things in action, as may belong to or be vested in the

company, or to or in any person or persons on trust for or on behalf of the company, or any part of such property, is to vest in the official liquidator or official liquidators by his or their official name or names, and thereupon the same or such part thereof as may be specified in the order shall vest accordingly, and the official liquidator or official liquidators may in his or their official name or names, or in such name or names and after giving such indemnity as the court directs, bring or defend any actions, suits, or other legal proceeding relating to any property vested in him or them, or any actions, suits, or other legal proceedings necessary to be brought or defended for the purposes of effectually winding-up the company and recovering the property thereof: (C. A., 1862, s. 203.)

A vesting order can be obtained on an *ex parte* motion. A schedule of the property upon which the vesting order is to operate should be annexed to the petition: (Buck. 355.)

5. APPLICATION OF PROVISIONS RELATING TO THE WINDING-UP OF REGISTERED COMPANIES.

The provisions made by . . . the Act with respect to unregistered companies shall be deemed to be made in addition to and not in restriction of any provisions . . . with respect to winding-up companies by the court, and the court or official liquidator may, in addition, . . . exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding-up companies formed under [the] Act; but an unregistered company shall not, except in the event of its being wound-up, be deemed to be a company under [the] Act, and then only to the extent provided by [the] Act: (C. A., 1862, s. 204.)

[See *sup.* I., 1.]

III. LIFE ASSURANCE COMPANIES (SPECIAL PROVISIONS).

1. REGISTRATION.

Every insurance company registered under the Act, 8 Vict. c. 110, shall register itself as a company under the Companies Acts, in manner and subject to the regulations therein contained: (C. A., 1862, s. 209.)

2. HOW WOUND-UP.

Registered life assurance companies may be wound-up compulsorily, voluntarily, or under supervision of the court: (see *sup.* I., 1, 2, 3.)

Unregistered life assurance companies must be wound-up compulsorily: (see *sup.* II.)

(a) *Under what Circumstances.*

(1) *Insolvency.*

The court may order the winding-up of any company, in accordance with the Companies Act, 1862, . . . upon its being proved to the satisfaction of the court that the company is insolvent, and in determining whether or not the company is insolvent the court shall take into account its contingent or prospective liability under policies and annuity and other existing contracts: (L. A. C. A., 1870, s. 21.)

If the company is unable to meet current demands, it is commercially insolvent, and may be wound-up apart from the special grounds of what may be called prospective insolvency: (Buck. 551.)

(2) *Other Circumstances.*

[The court may order the winding-up of] every company which makes default in complying with the requirements of [the Life Assurance Companies Act, 1870] . . . for a period of three months after notice of default by the Board of Trade, which notice shall be published in one

or more newspapers as the Board of Trade may direct : (L. A. C. A., 1870, s. 18.)

(b) *Calling up of Capital.*

In the case of a proprietary company having an uncalled capital of an amount sufficient with the future premiums receivable by the company to make up the actual invested assets equal to the amount of the estimated liabilities, the court shall suspend further proceedings on the petition for a reasonable time (in the discretion of the court) to enable the uncalled capital, or a sufficient part thereof, to be called up; and if, at the end of the original or any extended time for which the proceedings shall have been suspended such an amount shall not have been realised by means of calls as, with the already invested assets, to be equal to the liabilities, an order shall be made on the petition as if the company had been proved insolvent : (L. A. C. A., 1870, s. 21.)

(g) *Who May Petition.*

[Application for winding-up shall be made by petition by] one or more policy-holders or shareholders : (L. A. C. A., 1870, ss. 18, 21.)

(d) *The Petition.*

The petition must be entitled under the Life Assurance Companies Act, 1870 : (Buck. 551.)

(e) *Hearing.*

(1) *Security for Costs.*

The court shall not give a hearing to the petition until security for costs for such amount as the judge shall think reasonable shall be given : (L. A. C. A., 1870, s. 21.)

(2) *Primâ Facie Case.*

[The court shall not give a hearing to the petition] until a *primâ facie* case shall also be established to the satisfaction of the judge : (*Id.*)

Where a policy-owner in a life insurance company, being a creditor, presented a petition for the winding-up of the company, it was held that the provisions of the Life Assurance Companies Act, 1870, s. 21, had not been complied with, and that the proper course is to mark such a petition with a special *fiat*, directing an inquiry before the judge in chambers as to whether or not there is a *primâ facie* case of insolvency, in order to justify the hearing of the petition : (*Re Great Britain Life Assurance Society*, W. N. 1880, p. 164; 70 L. T. 24; see *post*, (f).)

The company is not heard on the preliminary inquiry, for the petitioner is only required to make out a *primâ facie* case. If the company were heard, the result would in fact be that the real matter in issue on the petition would be fought out on the preliminary inquiry. Thus either the solvency of the company would be tried in a private proceeding, or the company would lose the benefit of the privacy, which the Act desires to maintain until a *primâ facie* case is shown : (Buck. 550.)

The practice is to mark the petition with a special *fiat* in the following form :

“The court doth order that this petition be referred to the judge in chambers to inquire whether a *primâ facie* case within the meaning of sect. 21 of the Life Assurance Companies Act, 1870, is established and to consider the security for costs to be given pursuant to the same section, and the result of such inquiry is to be certified to the court.”

The matter then goes to chambers, and is there heard *ex parte*.

Upon the result of the proceedings in chambers, the petition will be answered for hearing in the usual way : (Buck. 550.)

(f) Reduction of Contracts in Lieu of Winding-up.

The court, in the case of a company which has been proved to be insolvent, may, if it thinks fit, reduce the amount of the contracts of the company upon such terms, and subject to such conditions, as the court thinks just, in place of making a winding-up order: (L. A. C. A. 1870, s. 22.)

Where, after a winding-up order had been made, certain policy-holders applied to the court to order a meeting of policy-holders to be held to ascertain their wishes, and with a view to reduce the contracts of the society, pursuant to the above section, the court discharged the winding-up order, and complied with the wishes of the policy-holders, and directed a meeting to be called: (*Re Great Britain Life Assurance Society*, W. N. 1880, p. 181; 43 L. T. Rep. N. S. 684; see *sup.* (e) (2).)

(g) Liquidator.

The court will not appoint a provisional liquidator *ex parte* before the preliminary inquiry has been answered: (Buck. 551.)

(h) Valuation of Policies and Annuities.

. . . . The official liquidator in the case of all persons appearing by the books of the company to be entitled to or interested in policies granted by such company, for life assurance, endowment, annuity, or other payment, is to ascertain the value of such policies, and give notice of such value to such persons, and any person to whom notice is so given shall be bound by the value so ascertained unless he gives notice of his intention to dispute such value in manner and within a time to be prescribed by a rule or order of the court: (L. A. C. A., 1872, sch. II.)

. . . . The value of every life annuity and life policy requiring to be valued in [the] winding-up shall be estimated in manner provided by the first schedule to [the Life Assurance Companies Act, 1872]: (L. A. C. A., 1872, s. 5.)

*(i) Subsidiary Company.**(1) May be Wound-up in conjunction with Principal Company.*

Where the business or any part of the business of a life assurance company has been transferred to another company under an arrangement in pursuance of which such first-mentioned company (. . . . called the subsidiary company) or the creditors thereof has or have claims against the company to which such transfer was made (. . . . called the principal company) then, if such principal company is being wound-up the court shall (subject as hereinafter mentioned) order the subsidiary company to be wound-up in conjunction with the principal company: (L. A. C. A., 1872, s. 4.)

(2) Who may Petition.

An application may be made in relation to the winding-up of any subsidiary company in conjunction with a principal company by any creditor of, or person interested in, such principal or subsidiary company: (*Id.*)

(3) Commencement of Winding-up.

The commencement of the winding-up of the principal company shall, save as otherwise ordered by the court, be the commencement of the winding-up of the subsidiary company: (*Id.*)

See *Gardiner's case*, L. T. 63 (Eur. Arb.); 17 Sol. J. 64; *Conquest's case*, L. T. 121 (Eur. Arb.)

(4) Liquidator.

[The court] may by the same or any subsequent order appoint the same person to be liquidator for the two companies, and make provision for such

other matters as may seem to the court necessary, with a view to such companies being wound-up as if they were one company: (L. A. C. A., 1872, s. 4.)

(5) **Regard to Circumstances.**

The court nevertheless shall have regard, in adjusting the rights and liabilities of the members of the several companies between themselves, to the constitution of such companies, and to the arrangements entered into between the said companies, in the same manner as the court has regard to the rights and liabilities of different classes of contributories in the case of the winding-up of a single company, or as near thereto as circumstances admit: (*Id.*)

(6) **Considerations, on Ordering Winding-up, where not Included in Original Winding-up.**

Where any subsidiary company or company alleged to be subsidiary is not in process of being wound-up at the same time as the principal company to which it is subsidiary, the court shall not direct such subsidiary company to be wound-up unless after hearing all objections (if any) that may be urged by or on behalf of such company against its being wound-up, the court is of opinion that such company is subsidiary to the principal company, and that the winding-up of such company in conjunction with the principal company is just and equitable: (*Id.*)

(7) **When being Wound-up by Different Branches of Court.**

Where any subsidiary company and principal company are being wound-up by different branches of the court, the [Lord Chancellor] shall make an order directing in which branch the winding-up of such companies is to be carried on, and the necessary proceedings shall be taken for carrying such order into effect: (*Id.*); See TRANSFER.)

(8) **May be Wound up Together or in Separate Groups.**

Where a company stands in the relation of a principal company to one company, and in the relation of a subsidiary company to some other company, or where there are several companies standing in the relation of subsidiary companies to one principal company, the court may deal with any number of such companies together or in separate groups, as it thinks most expedient, upon the principles laid down in this section: (*Id.*)

See Buck. 566.

IV. RAILWAY COMPANIES.

For the special provisions relating to the winding-up of railway companies, see COMPANIES XI., 1, and Buckley, 348.

WITHDRAWAL.

[See DISCONTINUANCE AND WITHDRAWAL.]

WITNESS.

[See EVIDENCE; TRIAL.]

WRIT.**OF ASSISTANCE.**

[See EXECUTION, XXIII.]

OF ATTACHMENT.

[See EXECUTION, XX.]

OF CERTIORARI.

[See CERTIORARI].

DE CONTUMACE CAPIENDO.

[See JUDGMENT, XXV., 1 (c).]

OF DELIVERY.

[See EXECUTION, XXIV.]

OF DISTINGAS NUPER VICE COMITEM.

[See EXECUTION, XV., 1.]

OF ELEGIT.

[See EXECUTION, XIV.]

OF FIERI FACIAS.

[See EXECUTION, XIII.]

OF FIERI FACIAS DE BONIS ECCLESIASTICIS.

[See EXECUTION, XV., 3.]

OF INQUIRY.

[See INQUIRIES, II.]

OF MANDAMUS.

[See MANDAMUS.]

OF NE EXEAT REGNO.

[See ARREST, II., 2.]

OF POSSESSION.

[See EXECUTION, XXII.]

OF PROHIBITION.

[See PROHIBITION.]

OF SEQUESTREARI FACIAS DE BONIS ECCLESIASTICIS.

[See EXECUTION, XV., 3.]

OF SEQUESTRATION.

[See EXECUTION, XVII.]

OF SUBPCENA.

[See EVIDENCE; SOLICITORS, IV.]

OF SUMMONS.

[See WRIT OF SUMMONS.]

OF VENDITIONI EXPONAS.

[See EXECUTION, XV., 1.]

WRIT OF SUMMONS.

- I. WHAT PROCEEDINGS COMMENCED BY WRIT.
- II. PREPARATION.
- III. PAPER, &c.
- IV. DATE AND TESTING.
- V. DIVISION AND JUDGE.
- VI. DIRECTION AS TO APPEARANCE.
- VII. FORMS.
 - 1. WRIT FOR SERVICE WITHIN JURISDICTION.
 - 2. WRIT FOR SERVICE OUT OF JURISDICTION.
 - 3. NOTICE OF WRIT FOR SERVICE OUT OF JURISDICTION.
- VIII. INDORSEMENTS.
 - 1. OF CLAIM.
 - (a) *General Rules.*
 - (b) *Different Kinds.*
 - (1) General, not being for a Debt or Liquidated Demand.
 - (2) General, for a Debt or Liquidated Demand.
 - (3) Special Indorsement.
 - (4) Indorsement for Account.
 - (c) *Joinder of Causes of Action.*
 - (1) Several in one Claim.
 - (2) Claim for Recovery of Land.
 - (3) Claims by Trustees in Bankruptcy.
 - (4) Claims by or against Husband and Wife.
 - (5) Claims by or against Executors or Administrators.
 - (6) Joint and Several Claims.
 - (7) By Amendment.
 - (8) Separating Joined Causes.
 - 2. OF ADDRESS FOR SERVICE.
 - (a) *Where Writ Issued out of London Office.*
 - (b) *Where Writ Issued out of District Registry.*
- IX. ISSUE.
 - 1. LEAVE FOR WRIT FOR SERVICE OUT OF JURISDICTION.
 - 2. PLACE OF ISSUE.
 - 3. MODE OF ISSUE.
- X. FILING AND ENTRY.
- XI. HOW ACTION DISTINGUISHED.
- XII. RENEWAL.
 - 1. WHEN NECESSARY.
 - 2. HOW APPLICATION MADE.
 - 3. WHEN APPLICATION MADE.
 - 4. ORDER FOR RENEWAL.
 - 5. HOW RENEWAL MADE.
 - 6. EFFECT.
 - 7. EVIDENCE OF RENEWAL.
- XIII. AMENDMENT.
- XIV. SERVICE.
 - 1. WITHIN THE JURISDICTION.
 - (a) *When Unnecessary.*
 - (b) *How Effected.*
 - (1) In Ordinary Cases.
 - (2) On Wife, where Defendant with Husband.
 - (3) On Infant.
 - (4) On Lunatic, so Found.

- (5) On Lunatic, Not so Found.
- (6) On Partnership Firm.
- (7) On Corporations, &c., under Statutes as to Service.
- (8) On New Defendant,

2. OUT OF THE JURISDICTION.

- (a) *When Allowed.*
- (b) *When Application Made.*
- (c) *How Application Made.*
- (d) *Evidence.*
- (e) *How Discretion Exercised in Action on Contract.*
- (f) *Order.*
- (g) *How Writ Served or Notice Given,*
- (h) *How Order Set Aside.*

3. SUBSTITUTED SERVICE.

- (a) *In Action for Recovery of Land.*
- (b) *By Order in Other Cases.*

XV. INDORSEMENT OF DATE OF SERVICE.

XVI. REGISTRATION [see LIS PENDENS].

XVII. DISCLOSURE BY SOLICITORS, PLAINTIFFS, AND PARTNERS.

XVIII. CONCURRENT WRITS.

I. WHAT PROCEEDINGS COMMENCED BY WRIT.

All actions [formerly] commenced by writ in the Superior Courts of Common Law, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits [formerly] commenced by bill or information in the High Court of Chancery, or by a cause *in rem* or *in personam* in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding, to be called an action : (O. I., r. 1.)

Every action in the High Court shall be commenced by a writ of summons : (O. II., r. 1.)

II. PREPARATION.

Writs of summons shall be prepared by the plaintiff or his solicitor : (O. V., r. 5.)

III. PAPER, ETC.

Writs of summons shall be written or printed, or partly written and partly printed, on paper of the same description as hereby directed in the case of proceedings directed to be printed (O. V., r. 5); (*i. e.*, cream-wove machine drawing foolscap folio paper, 19lb. per mill ream : (O. LVI., r. 2.)

IV. DATE AND TESTING.

Every writ of summons . . . shall bear date on the day on which the same shall be issued, and shall be tested in the name of the Lord Chancellor, or if the office of Lord Chancellor shall be vacant, in the name of the Lord Chief Justice of England : (O. II., r. 8.)

V. DIVISION AND JUDGE TO BE SPECIFIED.

[The] writ of summons . . . shall specify the division of the High Court to which it is intended that the action should be assigned : (O. II., r. 1.)

Subject to the power of transfer, every person by whom any cause or matter may be commenced in the High Court of Justice which would have been within the non-exclusive cognisance of the High Court of Admiralty if the said Act had not passed, shall assign such cause or matter to any

one of the divisions of the said High Court as he may think fit, by marking the document by which the same is commenced with the name of the division, and giving notice thereof to the proper officer of the court. If so marked for the Chancery Division, the same shall be assigned to one of the judges of such division by marking the same with the name of such of the said judges as the plaintiff subject to such power of transfer, may think fit: (O. V., r. 4; J. A., 1873, s. 33.)

No cause or matter is to be assigned to Mr. Justice Fry, by being marked with his name, until further order: (Order of L. C., 19th June, 1877, W. N., 1877, p. 307.)

VI. DIRECTION AS TO APPEARANCE.

In all cases where a defendant neither resides, nor carries on business, within the district out of the registry whereof a writ of summons is issued, there shall be a statement on the face of the writ of summons that such defendant may cause an appearance to be entered at his option either at the district registry or the London office, or a statement to the like effect: (O. V., r. 2.)

In all cases where a defendant resides, or carries on business, within the district, and a writ of summons is issued out of the district registry, there shall be a statement on the face of the writ of summons that the defendant do cause an appearance to be entered at the district registry, or to the like effect: (O. V., r. 3.)

VII. FORMS.

1. WRIT FOR SERVICE WITHIN JURISDICTION.

The writ of summons for the commencement of an action shall, except in the cases in which any different form is hereinafter provided, be in Form No. 1, in part 1 of Appendix A. to [the Rules of 1875] with such variations as circumstances may require: (O. II., r. 3.)

The form of a writ issued out of a district registry is given in Sched. A. 1b. to the Rules of April, 1880.

2. WRIT FOR SERVICE OUT OF JURISDICTION.

A writ of summons to be served out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be in Form No. 2 in part 1 of Appendix A. [to the Rules of 1875] with such variations as circumstances may require: (O. II., r. 5.)

Form 2 in Part I. of Appendix A. to the Rules of the Supreme Court shall be read as if the words "by leave of the court or a judge" were not therein: (O. II., r. 3a., June, 1876.)

A form of specially indorsed writ issued from the Central Office for service out of the jurisdiction is given in Sched. A. 2a. to the Rules of April, 1880.)

Forms of ordinary and specially indorsed writs issued from a district registry for service out of the jurisdiction are given in Schedules A. 2b. and A. 2c. to the same rules.

3. NOTICE OF WRIT FOR SERVICE OUT OF JURISDICTION.

[A notice of a writ of summons to be served out of the jurisdiction] shall be in Form No. 3 in [Part. I., of Appendix A. to the Rules of 1875] with such variations as circumstances may require: (O. II., r. 5.)

Form 3 in Part I. of Appendix A. to the Rules of the Supreme Court shall be read as if the words "by leave of the court or a judge" were not therein: (O. II., r. 3a., June, 1876.)

The district registry form is given in Schedule A. 3a. to the Rules of April, 1880.

VIII. INDORSEMENTS.

1. OF CLAIM.

(a) *General Rules.*

[The writ of summons] shall be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action: (O. II., r. 1.)

In the indorsement required by Order II., r. 1, it shall not be essential to set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled: (O. III., r. 2.)

If the plaintiff sues or the defendant or any of the defendants is sued in a representative capacity, the indorsement shall show, in manner appearing by the statement in Appendix A. [to the Rules], part II., sect. 8, or by any other statement to the like effect, in what capacity the plaintiff or defendant sues or is sued: (O. III., r. 4.)

The indorsement of claim may be to the effect of such of the forms in Part II. of Appendix A. [to the rules] as shall be applicable to the case, or if none be found applicable then such other similarly concise form as the nature of the case may require: (O. III., r. 3.)

The indorsement of claim shall be made on every writ of summons before it is issued: (O. III., r. 1.)

Any costs occasioned by the use of any more prolix or other forms of writs, and of indorsements thereon, than the forms . . . prescribed, shall be borne by the party using the same, unless the court shall otherwise direct: (O. II., r. 2.)

(b) *Different Kinds.*

There are five different kinds of indorsement of claim:

- (1) General, *not* being for a debt or liquidated demand.
- (2) General, for a debt or liquidated demand.
- (3) Special.
- (4) For account.

No writ shall hereafter be issued under the Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67): (O. II., r. 6, April, 1880.)

(1) General, not being for a Debt or Liquidated Demand.

Examples of forms of claim where no debt or liquidated demand is claimed are set out in Appendix A., part II., ss. 1, 4, 5, and 6. Those in sect. 1, relating to matters assigned to the Chancery Division [see ACTION], are set forth under the proper titles.

(2) General, for a Debt or Liquidated Demand.

Wherever the plaintiff's claim is for a debt or liquidated demand only, the indorsement, beside stating the nature of the claim, shall state the amount claimed for debt, or in respect of such demand, and for costs respectively, and shall further state, that upon payment thereof within four days after service, or in case of a writ not for service within the jurisdiction within the time allowed for appearance, further proceedings will be stayed: (O. III., r. 7.)

The claim, as to the money, must be in one of the forms in Appendix A., part 2, s. 2.

Such statement may be in the form in Appendix A. . . . part II., s. 3: (O. III., r. 7.)

The following is the form—

And *l.* for costs; and if the amount claimed be paid to the plaintiff or his solicitor within four days [or if the writ is to be served out of the jurisdiction, or notice in lieu of service allowed, insert the time for appearance limited by the order] from the service hereof further proceedings will be stayed:

(App. A., P. II., s. 3.)

The defendant may, notwithstanding such payment, have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's solicitor shall pay the costs of taxation: (O. III., r. 7.)

Where the plaintiff issued a writ indorsed with the amount of the debt and a sum for costs, and more than four days after service accepted payment of the full amount indorsed, without any agreement as to costs, it was held that the defendant was entitled to tax the costs under the rule: (*Hoole v. Earnshaw*, 39 L. T. Rep. N. S. 410.)

(3) Special Indorsement.

In all actions where the plaintiff seeks merely to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising upon a contract, express or implied, as, for instance, on a bill of exchange, promissory note, cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt, or on a guaranty, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or note, or on a trust, the writ of summons may be specially indorsed with the particulars of the amount sought to be recovered, after giving credit for any payment or set-off: (O. III., r. 6.)

Examples of forms of special indorsement are given in Appendix A., Part II., sect. 7, and Schedules A. 1a. and A. 2a. to the Rules of April, 1880.

Forms for service in the district registry are given in Schedules A. 1c. and A. 2c. to the Rules of April, 1880.

Sufficient particulars ought to be given to enable the defendant to satisfy his mind whether he ought to pay or resist: (*Walker v. Hicks*, L. Rep. 3 Q. B. Div. 8; 37 L. T. Rep. N. S. 529; 47 L. J. 27, Q. B.; 26 W. R. 113; *Parpaite Frères v. Dickinson*, W. N. 1878; p. 51; 38 L. T. Rep. N. S. 178; 26 W. R. 179; *Smith v. Wilson*, L. Rep. 4 C. P. Div. 392; L. Rep. 5 C. P. Div. 25; 41 L. T. Rep. N. S. 433; 49 L. J. 96; 28 W. R. 57.)

Where there is a claim for costs, the amount must be ascertained so that the claim may be for a specific sum of money: (*French v. Lear*, 21 S. J. 479.)

The same forms as those used under s. 25 of the Common Law Procedure Act, 1852, will suffice: (*Aston v. Hurwitz*, 41 L. T. Rep. N. S. 521; W. N. 1879, p. 194.)

A writ indorsed for an injunction and other relief, and for payment of a sum of 1000*l.*, alleged to have been received by the defendant as plaintiff's solicitor, is not a specially indorsed writ: (*Yeatman v. Snow*, 42 L. T. Rep. N. S. 502; 28 W. R. 574.)

As to the effect of a special indorsement, see JUDGMENT, I., 1 (b); III.

A plaintiff may be ordered to give particulars of items which are, in his claim, placed to the defendant's credit: (*Godden v. Corsten*, L. Rep. 5 C. P. Div. 17; 41 L. T. Rep. N. S. 527; 49 L. J. 112, C. P.; 28 W. R. 305.)

(4) Indorsement for Account.

In all cases of ordinary account, as, for instance, in the case of a partnership or executorship or ordinary trust account, where the plaintiff, in the first instance, desires to have an account taken, the writ of summons shall be indorsed with a claim that such account be taken: (O. III., r. 8; and see ACCOUNT.)

(c) Joinder of Causes of Action.

(1) Several in one Claim.

Subject to the following rules [Rules 2-9 of Ord. XVII.] the plaintiff may unite in the same action and in the same statement of claim several causes of action: (O. XVII., r. 1.)

Alternative relief may be asked for (per Cairns, L. C., *Bagot v. Easton*, L. Rep. 7 Ch. Div. 1; 37 L. T. Rep. N. S. 369; 47 L. J. 225, Ch.; 26 W. R. 66); but it must not be inconsistent: (*Id.*; *Ede v. Vyse*, W. N. 1877, p. 98.)

Claims by a purchaser for return of a deposit on the ground of misdescription, and, alternatively, specific performance of the contract if the court thought him bound by it, was held too inconsistent: (*Ede v. Vyse*, *sup.*) Claims for an injunction against breach of covenant on the footing of an agreement continuing, and for recovery of possession notwithstanding the agreement, were held too inconsistent: (*Evans v. Davis*, L. Rep. 10 Ch. Div. 747; 39 L. T. Rep. N. S. 391.) Nothing can be granted by way of further relief, inconsistent with what is expressly asked: (*Cargill v. Bower*, L. Rep. 10 Ch. Div. 502.)

See also PLEADING, III., 7, and *post* (8).

(2) Claim for Recovery of Land.

No cause of action shall, unless by leave of the court or a judge, be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held: (O. XVII., r. 2; and see RECOVERY OF LAND, II.)

(3) Claims by Trustees in Bankruptcy.

Claims by a trustee in bankruptcy as such shall not, unless by leave of the court or a judge, be joined with any claim by him in any other capacity: (O. XVII., r. 3.)

The application for leave must be made before service of the writ: (see *Re Pilcher, Pilcher v. Hinds*, L. Rep. 11 Ch. Div. 905; 40 L. T. Rep. N. S. 422, 832; 48 L. J. 512, 587, Ch.)

(4) Claims by or against Husband and Wife.

Claims by or against husband and wife may be joined with claims by or against either of them separately: (O. XVII., r. 4.)

This rule is subject to the rules mentioned *post* (8): (O. XVII., r. 7.)

A writ of summons issued by the next friend of a married woman, without the employment of a solicitor, will be set aside with costs: (*Swann v. Swann*, 43 L. T. Rep. N. S. 530.)

(5) Claims by or against Executors or Administrators.

Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator: (O. XVII., r. 5.)

The claim must be against assets, *quâ* assets: (*Johnson v. Burgess*, 47 L. J. 552, Ch.)

The rule is subject to the rules mentioned *post* (8): (O. XVII., r. 7.)

(6) Joint and Several Claims.

Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant: (O. XVII., r. 6.)

This rule is subject to the rules mentioned *post* (8): (O. XVII., r. 7.)

(7) By Amendment.

The plaintiff may by leave of the court or judge amend [his] indorsement so as to extend it to any other cause of action or any additional remedy or relief: (O. III., r. 2.)

When a statement of claim has been delivered, amendment of the indorsement is unnecessary: (*Large v. Large*, W. N. 1877, p. 198.)

(8) Separating Joined Causes.

If it appears to the court or a judge that any such causes of action [as are mentioned *sup.* (1), (4), (5), and (6)] cannot be conveniently tried or disposed of together, the court or judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof: (O. XVII., r. 1; *Id.*, r. 7.)

Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of in one action, may at any time apply to the court or a judge for an order confining the action to such of the causes of action as may be conveniently disposed of in one proceeding: (O. XVII., r. 8.)

If on the hearing of such application as in the last preceding rule mentioned, it shall appear to the court or a judge that the causes of action are such as cannot all be conveniently disposed of in one action, the court or a judge may order any of such causes of action to be excluded, and may direct the statement of claim, or, if no statement of claim has been delivered, the copy of the writ of summons, and the indorsement of claim on the writ of summons to be amended accordingly, and may make such order as to costs as may be just: (O. XVII., r. 9.)

2. OF ADDRESS FOR SERVICE.

(a) Where Writ issued out of London Office.

The solicitor of a plaintiff suing by a solicitor shall indorse upon every writ of summons and notice in lieu of service of a writ of summons the address of the plaintiff, and also his own name or firm and place of business, and also, if his place of business shall be more than three miles from Temple Bar, another proper place, to be called his address for service, which shall not be more than three miles from Temple Bar, where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him. And where any such solicitor is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor: (O. IV., r. 1.)

Notwithstanding anything to the contrary contained in Order IV. of "the Rules of the Supreme Court," rule 1 . . . of such order shall only apply where the writ of summons is issued out of the London office: (O. IV., r. 2a., Feb. 1876.)

As to disclosure of solicitor's authority, see *post*, XVII.

A plaintiff suing in person shall indorse upon every writ of summons and notice in lieu of service of a writ of summons his place of residence and occupation, and also, if his place of residence shall be more than three miles from Temple Bar, another proper place, to be called his address for service, which shall not be more than three miles from Temple Bar, where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him: (O. IV., r. 2.)

Notwithstanding anything to the contrary contained in Order IV. of the Rules of the Supreme Court, rule . . . 2 of such order shall only

apply where the writ of summons is issued out of the London office : (O. IV., r. 2a, Feb. 1876.)

The name and address of the plaintiff who is actually suing must be given : (*Leathley v. McAndrew*, W. N. 1875, p. 259.)

(b) *Where Writ issued out of District Registry.*

In all cases where a writ of summons is issued out of a district registry, the solicitor shall give on the writ the address of the plaintiff and his own name or firm and his place of business, which shall, if his place of business be within the district of the registry, be an address for service, and, if such place be not within the district, he shall add an address for service within the district; and where the defendant does not reside within the district, he shall add a further address for service, which shall not be more than three miles from Temple Bar; and where the solicitor issuing the writ is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor : (O. IV., r. 3, Feb. 1876.)

As to disclosure of solicitor's authority, see *post*, XVI.)

Where the plaintiff sues in person, he shall give on the writ his place of residence and occupation, which shall, if his place of residence be within the district, be an address for service, and if such place be not within the district, he shall add an address for service within the district, and where the defendant does not reside within the district, he shall add a further address for service, which shall not be more than three miles from Temple Bar : (O. IV., r. 3, Feb. 1876.)

IX. ISSUE.

1. LEAVE FOR WRIT FOR SERVICE OUT OF JURISDICTION.

No writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of a court or judge : (O. II., r. 4.)

The court has a discretion as to giving leave : (*Preston v. Lamont*, 24 W. R. 928.)

The order will be made on an affidavit as to the merits : (*Young v. Brassey*, L. Rep. 1 Ch. Div. 277.)

This application and the application for leave to serve the writ must be made together : (see *post*, XIV., 2 (b).)

2. PLACE OF ISSUE.

In any action other than a probate action, the plaintiff wherever resident may issue a writ of summons out of the registry of any district : (O. V., r. 1.)

Every writ of summons not issued out of a district registry shall be issued out of the Central Office : (O. V., r. 1a, April, 1880.)

3. MODE OF ISSUE.

Every writ of summons shall be sealed by the proper officer, and shall thereupon be deemed to be issued : (O. V., r. 6.)

Before the name of any person shall be used in any suit to be instituted as next friend of any infant, married woman, or other party, or as a relator in any information, such person shall sign a written authority to the solicitor for that purpose, and such authority shall be filed with the [writ] : (15 & 16 Vict. c. 86.)

A writ issued by a next friend, without the employment of a solicitor, will be set aside with costs : (*Swann v. Swann*, 43 L. T. Rep. N. S. 530.)

The plaintiff or his solicitor shall, on presenting any writ of summons for sealing, leave with the officer a copy, written or printed, or partly

written and partly printed, on paper of the description aforesaid, of such writ, and all the indorsements thereon, and such copy shall be signed by or for the solicitor leaving the same, or by the plaintiff himself if he sues in person : (O. V., r. 7.)

The copy is sufficient evidence, in another trial, of the institution of the action : (*Reg. v. Scott*, L. Rep. 2 Q. B. Div. 415.)

If an order has been made for leave to issue and serve a writ out of the jurisdiction, the order must be copied on the copy writ for filing : (Dan. Forms, 3rd edit., 98.)

X. FILING AND ENTRY.

The officer receiving such copy shall file the same, and an entry of the filing thereof shall be made in a book to be called the Cause Book, which is to be kept in the manner in which Cause Books have heretofore been kept by the Clerks of Records and Writs in the Court of Chancery : (O. V., r. 8.)

XI. HOW ACTION DISTINGUISHED.

The action shall be distinguished by the date of the year, a letter, and a number, in the manner in which causes are now distinguished in such last-mentioned Cause Books : (O. V., r. 8.)

When such action shall be commenced in a district registry, it shall be further distinguished by the name of such registry : (*Id.*, June, 1876.)

XII. RENEWAL.

1. WHEN NECESSARY.

Renewal becomes necessary when service has not been effected until nearly the expiration of the time during which the writ is in force.

No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date : (O. VIII., r. 1.)

2. HOW APPLICATION MADE.

If any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to a judge, or the district registrar, for leave to renew the writ : (*Id.*)

[Evidence must be produced so that the judge or the registrar may be] satisfied that reasonable efforts have been made to serve the defendant, or . . . other good reason [must be shown] : (*Id.*)

3. WHEN APPLICATION MADE.

[The application must be made] before the expiration of the twelve months : (*Id.*)

By leave it may be renewed afterwards (*Re Jones*, W. N. 1877, p. 38 ; 46 L. J. 316, Ch.), unless the Statute of Limitations has run in the meantime : (*Doyle v. Kaufman*, L. Rep. 3 Q. B. Div. 7, 340 ; 47 L. J. 26, Q. B. ; 26 W. R. 98.)

4. ORDER FOR RENEWAL.

The judge or registrar, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal, and so from time to time during the currency of the renewed writ : (O. VIII., r. 1.)

The form of order is given in Schedule H. 20, to the Rules of April, 1880.

5. HOW RENEWAL MADE.

The writ shall in such case be renewed by being marked with a seal bearing the date of the day, month, and year of such renewal ; such seal

to be provided and kept for that purpose at the proper office, and to be impressed upon the writ by the proper officer, upon delivery to him by the plaintiff or his solicitor of a memorandum in [the proper] form: (*Id.*)

If the original writ has been lost, it cannot be renewed by the seal being impressed on a verified copy: (*Davies v Garland*, L. Rep. 1 Q. B. Div. 250; 33 L. T. Rep. N. S. 727; 45 L. J. 137, Q. B.)

A form of *præcipe* is given in Schedule E. 19, to the Rules of April, 1880.

6. EFFECT.

A writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons: (O. VIII., r. 1.)

If leave to renew is granted during the currency of the original writ, but the seal is not impressed before the currency has expired, it cannot be then impressed.

Where a writ was issued within six years after accrual of a debt, but never served, and the plaintiff took out an administration summons for the same debt within six months and when the action was barred unless saved by the writ, it was held that the writ only saved the bar in the division, out of which it was issued, and that the administration suit was barred: (*Manby v Manby*, L. Rep. 3 Ch. Div. 101.)

7. EVIDENCE OF RENEWAL.

The production of a writ of summons purporting to be marked with the seal of the court, showing the same to have been renewed in manner aforesaid, shall be sufficient evidence of its having been so renewed, and of the commencement of the action as of the first date of such renewed writ for all purposes: (O. VIII., r. 2.)

XIII. AMENDMENT.

The court or judge may, at any stage of the proceedings, allow the plaintiff to amend the writ of summons in such manner and on such terms as may seem just: (O. XXVII., r. 11, Feb., 1876.)

An action may, by amendment of the writ and statement of claim, be turned into an information and action, the Attorney-General's sanction being obtained: (*Caldwell v Pagham Harbour Company*, L. Rep. 2 Ch. Div. 221.)

Where statement of claim has been delivered, it is unnecessary to amend the indorsement of the writ: (*Large v. Large*, W. N. 1877, p. 198.)

An amended writ must in all cases be served in the same way as an original writ would be under similar circumstances: (*The Cassiopeia*, 40 L. T. Rep. N. S. 869; 48 L. J. 39, P. D. & A.; 27 W. R. 703.)

Before defence delivered, amendment may be ordered on motion or petition of course: (Dan. Forms, 3rd edit., 128.)

After defence delivered, amendment may be ordered on motion or petition of course, if all parties consent, otherwise on summons, except in case of mere clerical errors, which may be ordered to be amended on motion or petition of course: (Dan. Forms, 3rd edit., 128.)

Where leave has been given to amend, the amendment will be made on production of the brief in the case indorsed by counsel, and initialled by the registrar, without the order being drawn up: (*Mathias v. Mathias*, W. N. 1876, p. 214.)

The amendment must be made within fourteen days from the date of the order unless a further time is allowed: (Seton, 1519.)

Where notice of trial, or for a receiver or injunction, has been given, the order to amend should be obtained on summons asking that the amendment may be without prejudice, otherwise the notice will be waived: (Dan. Forms, 3rd edit. 128.)

As to service of amended writ, see *post*, XIV., 1 (b) 8.

XIV. SERVICE.

1. WITHIN THE JURISDICTION.

(a) *When Unnecessary.*

No service of writ shall be required when the defendant, by his solicitor, agrees to accept service, and enters an appearance: (O. IX., r. 1.)

(b) *How Effected.*

(1) In Ordinary Cases.

Where service is required the writ shall, wherever it is practicable, be served in the manner in which personal service [was] made [when the new procedure came into operation]: (O. IX., r. 2.)

Service must, if practicable, be personal.

Service is effected by delivering a copy, and showing the defendant the original writ if he requires to see it: (Ch. Arch. Pr. 13th edit. 231.)

An amended writ must in all cases be served in the same way as an original writ would be under similar circumstances: (*The Cassiopeia*, 40 L. T. Rep. N. S. 869; 48 L. J. 39, P. D. & A.; 27 W. R. 703.)

(2) On Wife where Defendant with Husband.

When husband and wife are both defendants to the action, service on the husband shall be deemed good service on the wife, but the court or a judge may order that the wife shall be served with or without service on the husband: (O. IX., r. 3.)

(3) On Infant.

When an infant is a defendant to the action, service on his or her father or guardian, or, if none, then upon the person with whom the infant resides, or under whose care he or she is, shall, unless the court or judge otherwise orders, be deemed good service on the infant, provided that the court or judge may order that service made, or to be made, on the infant shall be deemed good service: (O. IX., r. 4.)

(4) On Lunatic so Found.

When a lunatic . . . is a defendant to the action, service on the committee of the lunatic . . . shall, unless the court or judge otherwise orders, be deemed good service on such defendant: (O. IX., r. 5.)

Service on the lunatic asylum keeper has been ordered: (*Thorn v. Smith*, W. N. 1879, p. 81.)

(5) On Lunatics Not so Found.

When a person of unsound mind not so found by inquisition is a defendant to the action, service . . . on the person with whom the person of unsound mind resides, or under whose care he or she is, shall, unless the court or judge otherwise orders, be deemed good service on such defendant: (O. IX., r. 5.)

(6) On Partnership Firm.

Where partners are sued in the name of their firm, the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and, subject to the rules hereinafter contained, such service shall be deemed good service upon the firm: (O. IX.,

Where one person carrying on business in the name of a firm apparently consisting of more than one person, shall be sued in the firm name, the writ may be served at the principal place within the jurisdiction of the business so carried on, upon any person having at the time of service the control or management of the business there; and subject to any of the rules of the Supreme Court such service shall be deemed good service on the person so sued: (O. IX., r. 6A, Rules, June, 1876.)

If service is effected on the manager, it is immaterial that the defendant is out of the jurisdiction: (*O'Neill v. Clason*, 46 L. J. 191, Q. B.)

(7) On Corporations, &c., under Statutes as to Service.

Whenever, by any statute, provision is made for service of any writ of summons, bill, petition, or other process, upon any corporation, or upon any hundred, or the inhabitants of any place, or any society or fellowship, or any body or number of persons, whether corporate or otherwise, every writ of summons may be served in the manner so provided: (O. IX., r. 7.)

Corporation Aggregate.

Every . . . writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation: (15 & 16 Vict. c. 76, s. 16.)

Hundred.

Every writ issued against the inhabitants of a hundred, or other like district, may be served on the high constable thereof, or any one of the high constables thereof: (15 & 16 Vict. c. 76, s. 16.)

In every action to be brought . . . against any hundred, or other like district of which there is no high constable, the process for appearance in the action, and the notice required in the case of the claim, shall be served upon the chief constable, or other acting chief officer of police for the time being, of the county in which such hundred or district is situate: (32 & 33 Vict. c. 47, s. 5.)

District, Not being Hundred.

Every . . . writ issued against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town, or place, not being part of a hundred or other like district, on some peace officer thereof: (15 & 16 Vict. c. 76, s. 16.)

Limited Company.

Any summons, notice, order, or other document required to be served upon the company may be served by leaving the same, or sending it through the post in a prepaid letter addressed to the company at the registered office: (25 & 26 Vict. c. 89, s. 62.)

Any document to be served by post on the company shall be posted in such time as to admit of its being delivered in the due course of delivery within the period (if any) prescribed for the service thereof; and in proving service of such document it shall be sufficient to prove that such document was properly directed, and that it was put as a prepaid letter into the post-office: (*Id.*, s. 63.)

Trading Company.

In all cases wherein it may be necessary for any person to serve any . . . writ upon [any company under the Act] service thereof . . . on the clerk, or by leaving the same at the head office for the time being . . . or in case such clerk of the said office shall not be found or known, then service thereof on any agent or officer employed by the company, or by leaving the same at the usual place of abode of such agent or officer,

shall be deemed good and sufficient service on the company: (7 Wilt. 4 & 1 Vict. c. 73, s. 26.)

Clerk means chief clerk, not a mere clerk employed under a secretary, or other clerk: (*Walton v. Universal Salvage Company*, 16 M. & W. 438, cited *Day's C. L. P. Acts*.)

Railway and other Public Companies.

Any . . . writ . . . requiring to be served upon the company, may be served by the same being left at, or transmitted through the post directed to the principal office of the company, or one of their principal offices, where there shall be more than one, or being given personally to the secretary, or in case there be no secretary, then by being given to any one director of the company: (8 & 9 Vict. c. 16, s. 135; 8 & 9 Vict. c. 20, s. 138.)

See *Lawrenson v. Dublin Metropolitan Junction Railway Company*, 37 L. T. Rep. N. S. 32.

Promoters.

Any writ . . . requiring to be served upon the promoters of [an] undertaking may be served by the same being left at, or transmitted through the post directed to the principal office of the promoters of the undertaking, or one of the principal offices, when there shall be more than one, or being given or transmitted through the post directed to the secretary, or in case there be no secretary, the solicitor of the said promoter: (8 & 9 Vict. c. 18, s. 134.)

(8) On New Defendant.

All parties whose names are . . . added as defendants shall be served with a summons or notice [in lieu of service] in the same manner as original defendants are served, or in such manner as may be prescribed by any special order, and the proceedings as against them shall be deemed to have begun only on the service of such summons or notice: (O. XVI., r. 13; and see r. 15.)

Where a defendant is added, unless otherwise ordered by the court or judge, the plaintiff shall file an amended copy of and sue out a writ of summons, and serve such new defendant with such writ or notice in lieu of service thereof in the same manner as original defendants are served (O. XVI., r. 15); and an amended writ must be served in the same manner as if it had been an original writ: (*The Cassiopeia*, L. Rep. 4 P. Div. 183.)

Where an order is obtained, adding a new party in place of one who has married, died, &c., it seems necessary only to serve the order: (see O. L. r. 5; PARTIES, VI., 2 (b) (2).)

2. OUT OF THE JURISDICTION.

(a) *Where Allowed.*

Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever the whole or any part of the subject matter of the action is land or stock, or other property situate within the jurisdiction, or any act, deed, will, or thing affecting such land, stock, or property, and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made, and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done or is situate within the jurisdiction: (O. XI., r. 1.)

Scotland and Ireland are included in the rule as to service out of the jurisdiction: (*Swansea Shipping Company v. Duncan*, L. Rep. 1 Q. B. Div. 644; 45 L. J. 638, Q. B.; *Green v. Browning*, W. N. 1876, p. 190; 34 L. T. Rep. N. S. 760; *Catling v. English, &c., Company*, W. N. 1877, p. 275.)

"Within the jurisdiction" means within the territorial jurisdiction (*Re Smith*, L. Rep. 1 P. Div. 300; 45 L. J. 92, Adm.; 35 L. T. Rep. N. S. 380; *The Vivar*, L. Rep. 2 P. Div. 29; 35 L. T. Rep. N. S. 782), which does not extend beyond low-water mark: (*Harris v. Owners of the Franconia*, L. Rep. 2 C. P. Div. 173.)

The rule extends both to individuals and foreign corporations: (*Scott v. Royal Wax Candle Company*, L. Rep. 1 Q. B. Div. 404.)

Where one contract was made out of the jurisdiction and another contract was made within the jurisdiction, which constituted a breach within the jurisdiction of the first contract, service on defendants in Scotland was allowed: (*Harris v. Fleming*, L. Rep. 13 Ch. Div. 208; 49 L. J. 32, Ch.; 28 W. R. 389.)

Service on the ambassador of a foreign sovereign will not be allowed: (*Stewart v. Bank of England*, W. N., 1876, p. 263.)

Notice of the writ, and not the writ or a copy, must be served on a foreigner: (*Westman v. Aktiebolaget Ekmans Mekaniska Snickarefabrik*, L. Rep. 1 Ex. Div. 237; 45 L. J. 327, Ex; *Re Howard, Padley v. Camphausen*, L. Rep. 10 Ch. Div. 550; 48 L. J. 364, Ch.; 27 W. R. 217.)

A British subject must be served with the writ in the ordinary way: (*Bacon v. Turner*, L. Rep. 3 Ch. Div. 275.)

The question whether leave ought to be given to issue the writ is for the judge at chambers, and cannot be raised by statement of defence: (*Preston v. Lamont*, L. Rep. 1 Ex. Div. 361; 45 L. J. 797, Ex.)

A statement in the nature of slander of title, made out of the jurisdiction concerning property within the jurisdiction, will not entitle the plaintiff to an order: (*Casey v. Arnott*, L. Rep. 2 C. P. Div. 24; 46 L. J. 3 C. P.)

(b) When Application Made.

Application should be made before the writ is issued: (*Great Australian Gold Mining Company v. Martin*, L. Rep. 5 Ch. Div. 16.)

(c) How Application Made.

The application should be made at chambers: (*Catling v. English, &c. Co.*, W. N. 1877, p. 275; but see *Re British Imperial Corporation*, L. Rep. 5 Ch. Div. 749; *Randall v. Campbell*, W. N. 1877, p. 201.)

Leave to serve and leave to issue the writ must be sought for by one application. The application is generally made by leaving at chambers the unsealed writ, and an office copy of the affidavit mentioned *post* (d): (*Dan. Forms*, 3rd edit. 98.) No summons is issued: (*Id.*)

(d) Evidence.

Every application for an order for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by evidence, by affidavit, or otherwise, showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made: (O. XI., r. 3.)

It is not sufficient for the affidavit to follow the indorsement. It must specifically allege a cause of action within the jurisdiction: (*Great Australian Gold Mining Company v. Martin*, *sup.*)

The evidence will not be allowed to be controverted, or the merits of the case gone into: (*Great Australian Gold Mining Company v. Martin*, *sup.*)

To obtain leave to serve a defendant in Scotland, it is not enough to shew the amount of the claim, that the contract was made and the breach of it occurred in London; that the plaintiff and also the agent of the defendant (who signed the contract) reside in London, that all the plaintiff's witnesses reside in London, and that it would be more convenient and less expensive to try the action in London than in Scotland. The affidavit should go on to show in what respect, regard being had to the facilities for trying the cause in the neighbourhood of the defendant's residence, it would be cheaper and more convenient to try in London: (*Woods v. M'Innes*, L. Rep. 4 C.P. Div. 67.)

An affidavit (wherever an affidavit is necessary) shall be thus intitled:

"In the matter of the Judicature Acts of 1873 and 1875."

"In the matter of an intended action between A. B., plaintiffs, and C. D. and others, defendants:" (Directions of Master of the Rolls adopted by all the judges of the Chancery Division.)

For the rest of the form to be used, see *Dan. Forms*, 3rd ed., 142-4.

[In actions on contract] no such leave is to be granted without an affidavit stating the particulars necessary for enabling the judge to exercise his discretion in manner [mentioned *post*, (e)], and all such other particulars (if any) as he may require to be shown: (O. XI., r. 1A., June, 1876.)

And an affidavit seems to be always necessary: (*Young v. Brassey*, L. Rep. 1 Ch. Div. 277.)

(e) *How Discretion exercised in Actions on Contract.*

Whenever any action is brought in respect of any contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, when such contract was made or entered into within the jurisdiction, or whenever there has been a breach within the jurisdiction of any contract wherever made, the judge, in exercising his discretion as to granting leave to serve such writ or notice on a defendant out of the jurisdiction, shall have regard to the amount or value of the property in dispute or sought to be recovered, and to the existence in the place of residence of the defendant, if resident in Scotland or Ireland, of a local court of limited jurisdiction, having jurisdiction in the matter in question, and to the comparative cost and convenience of proceeding in England or in the place of such defendant's residence: (O. XI., r. 1A, June, 1876.)

Leave was refused to serve the writ in an action to administer the trusts of a settlement of Scotch property, where the trustees resided in Scotland, although the plaintiff resided in England: (*Cresswell v. Parker*, L. Rep. 11 Ch. Div. 601; 40 L. T. Rep. N. S. 599; 27 W. R. 897.)

Where a charter-party had been entered into in Scotland between persons both resident there, the court refused to direct service of a writ in an action for a breach of the charter-party, on the ground that the plaintiff had a complete remedy in the Scotch court: (*Ex parte McPhail*, L. Rep. 12 Ch. Div. 632; 41 L. T. Rep. N. S. 338; 48 L. J. 415, Ch.; 27 W. R. 535.)

And leave was refused where the plaintiff, temporarily residing in England, commenced an action for dissolution of a partnership, the business of which was principally carried on in Ireland: (*Tottenham v. Barry*, L. Rep. 12 Ch. Div. 797.)

Where, in an action by first mortgagees of a British ship and her freight against a second mortgagee, the mortgagees and puisne incumbrancers claiming an account, the plaintiffs, the first mortgagees, discovered part of the mortgaged property in the hands of R. and Co.,

a firm of Antwerp merchants, who claimed to retain it as against a debt due to them from the second mortgagee, and the plaintiffs thereupon obtained an order for leave to amend, by adding R. and Co. as defendants, and for leave to serve them with notice of the writ, the Court of Appeal discharged the order for service of notice out of the jurisdiction: *McStevens v. Carnegie*, 42 L. T. Rep. N. S. 309; 28 W. R. 385.)

(f) *Order.*

Any order giving leave to effect such service or give such notice shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given: (O. XI., r. 4.)

The order is put upon the writ, and a copy of the order is put on the copy filed: (Dan. Form, 3rd edit. 98.)

The form of order is given Sched. H. 18 to the Rules of April, 1880.

The order will provide, if necessary, for service of interrogatories, and for an injunction: (*Young v. Brassey*, L. Rep. 1 Ch. Div. 277.)

(g) *How Writ Served or Notice Given.*

Notice in lieu of service shall be given in the manner in which writs of summons are served: (O. XI., r. 5.)

The writ will be served in the same manner as one within the jurisdiction. The usual addresses must be indorsed: (see *sup.*, VIII., 2.)

(h) *How Order Set Aside.*

If the defendant, after service, think the order was wrongly made, he ought to enter a conditional appearance (see APPEARANCE); and then move to set aside the order. The objection cannot be taken by the statement of defence: (*Preston v. Lamont*, L. Rep. 1 Ex. Div. 361.)

3. SUBSTITUTED SERVICE.

(a) *In Actions for Recovery of Land.*

Service of a writ of summons in an action to recover land may, in case of vacant possession, when it cannot otherwise be effected, be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property: (O. IX., r. 8.)

A foreclosure action is not within this rule: (*Tawell v. Slate Company*, W. N. 1876, p. 219.)

(b) *By Order in other Cases.*

If it be made to appear to the court or to a judge that the plaintiff is from any cause unable to effect prompt personal service, the court or judge may make such order for substituted or other service, or for the substitution of notice for service, as may seem just: (O. IX., r. 2.)

Every application to the court or a judge under Order IX., r. 2, for an order for substituted or other service, or for the substitution of notice for service, shall be supported by an affidavit setting forth the grounds upon which the application is made: (O. X.)

The affidavit must state:

The issuing of the writ; that no appearance has been entered; that searches have been made in the cause book in London, or the district registry, or both, according to circumstances: (Dan. Forms, 3rd edit. 140.)

The form of order is given in Schedule H. 19 to the Rules of April, 1880.

Substituted service can only be ordered to be made on some person or persons, or body corporate, on whom there could be original service: (*Stoman v. Government of New Zealand*, L. Rep. 1 C. P. Div. 563.)

It cannot be made on a colonial or foreign government: (*Id.*; *Stewart v. Bank of England*, W. N. 1876, p. 263.)

The order will be made whenever the defendant has absconded, and his address cannot be ascertained: (*Cook v. Dey*, L. Rep. 2 Ch. Div. 218; *Crane v. Jullion*, *Id.* 220; *Bank of Whitehaven v. Thompson*, W. N. 1877, p. 45.)

Leave for substituted service of writ on a defendant should not be given unless there is a probability of the defendant being thereby reached: (*Wolverhampton and Staffordshire Banking Company v. Bond*, 70 L. T. 223.)

It is generally ordered to be effected by leaving a copy of the writ at the defendant's last known residence or club, and by inserting an advertisement in the *Gazette* and one or more newspapers so framed as to give notice that in default of appearance the plaintiff will move for judgment at such time and place as may be proper: (*Id.*; *Rafael v. Ongley*, 34 L. T. Rep. N. S. 124; *Hamilton v. Davies*, W. N. 1880, p. 82.)

A notice in lieu of service will not be ordered to be given in ordinary cases where the defendant is within the jurisdiction: (*Cook v. Dey*, *sup.*)

The service, if effected according to the order, is equivalent for every purpose to personal service, so long as the order remains undischarged, and the fact that the defendant has not had notice of the proceedings, is not of itself sufficient ground for setting the order aside. If he proves a good defence on the merits as well, the court may let him in to defend, and may impose terms: (*Watt v. Barnett*, L. Rep. 3 Q. B. Div. 363; 38 L. T. Rep. N. S. 903; 26 W. R. 400; 47 L. J. 329, Q. B.)

XV. INDORSEMENT OF DATE OF SERVICE.

The person serving a writ of summons shall, within three days at most after such service, indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default; and every affidavit of service of such writ shall mention the day on which such indorsement was made: (O. IX., r. 13.)

The rule only applies in cases where the service is personal: (*Dymond v. Croft*, L. Rep. 3 Ch. Div. 512; 34 L. T. Rep. N. S. 786; 45 L. J. 601, Ch.; 24 W. R. 842.)

Where a notice in lieu of a writ is served out of the jurisdiction, the affidavit may either refer to the notice, a copy being annexed, or may state that the deponent "has personally served the defendant with a notice of the writ of summons in this action, which appeared to me to have been regularly issued out of the Chancery Division of the Honourable Court," and that "at the time of the service of such notice in manner aforesaid, memoranda were subscribed to the said writ, and indorsements were made thereon, and on the said notice in the manner and form prescribed by the rules of the Supreme Court": (*Bustros v. Bustros*, L. Rep. 14 Ch. Div. 849.)

XVI. REGISTRATION.

[See *LIS PENDENS*.]

XVII. DISCLOSURE BY SOLICITORS, PLAINTIFFS, AND PARTNERS.

Every solicitor whose name shall be endorsed on any writ of summons shall, on demand in writing made by or on behalf of any defendant who has been served therewith or has appeared thereto, declare forthwith whether such writ has been issued by him or with his authority or privity;

and if such solicitor shall declare that the writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the court or a judge: (O. VII., r. 1.)

When a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitors shall, on demand in writing by or on behalf of any defendant, declare forthwith the names and places of residence of all the persons constituting the firm. And if the plaintiffs or their solicitors shall fail to comply with such demand, all proceedings in the action may, upon an application for that purpose, be stayed upon such terms as the court or a judge may direct. And when the names of the partners are so declared, the action shall proceed in the same manner and the same consequences in all respects shall follow as if they had been named as the plaintiffs in the writ. But all proceedings shall, nevertheless, continue in the name of the firm: (O. VII., r. 2.)

Any two or more persons claiming or being liable as co-partners may sue or be sued in the name of their respective firms, if any; and any party to an action may in such case apply by summons to a judge for a statement of the names of the persons who are co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the judge may direct: (O. XVI., r. 10.)

[And see DISCOVERY.]

XVIII. CONCURRENT WRITS.

The plaintiff in any action may, at the time of or at any time during twelve months after the issuing of the original writ of summons, issue one or more concurrent writ or writs, each concurrent writ to bear teste of the same day as the original writ, and to be marked with a seal bearing the word "concurrent," and the date of issuing the concurrent writ; and such seal shall be impressed upon the writ by the proper officer: Provided always, that such concurrent writ or writs shall only be in force for the period during which the original writ in such action shall be in force: (O. VI., r. 1.)

A writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service, or whereof notice in lieu of service is to be given, out of the jurisdiction; and a writ for service, or whereof notice in lieu of service is to be given, out of the jurisdiction, may be issued and marked as a concurrent writ with one for service within the jurisdiction: (O. VI., r. 2.)



